

[Oral Argument Not Yet Scheduled]

No. 19-5298

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAKE THE ROAD NEW YORK, ET AL.,

Plaintiffs-Appellees,

—v.—

CHAD F. WOLF, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court for the
District of Columbia No. 1:19-cv-02369

**AMICUS CURIAE BRIEF OF THE STATES OF CALIFORNIA,
COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS,
MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN,
MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW
YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT,
VIRGINIA, WASHINGTON, AND THE DISTRICT OF COLUMBIA IN
SUPPORT OF APPELLEES**

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INTRODUCTION

In July 2019, the federal government significantly expanded the summary deportation process known as expedited removal with no advance notice to those affected or opportunity for comment. Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019) (the Notice). As a result, if the new designation announced in the Notice (the New Designation) were to take effect, any person apprehended anywhere in the country who cannot satisfy an immigration officer that he or she is lawfully in the country, has been continuously present here for at least two years, or has a credible fear of persecution if deported, could be summarily deported without further hearing. *Id.* Finding that the plaintiffs were likely to be able to show that the Department of Homeland Security (DHS) issued the expanded designation in violation of the Administrative Procedure Act (APA), the district court preliminarily enjoined implementation of the New Designation. For all the reasons detailed below, the States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia (the Amici States), as amici curiae, respectfully urge this court to uphold the district court's preliminary injunction.

STATEMENT OF INTEREST OF AMICI

The Amici States are home to hundreds of thousands of immigrants who have come to this country because they fear persecution, torture, or violence in their countries of origin or to seek a better life for their families. These individuals face potentially severe consequences if placed in expedited removal. For some, the stakes are “life or death, since [they] face torture or worse upon returning to their home countries.”¹ Even for those who do not face persecution, a removal order may result in permanent separation from their spouses and children and the lives they have built in the United States. The Amici States recognize that immigration enforcement is the responsibility of the federal government, but they have a strong interest in ensuring that all people residing within their borders—citizens and non-citizens alike—are treated fairly and that the federal government consider the consequences and impacts of its policies as required by federal law.

Expedited removal accords those caught up in the proceedings virtually none of the process provided in formal immigration hearings. Not surprisingly, this has led to numerous documented cases of erroneous deportation, with tragic consequences for the people removed. These mistakes affect people who have lived in the United States for years; have children who are U.S. citizens; are fleeing

¹ Bruce J. Einhorn, *Op-Ed: L.A. needs to provide attorneys to immigrants facing deportation*, L.A. Times (Mar. 27, 2017), <https://tinyurl.com/Einhorn-LATimes>.

violence, persecution and torture; or have lawful status, including U.S. citizenship. The New Designation exposes hundreds of thousands more people residing in Amici States to the risk of erroneous deportation.

Many of the Amici States invest significant resources to help fund, either directly or through immigrant services organizations, services to immigrants residing within their borders, including those who have been granted or are seeking asylum. These funds increase access to legal services and information about legal rights.² California, for example, provided more than \$43 million in funding for this purpose in the past fiscal year,³ and since fiscal year 2015-16, has allocated at least \$147 million to nonprofit legal service organizations for immigration-related programs.⁴ Illinois funds more than five dozen community organizations providing citizenship and other services to immigrants.⁵ New Jersey provides \$2.1

² Ready Cal., *One California: Immigration Services Funding* (July 28, 2017), <https://tinyurl.com/OneCal-funding>; Ready Cal., *Ready California Overview* (Aug. 2018), <https://tinyurl.com/ReadyCal>.

³ Cal. Dep't of Soc. Servs., *Immigration Branch: Immigration Services Funding: Tentative Award Announcement* (Jan. 3, 2019), <https://tinyurl.com/CDSS-ImmServs2019>; Cal. Dep't of Soc. Servs., *Immigration Services Contractors*, <https://tinyurl.com/Cal-DSS-ISC> (last visited Jan. 14, 2020); Cal. Dep't. of Soc. Servs., *Immigration Services Program Update* at 17 (March 2019), <https://tinyurl.com/rtg4avp>.

⁴ Cal. Dep't of Soc. Servs., *Immigration Services Program Update*, *supra* note 3, at 1.

⁵ Ill. Dep't Hum. Servs., *List of Community Service Agencies Serving Immigrants*, <https://tinyurl.com/Ill-Imm-Servs> (last visited Jan. 14, 2020).

million in state funds for legal services to immigrants facing detention or deportation.⁶ The State of Washington allocated \$1 million for fiscal year 2019 to help provide legal representation to asylum seekers and other immigrant populations in the state.⁷ In calendar year 2018, the State of Connecticut's Judicial Branch provided \$13,886,873 through the Connecticut Bar Foundation, to nonprofit civil legal services that provide legal services to immigrants, including asylees, asylum seekers, and refugees.⁸ Under a 2019 Oregon law, the nonprofit Innovation Law Lab will receive \$2 million in state funding to represent Oregonians in removal proceedings.⁹ New York's Fiscal Year 2020 Enacted Budget includes \$10 million to support the expansion of the Liberty Defense Project, the first-in-the-nation, state-led, public-private project administered by New York's Office for New Americans to assist immigrants, regardless of status,

⁶ N.J. Office of Mgmt. & Budget, *The Governor's FY2020 Budget – Detailed Budget* 495 (Mar. 2019), <https://tinyurl.com/NJ-Budget-2020>.

⁷ E.S.S.B. 6032, 65th Leg. Sess. (Wa. 2018), <https://tinyurl.com/WA-SessLaw>.

⁸ I.R.S. Form 990 (2018), Conn. Bar Found., Inc. (May 14, 2019), <https://tinyurl.com/CBF-990>; *see, e.g.*, Beth Fertig, *Two Immigrant Children In Connecticut Get Temporary Legal Status After Separation From Parents*, WSHU Conn. (Aug. 31, 2018), <https://tinyurl.com/WSHU-Fertig> (describing immigration advocacy efforts of state-funded Connecticut Legal Services lawyers).

⁹ H.B. 5050, 80th Legis. Assemb., Reg. Sess. (Or. 2019), <https://tinyurl.com/Or-HB5050>; Equity Corps Or., *About Equity Corps*, <https://tinyurl.com/EquityCorpsOr> (last visited Jan. 14, 2020).

in obtaining access to legal services and process.¹⁰ Community Legal Aid Society, Inc. of Delaware (Delaware Legal Aid) receives federal and state funding for legal services to immigrants. State funding for 2018-2021 amounted to approximately \$1.5 million, which included funding to provide victim-based services to non-citizens.

DHS's issuance of the Notice, expanding a system that provides so little process, undermines Amici States' efforts to ensure fairness for their residents. It will likely increase the demand for state resources to provide immigrant assistance, and could require Amici States to divert funds from other purposes to meet the needs of residents subjected to the expedited removal process.¹¹

¹⁰ Press Release, Office of the Governor, *Governor Cuomo and Legislative Leaders Announces 2020 Enacted Budget Includes \$10 Million to Support Expansion of the Liberty Defense Project* (Apr. 5, 2019), <https://tinyurl.com/NYGOV-PR>.

¹¹ *E.g.*, 84 Fed. Reg. 35,409, 35,411, *supra* (recognizing that even prior to the new rule's enactment, the rate of expedited removal may be increasing).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT PLAINTIFFS WERE LIKELY TO SUCCEED ON THE MERITS OF THEIR APA CLAIMS

A. Plaintiffs are Likely To Establish that DHS Issued the Notice in an Arbitrary and Capricious Manner

In issuing the preliminary injunction, the district court found, among other things, that plaintiffs were likely to establish that DHS promulgated the Notice “in an arbitrary and capricious manner.” *Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1, 34 (D.D.C. 2019). The district court correctly determined that DHS significantly expanded an already flawed process without considering those flaws, the impact they have on real people and their communities, or any options to avoid or mitigate them. *See* 84 Fed. Reg. 35,409, *supra*.

For example, the Notice fails to discuss the documented deficiencies in the expedited removal process, the risk of erroneous deportations and their tragic consequences, or the substantial disruption to families, communities, and employers caused by summary removal of established residents. *Id.* DHS also failed to take into account the likelihood those problems would increase or consider any methods for mitigating or avoiding them. And because the impacts were not acknowledged, analyzed, or addressed, they also were not weighed against any factors favoring the New Designation to determine how the scales might tip.

1. Flaws in the Expedited Removal Process Lead to Erroneous Deportations

As the district court detailed in its order, the expedited removal process is rife with potential for errors or abuse and has been misused to deport U.S. citizens, legitimate asylum seekers, longtime residents with family who are U.S. citizens, children, individuals with valid work and tourist visas, “and others with significant ties or legal claims to be in the United States.”¹² Substantial errors have been documented in the expedited removal process since its inception, including people being: (1) forced by officers to sign documents they cannot read or understand; (2) misinformed about or denied their right to apply for asylum; and (3) denied the ability to collect documentary or other information to support a valid defense against expedited removal.¹³

¹² ACLU Found., *American Exile: Rapid Deportations that Bypass the Courtroom* at 4 (Dec. 2014), <https://tinyurl.com/ACLU-AmExile>.

¹³ See e.g., U.S. Comm’n on Int’l Religious Freedom, *Report on Asylum Seekers in Expedited Removal: Volume I: Findings & Recommendations* at 51 (Feb. 2005), <https://tinyurl.com/USCIRF-ExpeditedRemoval>; Elizabeth Cassidy & Tiffany Lynch, U.S. Comm’n on Int’l Religious Freedom, *Barriers to Protection, The Treatment of Asylum Seekers in Expedited Removal* at 21-22 (2016), <https://tinyurl.com/USCIRF-Barriers>; Am. Immigration Council, *A Primer on Expedited Removal 1* (July 2019), <https://tinyurl.com/AmIC-Perils>; see also Borderland Immigration Council, *Discretion to Deny: Family Separation, Prolonged Detention, and Deterrence of Asylum Seekers at the Hands of Immigration Authorities Along the U.S.-Mexico Border* at 12-13 (Feb. 2017), <https://bit.ly/2ZxInuV>.

Given the speed of the process, there is rarely an opportunity to consult with an attorney, obtain witnesses, or collect documentary evidence that might prevent immediate deportation, such as a birth certificate, lease, or employment form. People, especially those traumatized by the harm they fled or the shock of being uprooted from family and friends, may find it even more difficult to clearly articulate a basis for immigration relief.¹⁴ Hasty decisions made by line-level immigration officers with broad discretion and little to no judicial review compound the likelihood of error.¹⁵ But despite the increased risk of mistakes, the number of expedited removals jumped from approximately 42,000 in 2004 to 193,000 in 2013—covering about 44 percent of people deported that year.¹⁶ In

¹⁴ Kathryn Shepherd & Royce Bernstein Murray, Am. Immigration Council, *The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers* at 9-16 (May 2017), <https://tinyurl.com/AIC-Perils> (finding that many asylum seekers in expedited removal are suffering from significant trauma, including the emotional impact of family separation, which may affect their ability to tell their story).

¹⁵ Ebba Gebisa, *Constitutional Concerns with the Enforcement and Expansion of Expedited Removal*, 2007 U. Chi. Legal Forum 565, 580-83 (2007), <https://tinyurl.com/rewwstc>.

¹⁶ Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Immigration Enforcement Actions: 2004* at 6 (Nov. 2005), <https://tinyurl.com/ImmEnf2004>; Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Annual Report: Immigration Enforcement Actions: 2013* at 5 (Sept. 2014), <https://tinyurl.com/ImmEnf2013>.

2017, 35 percent of all removals from the United States were conducted through expedited removal.¹⁷

This truncated procedure, with little to no process or judicial review and a lack of articulable legal standards, means the likelihood of wrongful deportation is far greater than in a full deportation proceeding. The expedited removal regulations provide no notice as to how continuous presence in the United States may be established or what burden of proof or legal standard is to be applied by the immigration officer making the determination. 8 C.F.R. § 235.3. Instead, expedited removal is allowed if the person does not “establish[] to the satisfaction of the immigration officer” that he or she has been physically present in the United States continuously for two years. 8 C.F.R. § 235.3(b)(1)(ii). The lack of a clear legal standard creates the risk that immigration officers may apply an unfairly high or inconsistent burden of proof and is especially problematic where, as here, people are compelled to try to prove a negative—that they have not left the country for a period of up to two years.¹⁸

The failure to provide a right to counsel during expedited removal only increases the probability of mistakes. A national study of 1.2 million immigration

¹⁷ Office of Immigration Statistics, U.S. Dep’t of Homeland Sec., *Immigration Enforcement Actions: 2017* at 9 (Mar. 2019), <https://tinyurl.com/ImmEnf2017>.

¹⁸ Am. Immigration Council, *supra* note 13; Cassidy & Lynch, *supra* note 13, at 35.

cases found that detained immigrants with counsel were ten times more likely to seek relief from removal than those without counsel and more than twice as likely to obtain relief.¹⁹ The expedited process may also unjustly deprive individuals who are eligible to stay in the United States any opportunity to pursue such relief. For example, a witness or victim of a crime who might be eligible to remain in the country is prohibited from making such a claim in expedited removal proceedings.²⁰

Deportation has serious consequences, and multiple reports have documented troubling instances of wrongful deportation. For example, a 2014 report described a U.S. citizen who was issued an expedited removal order by an officer who did not believe a U.S. citizen would speak only Spanish. Only after

¹⁹ Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 51 fig.15 (Dec. 2015), <https://tinyurl.com/y5j9bd3p>; see also U.S. Gov't Accountability Office, *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges* at 30 (Sept. 2008), <https://tinyurl.com/GAO-Asylum> (finding that, after controlling for other factors, having an attorney more than doubled an asylum seeker's chance of being granted asylum).

²⁰ Compare 8 U.S.C. § 1225(b)(i) (identifying limited grounds for challenging inadmissibility in expedited removal), with 8 U.S.C. § 1101(a)(15)(U) (identifying that witnesses and victims to a crime not in expedited removal proceedings can, under certain circumstances, petition for relief from removal).

spending many years in Mexico trying to return to the United States did she find an attorney who, following months of litigation, was able to prove her case.²¹

Given the extensively documented deficiencies in the process, it can be reasonably predicted that the significant expansion of expedited removal will lead to increased problems.

2. Although They Should Be Exempt, Asylum Seekers Face Harm from Expedited Removal

The New Designation also affects the rights of asylees, the large majority of whom live in Amici States. Amici States were home to more than 72 percent of the applicants granted asylum in 2016.²² Since 1990, an average of more than 22,000 individuals have been granted asylum annually,²³ with the largest number by far residing in California. California welcomed almost 44 percent of the grantees in fiscal year 2016.²⁴

Although asylum seekers who pass the “credible fear” interview are excluded from expedited removal, immigration officers retain virtually unchecked authority to determine whether to refer the individual for a credible fear interview

²¹ ACLU Found., *supra* note 12, at 4-5.

²² Nadwa Mossad & Ryan Baugh, Office of Immigration Statistics, U.S. Dep’t of Homeland Sec., *Refugees and Asylees: 2016* at 10 fig.7 (Jan. 2018), <https://tinyurl.com/Mossad-Baugh-DHS>.

²³ Office of Immigration Statistics, U.S. DHS, *2016 Yearbook of Immigration Statistics* at 43 tbl.16 (Nov. 2017), <https://tinyurl.com/2016YBImmStats>.

²⁴ Mossad & Baugh, *supra* note 22, at 8.

in the first instance, subject only to review by a supervisor. 8 U.S.C.

§ 1225(b)(1)(A)(i); 8 C.F.R. § 235.3(b)(2)(i).²⁵ In 2005, the United States

Commission on International Religious Freedom found that the federal government had insufficient quality assurance mechanisms to ensure that asylum seekers were

not improperly returned to their home countries.²⁶ Since then, multiple reports

have found that not all persons in the expedited removal process who express a

fear of persecution if deported are provided a credible fear screening interview.²⁷

The Commission reported that, in some cases, immigration officers pressured

individuals expressing fear into withdrawing their application for admission, and

thus their request for asylum, despite DHS policies forbidding the practice.²⁸ In

other cases, officers failed to ask if the arriving individual feared return.²⁹ Even

when individuals expressed such fear, officers failed to document their fear,

²⁵ In limited circumstances, additional review is provided. 8 U.S.C. § 1225(b)(1)(C).

²⁶ U.S. Comm'n on Int'l Religious Freedom, *supra* note 13, at 8-9.

²⁷ Michele R. Pistone & John J. Hoeffner, *Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 Geo. Immigr. L.J. 167, 175-93 (2006), <https://tinyurl.com/vcpulvo> (describing federal government's failure to adhere to statutes and regulations governing expedited removal); *see also* Cassidy & Lynch, *supra* note 13, at 21-22.

²⁸ *E.g.*, U.S. Comm'n on Int'l Religious Freedom, *supra* note 13, at 5-6; *see also* Cassidy & Lynch, *supra* note 13, at 23.

²⁹ U.S. Comm'n on Int'l Religious Freedom, *supra* note 13, at 5-6.

resulting in the denial of a credible fear screening.³⁰ In still other cases, individuals were denied a credible fear interview because officers interviewed them in a language they could not understand.³¹

The increased use of the summary expedited removal process heightens the risk that an individual will not know to assert, or immigration officers will not recognize, a valid claim for refuge from abuse, violence, or persecution in the person's country of origin. The consequences for those who are returned to their home countries can be deadly. Many recent arrivals requesting asylum are from the Northern Triangle of Central America (El Salvador, Honduras, and Guatemala),³² one of the most violent regions in the world, "akin to the conditions found in the deadliest armed conflicts in the world today."³³

³⁰ U.S. Comm'n on Int'l Religious Freedom *supra* note 13, at 53, 54-55, 57; Cassidy & Lynch, *supra* note 13, at 21; *see also* Letter from Nat'l Immigrant Justice Ctr. et al. to U.S. Dep't of Homeland Sec. Office of Civil Rights & Civil Liberties & Office of the Inspector Gen. at 12-22 (Nov. 13, 2014), <https://tinyurl.com/NIJctoCRCL> ("When applicants express fears, CBP officials fail to capture those statements in the required documentation or include mistaken information"); John Washington, The Intercept, *Bad Information: Border Patrol Arrest Reports Are Full of Lies That Can Sabotage Asylum Claims* (Aug. 11, 2019), <https://tinyurl.com/Washington-BadInfo>.

³¹ Cassidy & Lynch, *supra* note 13, at 27-28.

³² U.S. Citizenship & Immigration Servs., *Credible Fear Workload Report Summary FY 2018* at 3, <https://tinyurl.com/USCIS-CredFear>.

³³ Medecins Sans Frontieres, *Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis* 4 (May 2017), <https://tinyurl.com/MSF-ForcedFlee>; *see also* U.N. High Comm'r for Refugees, *Women on the Run: First-*
(continued...)

The reports of the violence experienced by immigrants returned to their home countries are sobering. Braulia A. and Hermalinda L. were gang-raped and shot after being deported to Guatemala; Braulia's son, who joined her in Guatemala after her deportation, was murdered by the same gang.³⁴ Laura S. told border officials that she was afraid of her abusive ex-partner; her pleas ignored, she was deported and murdered by him within days of her return to Mexico.³⁵ Nydia R., a transgender woman, *had* asylum status but was nonetheless twice deported without a hearing.³⁶ She was attacked and raped by men who tried to cut out her breast implants, kidnapped and sex-trafficked.³⁷

Furthermore, asylum seekers subjected to the expedited removal process may suffer additional trauma while in detention. Asylum seekers are often detained in facilities more akin to criminal detention units, with little or no privacy nor freedom of movement. These facilities are often already overcrowded, and fail

(...continued)

Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico 4 (Oct. 2015), <https://tinyurl.com/UNHCR-WomenRun> (“[T]he increasing violence from criminal armed groups occurred alongside repeated physical and sexual violence at home.”).

³⁴ ACLU Found., *supra* note 12, at 4.

³⁵ Sarah Stillman, *When Deportation is a Death Sentence*, *New Yorker* (Jan. 8, 2018), <https://tinyurl.com/Stillman-Deportation>.

³⁶ ACLU Found., *supra*, note 12, at 4.

³⁷ *Id.*

to provide even the most basic services and care.³⁸ “[P]enal detention conditions risk re-traumatizing asylum seekers who experienced or fear persecution or torture,” and prolonged detention can cause severe chronic emotional distress, including chronic anxiety, physically damaging stress levels, depression, suicide, and post-traumatic stress disorder.³⁹

With the New Designation, it is likely that more people who express a credible fear of persecution will be detained under conditions that will result in re-traumatization and increased demand for state-funded trauma and other health services.⁴⁰ Many of the Amici States have invested in specialized services to meet asylees’ needs. In California, for example, the Immigration Branch of the California Department of Social Services has various forms of assistance for certain eligible asylees and refugees, including programs that provide cash assistance and employment services.⁴¹ These benefits and services are typically administered by county social services departments or through county contracts

³⁸ Cassidy & Lynch, *supra* note 13, at 40-42; Office of Inspector Gen., U.S. Dep’t of Homeland Sec., *Management Alert – DHS Needs to Address Dangerous Overcrowding Among Single Adults at El Paso Del Norte Processing Center* (May 30, 2019), <https://tinyurl.com/DHSOIG-MA>.

³⁹ Cassidy & Lynch, *supra* note 13, at 9, 43-44.

⁴⁰ *Id.* at 14 (noting that “[a]s Expedited Removals have increased, so too have claims of fear by non-citizens in that process”).

⁴¹ See Cal. Dep’t of Soc. Servs., *Services for Refugees, Asylees, and Trafficking Victims*, <https://tinyurl.com/Services-CDSS> (last visited Jan. 14, 2020).

with local providers to deliver direct services.⁴² The State of Washington allocated approximately \$2.4 million for fiscal year 2018 to provide employment services for organizations serving asylum seekers and other immigrant populations in the state.⁴³ For fiscal year 2020, the District of Columbia allocated \$2.5 million to programs that provide services and resources to its immigrant population.⁴⁴ The New York State Office of Temporary and Disability Assistance provides various forms of financial and social services assistance to eligible asylees and refugees through its Refugee Resettlement Program, appropriating \$26 million in state fiscal year 2019-2020.⁴⁵ For state fiscal year 2019-2020, New York has also appropriated almost \$2.4 million for the Response to Human Trafficking Program, a state-funded program to assist human trafficking victims not otherwise eligible for services due to their immigration status.⁴⁶ In Vermont, the state Department of Health works with asylees from the moment they arrive through a community-based system of care. It collaborates with local health care partners to provide

⁴² *Id.*; see also SF-CAIRS, *Refugee & Asylee Benefits*, <https://tinyurl.com/SF-CAIRs> (last visited Jan. 14, 2020).

⁴³ E.S.S.B. 6032, 65th Leg. Sess., *supra* note 7, at 2220.

⁴⁴ Press Release, Office of the Mayor, *Mayor Bowser Announces \$2.5 Million Available for FY 2020 Immigrant Justice Legal Services Grant Program* (July 12, 2019), <https://tinyurl.com/DC-Grant>.

⁴⁵ A.B. A2003D, 242nd Leg. Assemb. Sess. (N.Y. 2019).

⁴⁶ N.Y. Soc. Serv. Law § 483-bb; A.B. A2003D, 242nd Leg. Assemb. Sess., *supra* note 45.

health screenings and integrate asylees into the health care system. It also provides translated information on public health and wellness for these new Vermonters.⁴⁷

When non-citizens ultimately granted asylum return to their communities, Amici States, their local jurisdictions, and non-governmental organizations funded by Amici States will be called upon to provide additional mental health and other services. The Amici States' public health care systems will also face the increased health needs of those who were denied preventative care and necessary mental health and medical treatment in detention.

Thus, the district court rightly characterized DHS's failure to acknowledge or consider the serious consequences of expanding such a flawed process as "the very definition of arbitrariness in rulemaking" and DHS's "failure to undertake *any* kind of assessment of *any* of the downside risks" of the New Designation as a "gross abdication" of its statutory duties. *Make the Road New York*, 405 F. Supp. 3d, at 59-60. This Court should uphold the district court's finding that the New Designation likely resulted from arbitrary and capricious decision making.

⁴⁷ See Vt. Dept. of Health, *Refugee Health Program*, <https://tinyurl.com/VTDOH-RHP> (last visited Jan. 14, 2020).

B. The States Are Harmed by the Failure to Provide a Notice-and-Comment Period

The district court also correctly concluded that a notice-and-comment period was likely required before DHS issued the Notice. *Make the Road New York*, 405 F. Supp. 3d at 53. Had the federal government provided that opportunity, Amici States could have, and would have, identified all of the foregoing problems with the New Designation before it was implemented.⁴⁸

In addition to being required by the APA, notice and comment promotes good government by ensuring the decision-maker has access to complete information about potential pitfalls and ramifications of, and alternatives to, the proposed action. Public participation ensures that agency actions are tested through exposure to diverse public comment; that the process is fair to affected parties, particularly where “governmental authority has been delegated to unrepresentative agencies”; and that affected parties have “an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.” *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005); *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980).

⁴⁸ Many of Amici States submitted comments on the New Designation during the *post hoc* comment period.

Defendants' failure to engage in pre-decisional notice and comment not only deprived the Amici States of the opportunity to participate in the rulemaking process but also deprived DHS and the public of the benefit of the States' unique perspectives. 84 Fed. Reg. 35,409, 35,410, *supra*. The opportunity to comment on proposed federal actions is vital to the Amici States' ability to protect their residents. As sovereigns responsible for the health, safety, and welfare of millions of people within their respective borders, the Amici States have unique interests and perspectives to contribute, particularly where, as here, federal actions will cause their residents unnecessary, substantial, and enduring harm. Further, the record developed through the notice and comment process might have altered how the Secretary exercised his discretion, resulting in changes to the rule, and would have aided the court in its review of the action. *See United Mine Workers*, 407 F.3d at 1259.

II. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

The district court also correctly determined that a preliminary injunction to suspend implementation of the New Designation pending resolution of this litigation is in the public interest. *Make the Road New York*, 405 F. Supp. 3d at 65. The court explained that the New Designation “has the potential to cause trauma” not only to the specific person subjected to it, but also to “those persons’ households, neighborhoods, communities, workplaces, cities, counties, and States.”

Id. at 59. The public interest is particularly relevant in cases where the impact of an injunction reaches beyond the parties and carries a potential for public consequences. *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017). Further, in cases like this, which affect many non-parties (including the Amici States), courts consider the hardship to third parties as part of the public interest analysis. *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12-14 (D.C. Cir. 2016); *Mova Pharm. Corp v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998). For example, an injunction is in the public interest where it ensures that immigrants are not improperly held in immigration detention, *Hernandez*, 872 F.3d at 996, or requires “governmental agencies [to] abide by the federal laws that govern their existence and operations,” *League of Women Voters*, 838 F.3d at 12. *See also Texas Children’s Hosp. v. Burwell*, 76 F. Supp. 3d 224, 246 (D.D.C. 2014) (“[T]he Secretary’s compliance with applicable law constitutes a . . . compelling public interest.”) (citation and internal quotation marks omitted).

Here, the public interest strongly favors suspending implementation of the new expedited removal designation, at least until its legality and constitutionality can be resolved. Without an injunction, hundreds of thousands of residents of Amici States—including citizens, lawful residents, asylees, or residents otherwise exempt from expedited removal—will be in danger of summary deportation without a meaningful opportunity to establish their status.

As the district court noted, there was no indication that DHS considered the substantial disruption of the New Designation to communities in Amici States.

Make the Road New York, 405 F. Supp. 3d at 55-57.

A. Immigrants Contribute Significantly to their Communities and Amici States

People who have lived in this country for one or two years (or longer) have begun to build lives here. The majority of undocumented immigrants have lived in the United States for 10 years or longer.⁴⁹ Undocumented immigrants are often part of the same family as documented immigrants and U.S. citizens.⁵⁰ Immigrants contribute to our economy and civic life in countless ways. For instance, immigrants make up more than a third of California's workforce.⁵¹ In 2015, immigrant workers comprised 10 percent of the labor force in Minnesota.⁵² Immigrant-led households in Minnesota paid \$1.1 billion in state and local taxes in 2014.⁵³ Eight percent of all self-employed Minnesota residents in 2015 were

⁴⁹ Ctr. for Am. Progress, *The Facts on Immigration Today: 2017 Edition*, <https://tinyurl.com/yczunwsg>.

⁵⁰ *Id.*

⁵¹ Am. Immigration Council, *Immigrants in California* at 2 (2017), <https://tinyurl.com/AmIC-CA>; Inst. on Taxation & Econ. Policy, *State and Local Tax Contributions of Undocumented Californians* at 1 (Apr. 2017), <https://tinyurl.com/ITEP-Taxes>.

⁵² *See* Am. Immigration Council, *Immigrants in Minnesota* at 2 (2017), <https://tinyurl.com/AmIC-MN>.

⁵³ *See id.* at 4.

immigrant business owners, who generated \$489.1 million in business income.⁵⁴ In 2015 in Connecticut, one of every six workers was an immigrant, comprising 17.6 percent of the labor force.⁵⁵ As of 2017, Connecticut had 525,813 immigrant residents, about 14.7 percent of the state population, who generated \$14.5 billion in spending power and paid almost \$6 billion in taxes annually.⁵⁶ The 37,285 immigrant entrepreneurs in Connecticut produced total sales of \$15.6 billion and employed 95,177 people.⁵⁷ Immigrant households in Vermont contributed nearly \$135 million in federal taxes and nearly \$58 million in state and local taxes in 2014.⁵⁸ In Massachusetts, one in five workers is an immigrant and undocumented immigrants pay an estimated \$185 million in taxes each year.⁵⁹ Undocumented immigrants in New Jersey paid an estimated \$587.4 million in state and local taxes in 2014.⁶⁰ Approximately 4.5 million immigrants live in New York State.⁶¹ Some

⁵⁴ *Id.*

⁵⁵ Am. Immigration Council, *Immigrants in Connecticut* at 2 (2017), <https://tinyurl.com/AmImC-CT>.

⁵⁶ New Am. Economy, *Immigrants and the Economy in Connecticut*, <https://tinyurl.com/NewAE-CT> (last visited Jan. 14, 2020).

⁵⁷ *Id.*

⁵⁸ New Am. Economy, *Contributions of New Americans in Vermont* at 5 (Aug. 2016), <https://tinyurl.com/NAE-VT-Report>.

⁵⁹ Am. Immigration Council, *Immigrants in Massachusetts* at 3, 5 (2017), <https://tinyurl.com/AmIC-MA>.

⁶⁰ Am. Immigration Council, *Immigrants in New Jersey* at 4 (2017), <https://tinyurl.com/AmIC-NJ>.

2.8 million immigrant workers comprise roughly 27.8 percent of the state's labor force.⁶² In 2014, New York State immigrant-led households paid \$26.5 billion in federal taxes and \$15.9 billion in state and local taxes, and had \$103.3 billion in after-tax income spending power.⁶³ And in Michigan, immigrants make up 8 percent of the state's workforce, pay approximately \$6.7 billion in state and local taxes, have a spending power of \$18.2 billion, and comprise close to 34,000 of the state's entrepreneurs.⁶⁴

These residents provide care and support to children or other family members, pay taxes, provide goods and services in their communities, and otherwise contribute to society. Their summary removal, without adequate opportunity to establish their eligibility to remain in this country, would cause great hardship to children, relatives, employers, the general public, and Amici States.

(...continued)

⁶¹ New. Am. Economy, *Contributions of New Americans in New York* at 10 (Aug. 2016), <https://tinyurl.com/NewAm-NY>.

⁶² *Id.*

⁶³ *Id.* at 7.

⁶⁴ *State Demographics Data: Michigan*, Migration Pol'y Inst., <https://tinyurl.com/MI-Immigrant-Workforce> (last visited January 21, 2020); *Immigrants and the Economy in Michigan*, New Am. Econ., <https://tinyurl.com/MI-Immigration-Economy> (last visited January 21, 2020).

B. The New Designation Increases the Risks that Families Will Be Torn Apart

Millions of children born to undocumented immigrants in the United States are U.S. citizens. As a result, millions of people live in “mixed-status” households, where one or both parents may be undocumented, while some or all of the children (and, sometimes, a spouse) are U.S. citizens.⁶⁵ Expanding expedited removal means that these “mixed-status” families face separation with little or no time to prepare.

Studies show that children faced with the likelihood of a family member’s deportation can experience serious mental health problems, including depression, anxiety, self-harm, and regression.⁶⁶ Studies also show that children’s concerns about their parents’ immigration status can impair their socio-emotional and

⁶⁵ Randy Capps, et al., Urb. Inst., *Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families: A Review of the Literature* at 8-12 (Sept. 2015), <https://tinyurl.com/y9bw3x66> (discussing 2015 study estimating that 5.3 million children, 85% of whom were U.S. born, were living with undocumented immigrant parents).

⁶⁶ Wendy Cervantes, et al., Ctr. for Law & Soc. Policy, *Our Children’s Fear: Immigration Policy’s Effects on Young Children* at 2-3, 10-12 (Mar. 2018), <https://tinyurl.com/ChildFears>.

cognitive development.⁶⁷ And children whose immigrant mothers are subject to deportation have a higher incidence of adjustment and anxiety disorders.⁶⁸

These harms are magnified when fears of forcible separation are realized. In one study, children with deported parents refused to eat, pulled out their hair, had persistent stomachaches and headaches, engaged in substance abuse, lost interest in daily activities, and had trouble maintaining positive relationships with non-deported parents.⁶⁹ These traumatic childhood experiences can also inflict lasting harm, including severe impairments of a child's sense of self-worth and ability to form close relationships later in life, increased anxiety, and depression.⁷⁰

In addition, deporting a family's financial breadwinner can lead to economic hardship and loss of housing for remaining family members, and can put children,

⁶⁷ Hirokazu Yoshikawa, *Immigrants Raising Citizens: Undocumented Parents and Their Young Children* at 120-136 (2011); Capps, *supra* note 65, at 8-9.

⁶⁸ Jens Hainmueller, et al., *Protecting Unauthorized Immigrant Mothers Improves Their Children's Mental Health*, 357 *Science* 1041, 1041 (2017).

⁶⁹ Heather Koball, et al., Urb. Inst., *Health and Social Services Needs of US-Citizen Children with Detained or Deported Immigrant Parents* at 5 (Sept. 2015), <https://tinyurl.com/MIRFinal>; see also Mary Papenfuss, *Weeping Girl Left Abandoned by ICE Pleads with 'Government' to 'Let my Parent be Free'*, *Huffington Post* (Aug. 8, 2019), <https://tinyurl.com/Papenfuss-HuffPost> (reporting scores of children left abandoned after largest ICE raid in a decade and 200 children failing to show up for schools in the area the following day).

⁷⁰ Kristen Lee Gray, Cal. Polytechnic St. Univ., San Luis Obispo, *Effects of Parent-Child Attachment on Social Adjustment and Friendship in Young Adulthood* at 14-15, 19 (June 2011), <https://tinyurl.com/j3lgrno>.

seniors, and family members with disabilities at serious risk.⁷¹ The predictable economic disruption from increased expedited removals will force many families to seek increased social services,⁷² stretching the resources of the Amici States. For example, as of 2011, more than 5,000 children nationally were estimated to be living in foster care due to their parents' immigration detention or deportation.⁷³ With long-term foster care estimated to cost about \$25,000 per child per year,⁷⁴ these immigration enforcement actions cost states and local governments \$125 million dollars annually. Such costs could substantially increase with the expansion of expedited removal and the separation of families.⁷⁵

Harms also extend to other residents of the Amici States who suffer the daily uncertainty of not knowing whether their relatives will be placed (erroneously or not) in expedited removal on the way to the grocery store, to work, or even to their

⁷¹ Capps, *supra* note 65, at 9-14, 17-23.

⁷² *Id.*

⁷³ Seth Freed Wessler, Applied Research Ctr., *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System* at 6 (Nov. 2011), <https://tinyurl.com/ARCFam>.

⁷⁴ Nicholas Zill, Nat'l Council for Adoption, *Better Prospects, Lower Cost: The Case for Increasing Foster Care Adoption* at 3 (May 2011), <https://tinyurl.com/Zill-Adoption>.

⁷⁵ Papenfuss, *supra* note 69 (discussing scores of crying children left abandoned after largest ICE raid in a decade); Immigrant Legal Res. Ctr., *Immigration Enforcement & the Child Welfare System* at 2 (Dec. 11, 2017), <https://tinyurl.com/ImmChildWelfare>.

children's schools.⁷⁶ Many individuals who seek asylum have relatives across the country and those relatives in Amici States are harmed by the federal government's actions.

C. The New Designation Endangers Public Health and Safety

The federal government's significant expansion of expedited removal will also impact public safety and health in Amici States. Amici States have a substantial interest in ensuring that their residents access medical treatment and preventative care. Providing health care services to immigrants can reduce future medical costs by preventing health problems from becoming more extreme and expensive. Unfortunately, immigration enforcement fears, which will only increase with the expansion of expedited removal, cause immigrant families to forego preventative medical care. In recent studies, health care providers are finding that immigrant families are increasingly skipping health care appointments and abstaining from scheduling routine prevention or primary care appointments for their children.⁷⁷ Clinics across the country have noticed a significant decline in

⁷⁶ Kelly Heyboer, *ICE Arrests Surging in N.J. Under Trump. Here's Why*, N.J. On-Line (Feb. 2018) (ICE has increased arrests and detentions of immigrants in New Jersey by 42%; many have been arrested at courthouses, children's schools, and at their work places).

⁷⁷ The Children's P'ship, *Healthy Mind, Healthy Future: Promoting the Mental Health and Wellbeing of Children in Immigrant Families in California* at 25, <https://tinyurl.com/ChildrensPship-Healthy>.

clinic visits due to this Administration's harsh immigration enforcement policies.⁷⁸

The expansion of expedited removal will further dissuade immigrants from seeking cost-effective preventive care that saves lives and reduces costs in Amici States.

As the district court pointed out, “[w]ith children missing meals, and medicine not taken, it actually borders on preposterous for DHS to say that all Plaintiffs’ members need to do is wait until this case is over” to obtain adequate relief. *Make the Road New York*, 405 F. Supp. 3d, at 63. Rather, these impacts further support the court’s conclusion that a preliminary injunction is in the public interest.

D. The Public Has an Interest in Ensuring that Asylum Seekers Can Access Protections

Finally, the New Designation jeopardizes not only the rights of asylum seekers, but also the interests of the Amici States and the public in ensuring that persons eligible for refuge in this country are not “deliver[ed] . . . into the hands of their persecutors.” *Leiva-Perez v. Holder*, 640 F.3d 962, 971 (9th Cir. 2011). The evidence suggests that one of the principal purposes of harsh federal policies such as the New Designation is to deter legitimate asylum seekers from obtaining

⁷⁸ Ctr. for Health Progress, *Immigration Policy Is Health Policy: Executive Order 13768 & The Impact of Anti-Immigrant Policy on Health* at 3 (Mar. 20, 2018), <https://tinyurl.com/CHP-Health>; see also Anna North, *Immigrants Are Skipping Reproductive Health Care Because They’re Afraid of Being Deported*, Vox (July 22, 2019), <https://tinyurl.com/North-Vox>.

relief.⁷⁹ Courts have cautioned against using civil detention, including immigration detention, to deter the actions of others. *See R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 188–90 (D.D.C. 2015) (granting preliminary injunction against policy of detaining asylum seekers to send “a message of deterrence to other Central American individuals who may be considering immigration”). The public interest is, therefore, served by a preliminary injunction suspending implementation of the New Designation while its validity is resolved.

CONCLUSION

The Amici States support appellees in urging this Court to uphold the district court’s preliminary injunction.

⁷⁹ *See* White House, *Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States*, (Nov. 9, 2018), <https://tinyurl.com/Pres-Proc> (recognizing that the “vast majority” of immigrants entering the U.S. by the southern border who assert a fear of persecution or torture are found to satisfy the “credible fear” threshold, but nevertheless seeking to limit their entry).

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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because:

1. This brief contains 6,433 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e)(1).

2. The brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: January 23, 2020

/s/ Antonette Benita Cordero
Antonette Benita Cordero

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2020, I electronically filed the foregoing

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with the Clerk for the United States Court of Appeals for the DC Circuit by using the CM/ECF system. A true and correct copy of this brief has been served via the Court's CM/ECF system on all counsel of record.

/s/ Antonette Benita Cordero
Antonette Benita Cordero