

No. 19-16487 & 19-16773

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

EAST BAY SANCTUARY COVENANT, ET AL.,
Plaintiffs-Appellees,

v.

WILLIAM P. BARR, ET AL.,
Defendants-Appellants.

**On Appeal from the United States District Court
for the Northern District of California**

No. 3:19-CV-04073-JST
The Honorable Jon S. Tigar

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

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INTRODUCTION AND INTERESTS OF THE AMICI STATES

The Interim Final Rule: Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019) (to be codified at 8 C.F.R. pts. 208, 1003 & 1208) (“the Rule”), which, with limited exceptions, bars asylum to any applicant who transited through a third country but did not apply for and fail to obtain humanitarian protection there, harms the public interest and was properly enjoined by the district court.

The Rule harms asylum seekers by forcing them into dangerous circumstances in countries that are not equipped to handle their claims, or alternatively, barring them from adequate protection in the United States. The Amici States of California, Massachusetts, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia (together “the States” or “Amici States”), have a strong interest in ensuring that asylum remains available to those in need of protection. Every year the States welcome thousands of asylees and potential asylees who could be harmed by this Rule.¹ In 2018,

¹ U.S. Dep’t of Homeland Sec., *2017 Yearbook of Immigration Statistics* 43 tbl.16 (Apr. 1, 2019), <https://tinyurl.com/DHSstat>; Nadwa Mossaad, Office of

approximately 11,373 individuals in removal proceedings were granted asylum by immigration courts in the States (“defensive asylum”).² And according to the most recent data available, the States constituted six of the top ten states of residence for individuals who applied for and were granted asylum by U.S. Citizenship and Immigration Services (“USCIS”) (“affirmative asylum”).³

The Rule’s unlawful restriction on asylum will harm the States in multiple ways: (1) by barring otherwise-deserving asylum seekers who likely would become valuable members of the States’ communities from entering or staying in the country; (2) by expanding the ranks of the undocumented, both by incentivizing people who otherwise would seek asylum here to enter the country between ports of entry, and by making legal status much more difficult for asylum seekers to attain; and (3) by inflicting trauma on asylum seekers who are forced to languish in dangerous conditions before finally being allowed to obtain asylum here, thereby increasing their eventual need for state-funded services. The Rule also harms the States because Defendants-Appellants (“Defendants”) failed to

Immigration Statistics, Dep’t of Homeland Sec., *Annual Flow Report: Refugees and Asylees: 2017* 6 tbl.5 (Mar. 2019), <https://tinyurl.com/mossaad>.

² U.S. Dep’t of Justice, Exec. Office for Immigration Review, *Statistics Yearbook 2018* 28, <https://www.justice.gov/eoir/file/1198896/download>.

³ Mossaad, *supra* note 1, at 11, tbl.13.

comply with notice and comment procedures, depriving the States of an opportunity to influence the agency by timely expressing their views on an action that affects their prospective residents, as well as their fisci.

The participation of Amici States located in the First, Second, Third, Fourth, Sixth, Eighth, Ninth, and Tenth Circuits illustrates the public interest at issue, and why a nationwide preliminary injunction against this facially invalid Rule will vindicate that interest. Most asylum seekers coming through the southern border initially enter at Texas and then relocate to other states.⁴ Thus, in the absence of an injunction halting the Rule, the Rule will continue to harm asylum seekers and states across the nation.

ARGUMENT

In determining whether to issue a preliminary injunction, the court considers: (1) whether the moving party is “likely to succeed on the merits,” (2) whether the moving party is “likely to suffer irreparable harm in the absence of

⁴ From the States’ calculation, in FY 2019 up to August 2019, approximately 73% of those apprehended by U.S. Customs and Border Protection seeking to enter the United States at the southern border came through Texas. *See* U.S. Customs and Border Protection, *U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019*, <https://tinyurl.com/CBPStatistics>; *See also* Nick Miroff & Tim Meko, *A snapshot of where migrants go after release into the United States*, WASH. POST (April 12, 2019), <https://tinyurl.com/WhereMigrantsGo> (showing that, in one study, asylum seekers released by CBP in El Paso went to 42 other states).

preliminary relief,” (3) if “the balance of equities tips in [their] favor,” and (4) whether “an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Courts enjoy “‘sound discretion’ to consider the ‘necessities of the public interest’ when fashioning injunctive relief.” *United States v. Oakland Cannabis Buyers’ Co-op.*, 532 U.S. 483, 496 (2001) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944)). A nationwide injunction can be proper when it is “necessary to give [the plaintiffs] a full expression of their rights” and when the challenged action has a “nationwide impact.” *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018) (quoting *Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017)), *rev’d and remanded on other grounds*, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (internal quotations omitted).

As Plaintiffs ably argue, the Rule is unlawful in several respects. Amici States focus on the public interest and equities at issue here, and argue that the harms to the public interest caused by this Rule support upholding the district court’s nationwide preliminary injunction.

I. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST BECAUSE THE RULE HARMS ASYLUM SEEKERS

Giving asylum seekers a safe haven from persecution is an essential value of the United States. In adopting the Refugee Act of 1980, which established the present asylum system, Congress codified “one of the oldest themes in America’s

history—welcoming homeless refugees to our shores.” S. Rep. No. 96-256, at 1 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 141, 141. In departing from these core principles, the Rule inflicts unnecessary peril and trauma on asylum seekers during every step of their pursuit of protection, forcing them to either: (1) go through a fruitless asylum process in a potentially dangerous third country to remain eligible for asylum in the United States; (2) forego the process in a third country and apply for protection in the United States that will likely be denied, thus risking deportation back to persecution; or (3) try to enter the United States undetected through a dangerous trek and reside here without legal status. The district court correctly recognized the public interest at stake here, finding that the prospect of the United States “delivering aliens into the hands of their persecutors” was reason to enjoin Defendants’ actions. *E. Bay Sanctuary Covenant v. Barr*, No. 3:19-cv-04073-JST, 2019 WL 3323095, at *2 (N.D. Cal. July 24, 2019) (quoting *Leiva-Perez v. Holder*, 640 F.3d 962, 971 (9th Cir. 2011) (*per curiam*)).

A. Asylum Seekers Cannot Safely Seek Protection in Mexico or Guatemala

Asylum seekers at the southern border hail from dangerous and politically unstable countries all over the world.⁵ Such countries often include Honduras, El

⁵ Molly O’Toole et al., *Facing Trump’s asylum limits, refugees from as far as Africa languish in a Mexican camp*, L.A. TIMES (July 8, 2019),

Salvador, and Guatemala, as well as conflict-torn African countries like the Democratic Republic of Congo, and the undemocratic state of Cuba.⁶ The Rule will require the many asylum seekers who transit through Mexico and/or Guatemala en route to the United States to first ask for protection there. *See* 84 Fed. Reg. at 33,830. But these countries are not equipped to provide such protection, and are dangerous to those who may need it the most, such as children, women, and Lesbian, Gay, Bisexual, Transgender and Queer (“LGBTQ”) individuals.

1. Guatemala and Mexico Have Inadequate Asylum Systems

Guatemala and Mexico are ill-equipped to provide humanitarian protection. Guatemala’s asylum system is not capable of assessing claims of the potentially thousands of applicants who would now be forced to invoke it under the Rule.⁷ It

<https://tinyurl.com/OTooleandCole>.

⁶ *Id.*; U.S. Dep’t of State, Bureau of Democracy, H.R. & Lab., *Democratic Republic of Congo 2018 Human Rights Report* 1 (Mar. 13, 2019), <https://www.state.gov/wp-content/uploads/2019/03/Democratic-Republic-of-the-Congo-2018.pdf>; U.S. Dep’t of State, Bureau of Democracy, H.R. & Lab., *Cuba 2018 Human Rights Report* 1 (Mar. 2019), <https://www.state.gov/wp-content/uploads/2019/03/CUBA-2018.pdf>.

⁷ Defendants recently announced possible safe third country agreements with Guatemala, El Salvador, and Honduras. Nick Miroff, *U.S. announces asylum deal with Honduras, could send migrants to one of the world’s most violent nations*, WASH. POST (Sept. 25, 2019), <https://tinyurl.com/NMiroff>. While this brief only focuses on the Rule, these agreements are unreasonable. As described here,

was only in 2017 that Guatemala began implementing a law that overhauled its immigration system and defined the term “refugee,” codified the rights of those seeking protection, and implemented its refugee application process.⁸ Guatemala has only twelve officials to work on asylum cases.⁹ In addition to the sheer infeasibility of determining asylum cases without sufficient staff, Guatemala would also fail to provide protection to those in need. In fact, in 2018, Guatemala did not grant a single asylum application of the 259 it received.¹⁰ The United Nations High Commissioner of Refugees (“UNHCR”) reported, “[t]here are no national reception mechanisms or transit centres for persons in need of international protection, and all humanitarian assistance and information on asylum procedures

Guatemala cannot protect asylum seekers. The same is true of El Salvador and Honduras, which have limited capacities to handle asylum claims and are dangerous. U.S. Dept of State, Bureau of Democracy, H.R. and Lab., *Honduras 2017 Human Rights Report* 1, 19 (Apr. 20, 2018) <https://tinyurl.com/2017DOS>; U.S. Dept of State, Bureau of Democracy, H.R. and Lab., *El Salvador 2018 Human Rights Report* 1, 19-20 (Mar. 2018) <https://tinyurl.com/DOSES2018>.

⁸ U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., *Guatemala 2018 Human Rights Report* 12 (Mar. 2019) [hereinafter *State Dep’t – Guatemala 2018*], <https://tinyurl.com/State-Dept-Guatemala2018>.

⁹ Human Rights First, *Is Guatemala Safe for Refugees and Asylum Seekers?*, (July 1, 2019), <https://tinyurl.com/HumanRightsFirstGuatemala>.

¹⁰ Seung Min Kim et al., *Trump says he has agreement with Guatemala to help stem flow of migrants at the border*, Wash. Post (July 26, 2019), <https://tinyurl.com/ThirdCountry>.

are being provided by civil society organizations—whose resources are already overstretched.”¹¹

Mexico’s asylum system, too, is inadequate. As is evident from the administrative record, Mexico’s system has several significant deficiencies that systematically deny asylum seekers protection including, but not limited to: (1) a widespread failure to employ proper screening protocols (AR533); (2) a failure to inform applicants of their right to seek asylum (AR715 [noting that 75% of migrants apprehended are not informed of the right to request asylum]); (3) inaccessible asylum offices and none near the southern border (AR 533); (4) prolonged detention in poor conditions (AR306, AR722, AR772); (5) an untenable 30-day filing deadline (AR703); and (6) insufficient access to counsel (AR719, AR772).

Consequently, very few asylum seekers obtain protection in Mexico. Children are denied protection on nearly a categorical basis—in recent years Mexico granted refugee status to less than 1% of the unaccompanied children it

¹¹ United Nations High Comm’r for Refugees, *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights’ Compilation Report: Universal Periodic Review: Guatemala 4* (Mar. 2017), <https://tinyurl.com/UNHCRGuatemala>.

apprehended.¹² And Central American LGBTQ applicants often feel pressured to accept “voluntary return” without being informed of the opportunity to request asylum in Mexico, leading to their deportation in violation of the principle of non-refoulement (non-return).¹³

2. Asylum Seekers Risk Persecution in Mexico and Guatemala

While going through the fruitless endeavor of requesting protection in Mexico and Guatemala, asylum seekers are at risk. Transiting through Mexico, migrants are often victimized by criminal groups and, in some cases, by police, immigration officers, and customs officials.¹⁴ Criminal groups are known to kidnap migrants to extort money from their relatives or force them into carrying

¹² Human Rights Watch, *Submission to the Committee on Economic, Social and Cultural Rights concerning Mexico 2* (Feb. 2018), <https://tinyurl.com/HRW-Submission>.

¹³ Amnesty Int’l, *No Safe Place: Salvadorans, Guatemalans and Hondurans Seeking Asylum in Mexico Based on Their Sexual Orientation and/or Gender Identity* 23 (Nov. 2017), <https://tinyurl.com/AmIntl-LGBT>.

¹⁴ U.S. Dep’t of State, Bureau of Democracy, H.R. & Lab., *Mexico 2018 Human Rights Report* 19 (Mar. 2019) [hereinafter *State Dep’t – Mexico 2018*], <https://www.state.gov/wp-content/uploads/2019/03/MEXICO-2018.pdf>; see also U.S. Dep’t of State, Bureau of Democracy, H.R. & Lab., *Mexico 2017 Human Rights Report* 1 (Apr. 20, 2018), <https://www.state.gov/wp-content/uploads/2019/01/Mexico.pdf> (“Organized criminal groups also were implicated in numerous killings, acting with impunity and at times in league with corrupt federal, state, local, and security officials.”).

out crimes.¹⁵ For example, in 2011 in Tamaulipas, 193 migrants were murdered, and police officers were reportedly involved.¹⁶ Further, Central American gangs, which are the reason many migrants flee to the United States in the first place, have a significant presence in Mexico.¹⁷ Guatemala also suffers from startling levels of violence, “an alarmingly high murder rate,”¹⁸ widespread corruption in the police and judicial sectors, human trafficking, and extortion.¹⁹ These crimes frequently occur with impunity.²⁰

The situation is especially dire for vulnerable populations, such as unaccompanied children, women, and LGBTQ persons. In Guatemala, children are targets of recruitment by criminal gangs,²¹ and girls are frequently kidnapped

¹⁵ *State Dep’t - Mexico 2018*, *supra* note 14, at 20.

¹⁶ Human Rights First, *Dangerous Territory: Mexico Still Not Safe for Refugees 3* (July 2017), <https://tinyurl.com/HRW-Mexico-NotSafe>.

¹⁷ *State Dep’t – Mexico 2018*, *supra* note 14, at 19.

¹⁸ Overseas Sec. Advisory Council, U.S. Dep’t of State, *Guatemala 2019 Crime & Safety Report 2* (Feb. 26, 2019), <https://tinyurl.com/OSAC-Guatemala>.

¹⁹ U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., *Guatemala 2017 Human Rights Report 1* (Apr. 20, 2018), <https://tinyurl.com/StateGuate>.

²⁰ *Id.*

²¹ United Nations Hum. Rts. Off. High Comm’r, *Committee on the Rights of the Child examines report of Guatemala* (Jan. 17, 2018), <https://tinyurl.com/UNHR-Guatemala-Children>.

and victimized by repeated gang rape.²² In Mexico, it was reported that as of April 2018, more than 6,600 children were recorded missing.²³ UNHCR has expressed concern about the prevalence of discrimination in Mexico against children who are indigenous, migrants, or LGBTQ.²⁴

Conditions for women in Mexico and Guatemala are similarly perilous. Migrant women are sometimes sold by smugglers to human trafficking operations or forced to engage in sex work at establishments frequented by law enforcement in Mexico's southern region.²⁵ Murders of women because of their gender, known as femicide, are also prevalent. Guatemala ranks third globally on rates of

²² Kids in Need of Defense, *Sexual and Gender Based Violence (SGBV) & Migration Fact Sheet 2* (Apr. 2018), <https://tinyurl.com/KIND-SGBV>.

²³ David Agren, *More than 6,600 children have gone missing in Mexico*, GUARDIAN (Oct. 5, 2019), <https://tinyurl.com/Agren-Guardian>.

²⁴ United Nations High Comm'r for Refugees, *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights Compilation Report: Universal Periodic Review: Mexico 14* (July 2018), <http://www.refworld.org/docid/5b57009a7.html>.

²⁵ Human Rights First, *supra* note 16, at 1-2.

femicide²⁶ with an average of two women murdered each day.²⁷ Not far behind, Mexico, as of 2017, ranked sixth in femicide, globally.²⁸

LGBTQ migrants also face special dangers in Mexico and Guatemala, as homophobic and transphobic violence is widespread in these countries. According to an Amnesty International report, two-thirds of LGBTQ Central American asylum seekers reported suffering sexual violence while transiting through Mexico.²⁹ In both Mexico and Guatemala, law enforcement intimidate, threaten, and commit violence against LGBTQ individuals. For instance, two Mexican police officers were arrested in connection with the kidnapping, torture, and execution of a young gay couple.³⁰ In Guatemala, almost one third of transwomen

²⁶ United Nations High Comm'r for Refugees, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico 2* (Oct. 2015), <https://www.unhcr.org/5630f24c6.html>.

²⁷ Kids in Need of Defense, *supra* note 22, at 2.

²⁸ United Nations Office on Drugs & Crime, *Statistics and Data: Global Study on Homicide – Homicide Data By Country, Female Homicide Rate* (2019), https://dataunodc.un.org/GSH_app; Kate Linthicum, *Why Mexico is giving out half a million rape whistles to female subway riders*, L.A. TIMES (Oct. 23, 2016), <https://tinyurl.com/Linthicum-LATimes>.

²⁹ Amnesty Int'l, *supra* note 13, at 7 (citing the UNHCR).

³⁰ Austrian Centre for Country of Origin and Asylum Research and Documentation, *Mexico: Sexual Orientation and Gender Identity (SOGI)* 20 (May 31, 2017), <http://www.refworld.org/docid/5937f12d4.html>.

identified police officers as their main persecutors, and LGBTQ women experience forced pregnancies through what is known as “corrective rape.”³¹ In addition to these harrowing types of violence, discrimination in aspects of civil society is common. In Mexico, rampant anti-LGBTQ discrimination exists despite the existence of some anti-discrimination laws.³² Notably, in Guatemala, these legal protections do not even exist.³³

In light of the dangerous conditions in Guatemala and Mexico, requiring migrants to seek asylum in these countries is untenable—and, in fact, may result in further persecution.

B. The Rule Will Deprive Vulnerable Applicants of Adequate Humanitarian Protection

As the dangers described above illustrate, there are valid reasons why bona fide asylum seekers, and especially those most vulnerable, would forego the

³¹ Organización Trans Reinas de la Noche, *Human Rights Violations Against Transgender Women in Guatemala* 7 (Feb. 2018), <https://tinyurl.com/OTRN-LGBT>; *State Dep’t – Guatemala 2018*, *supra* note 8, at 22.

³² Immigration & Refugee Bd. of Canada, *Mexico: Situation of sexual minorities, including in Mexico City; protection and support services offered by the state and civil society (2015-July 2017)* (Feb. 16, 2018), <http://www.refworld.org/docid/5ad5c5d24.html>; Immigration & Refugee Bd. of Canada, *Mexico: Societal norms on gender identity expressions, including in indigenous communities (2016-May 2018)* (May 25, 2018), <https://www.refworld.org/docid/5b9bdb404.html>.

³³ *State Dep’t – Guatemala 2018*, *supra* note 8, at 21.

processes in Mexico and/or Guatemala. Many of those who cannot safely access asylum in a third country would have strong claims for asylum in the United States that will be denied under the Rule. Further, the available forms of relief under the Rule, withholding of removal and protection under the Convention Against Torture (CAT), are insufficient replacements.

For example, unaccompanied children—who are subject to the Rule regardless of their ability to seek protection in a third country—often have cognizable asylum claims and even receive special protections to assert such claims. Congress expressly recognized the vulnerabilities of unaccompanied children and their unique need for protection in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008. Pub. L. No. 110-457, 122 Stat. 5044 (“TVPRA”). Significantly, under the TVPRA, children are entitled to present their claims during non-adversarial interviews at the USCIS Asylum Office in the first instance instead of before an immigration court. *Id.* § 235(d)(7)(C), 122 Stat. at 5081. Children are also excluded from the safe third country agreement bar to asylum, and those under the age of 18 are excepted from the one-year filing deadline. 8 U.S.C. § 1158(a)(2)(E); 8 C.F.R. § 208.4(a)(5)(i). With the benefit of these protections, unaccompanied children are often granted

asylum.³⁴ Indeed, in FY 2017, 5,361 children and young adults under the age of twenty were granted affirmative asylum as principal applicants, comprising approximately 44% of all such asylum grants.³⁵

The Rule will likely make many unaccompanied children ineligible for asylum, thus rendering these protections irrelevant. With asylum off the table, unaccompanied children will be forced to present claims for withholding of removal and protection under the CAT, which only can be granted by an immigration court. 8 C.F.R. § 208.16. In these adversarial proceedings, unaccompanied children are subject to cross-examination about the worst moments of their lives, without guaranteed legal counsel. *C.J.L.G. v. Barr*, 923 F.3d 622, 629, n. 7 (9th Cir. 2019) (discussing the Court's determination to not rule on whether minors have a constitutional right to appointed counsel). As Congress recognized in enacting the TVPRA, this is not the proper venue for children to present their claims for humanitarian protection. *See J.O.P. v. U.S. Dep't of*

³⁴ *See* U.S. Dep't of Homeland Sec., *supra* note 1, at tbl.18, <https://www.dhs.gov/immigration-statistics/yearbook/2017/table18>; U.S. Citizenship & Immigration Servs., *RAIO Combined Training Courses* 175 (56 of training module) (Nov. 30, 2015), available at https://www.aila.org/File/Related/18022100_Part3.pdf (portions of training module, instructing officers on common protected grounds that children have).

³⁵ U.S. Dep't of Homeland Sec., *supra* note 1, at tbl.18, <https://www.dhs.gov/immigration-statistics/yearbook/2017/table18>.

Homeland Sec., No. GJH-19-1944, 2019 WL 3536786, at *1 (D. Md. Aug. 2, 2019) (Under the TVPRA, “[i]nstead of having to be cross-examined in an adversarial courtroom by trained government lawyers, unaccompanied children engage with USCIS officers trained to conduct non-adversarial interviews and to apply child-sensitive and trauma-informed interview techniques.”).

As another example, LGBTQ applicants often have cognizable claims for asylum that have been recognized by courts and USCIS.³⁶ *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (“all alien homosexuals are members of a ‘particular social group’”); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1055 (9th Cir. 2017). Yet, regardless of the strength of their claims, many of these applicants will be ineligible for asylum because they may fear applying in a third country. *See supra*, Part I (A)(2).

Contrary to Defendants’ assertions, the availability of withholding of removal and CAT does little to protect applicants who are no longer eligible for asylum. First, many will be denied withholding of removal and CAT protection,

³⁶ U.S. Citizenship & Immigration Servs., *RAIO Combined Training Course: Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, And Intersex (LGBTI) Refugee and Asylum Claims* 15-17 (Dec. 28, 2011), <https://tinyurl.com/USCIS-RAIO> (explaining that LGBTQ status is a protected characteristic for asylum).

and become subject to deportation, because these forms of relief have much higher standards than asylum. *See* 8 U.S.C. § 1231(b)(3); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987); *INS v. Stevic*, 467 U.S. 407, 424 (1984). In 2018, less than 5% of CAT claims and only 6% of withholding of removal claims were granted,³⁷ whereas approximately 35% of asylum claims were granted.³⁸ Such persons, if not immediately deported, will likely join the ranks of the undocumented.

Second, the few applicants who are granted these alternative forms of relief may face additional trauma because, unlike asylum, neither withholding of removal nor CAT offers any protection to an applicant's children or spouse. *See* 8 U.S.C. § 1158(b)(3)(A); *see also* 84 Fed. Reg. at 33,832 (listing benefits of asylum). The Rule could thus result in absurd situations where a parent is granted protection, but the child who does not have a separate claim is ordered removed. Thus, even in obtaining this relief, “[t]he result is an almost impossible choice: live in safety while separated from one’s family and their perilous life a world away, or join them in their peril and risk the probability of death or imprisonment.” *Haniffa v. Gonzales*, 165 F. App’x 28, 29 (2d Cir. 2006).

³⁷ U.S. Dep’t of Justice, *supra* note 2.

³⁸ *Id.* at 27 fig.23.

Third, individuals granted withholding of removal and CAT are in a constant state of limbo because they cannot obtain permanent residency and are at risk of removal to a third country.³⁹ This uncertainty is exactly what Congress intended to eliminate in adopting the Refugee Act of 1980. S. Rep. No. 96-256, at 9 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 141, 149. (explaining that the Act was meant to remedy the fact that previous “practice ha[d] often left the refugee in uncertainty as to his own situation and ha[d] sometimes made it more difficult for him to secure employment and enjoy . . . other rights.”).

C. The Rule Discourages Safely Seeking Asylum

By making asylum out of reach for many migrants, the Rule discourages asylum seekers from presenting themselves and asking for asylum at a port of entry. This is particularly so given Defendants’ “metering” policy, which keeps asylum seekers waiting for several weeks or even months in dangerous conditions in Mexico before they can ask for asylum in the United States.⁴⁰ For example, in May of 2019, there was an approximately four-month wait to ask for asylum at the

³⁹ U.S. Dep’t of Justice, Exec. Office of Immigration Review, *Fact Sheet: Asylum and Withholding of Removal Relief, Convention Against Torture Protections 6* (Jan. 15, 2009), <https://tinyurl.com/EOIR-FactSheet>.

⁴⁰ Dara Lind, *Asylum Seekers That Followed Trump Rule Now Don’t Qualify Because of New Trump Rule*, PROPUBLICA (July 22, 2019), <https://tinyurl.com/Lind-ProPublica>.

El Paso ports of entry.⁴¹ As a particularly punishing twist, the vast majority of those who were waiting to claim asylum at the time the Rule went into effect would now be ineligible for it.⁴² Plaintiffs' Mot. for Preliminary Injunction at 9, *Al Otro Lado v. Neilsen*, 3:17-cv-02366, ECF 294-1 (S.D. Cal).

With the prospect of a prolonged wait in Mexico to present a case that due to the Rule is likely to fail, many of those in desperate situations may choose to make a harrowing trek into the United States between ports of entry. We have seen the deadly consequences that can result from this calculus. For example, in June of 2019, a Salvadoran father and his infant daughter drowned trying to cross the Rio Grande River after waiting two months in Mexico for the opportunity to ask for asylum.⁴³ Nine people drowned trying to cross near the El Paso canals in June alone.⁴⁴ These heartbreaking stories are corroborated by evidence in the

⁴¹ Robert Strauss Center for International Security and Law at the University of Texas at Austin and the Center for U.S.-Mexican Studies at UC San Diego School of Global Policy & Strategy, *Metering Update* 6 (May 2019), <https://tinyurl.com/MeteringUpdate>.

⁴² Lind, *supra* note 40.

⁴³ Daniella Silva, *Family of Salvadoran migrant dad, child who drowned say he 'loved his daughter so much'*, NBC NEWS (June 26, 2019), <https://tinyurl.com/Silva-NBCNews>.

⁴⁴ Riane Roldan, *June has been a deadly month for migrants crossing the border into Texas*, TEX. TRIB. (June 28, 2019), <https://tinyurl.com/Rolden-TexTribune>.

administrative record (AR664), as well as a report by Defendants' Inspector General, indicating that dangerous crossings have become more commonplace due to Defendants' restrictive metering policies.⁴⁵ Under the Rule, these dangerous crossings may occur even more frequently. And those fortunate enough to survive the journey into the United States will then lack legal status.

In all, this Rule is harmful for asylum seekers at every stage of their flight from persecution. Because this mistreatment is against the public interest, the Court should uphold the district court's preliminary injunction.

II. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST BECAUSE THE RULE SUBSTANTIALLY HARMS THE STATES

The district court's preliminary injunction is in the public interest because the Rule substantially harms the States in several ways: (1) immigrants, including asylees and asylum seekers, are vital to the success of the States' economies, and by making asylum unavailable to individuals who would otherwise qualify, the Rule deprives the States of their economic contributions; (2) the Rule will cause the States' agencies and nonprofits to divert resources and will result in increased demand for health, education, and other services, both because fewer asylum seekers will have legal status, and because those asylees able to comply with the

⁴⁵ Office of Inspector General, U.S. Dep't of Homeland Sec., OIG 18-84, *Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* 5-7 (2018), available at: <https://tinyurl.com/OIGdhs>.

Rule will likely have been traumatized by the experience of applying for protection in a third country; and (3) the Rule's improper promulgation harms the States' interest in notice and comment.

A. The Rule Will Result in Decreased Economic Contributions to the States

Immigrants, including asylees and asylum seekers, are vital to the States' workforces and economic success. As only a few examples of these contributions, in 2014, immigrant-led households in California paid over \$26 billion in state and local taxes and exercised almost \$240 billion in spending power⁴⁶; in Massachusetts, immigrants comprise 20% of the state's workforce and immigrant-led households paid \$3 billion in state and local taxes in 2014⁴⁷; 22% of Hawaii's business owners are foreign-born,⁴⁸ and in 2014, immigrants contributed \$668.5 million in state and local taxes⁴⁹; and in Connecticut, immigrants pay \$5.9 billion

⁴⁶ See Am. Immigration Council, *Immigrants in California* 4 (Oct. 4, 2017), <https://tinyurl.com/CAP-Immigrants-in-CA>.

⁴⁷ Am. Immigration Council, *Immigrants in Massachusetts* 2, 4 (Oct. 5, 2017), <https://tinyurl.com/AIC-Imm-MA>.

⁴⁸ Fiscal Pol'y Inst., *Immigrant Small Business Owners* 24 (June 2012), <https://tinyurl.com/Imm-Business-Owners>.

⁴⁹ New Am. Econ., *The Contributions of New Americans in Hawaii* 7 (Aug. 2016), <https://tinyurl.com/HI-Immigration-Economy>.

in taxes, have a spending power of \$14.5 billion, and Connecticut's over 37,000 immigrant entrepreneurs employ over 95,000 people.⁵⁰

The States' interests therefore weigh heavily against policies, such as the Rule, that present significant hurdles to the safe arrival and integration of potential asylees. By preventing otherwise-eligible asylum seekers from entering or staying in the country, the Rule deprives the States of their economic contributions. Further, by eliminating asylum as an option for individuals who do enter the country, the Rule will increase the number of individuals without legal status who are unable to work legally, resulting in decreased economic contributions to the States. *See supra*, Part I (B)-(C). For example, in Massachusetts, undocumented immigrants pay an average of \$184.6 million in state and local taxes annually, an amount that would increase to \$240.8 million if they had legal status and work authorization.⁵¹ Similarly, undocumented immigrants in New Mexico would have paid in excess of \$8 million more in taxes in 2017 if they had legal status.⁵²

⁵⁰ New Am. Econ., *Immigrants and the Economy in Connecticut*, <https://tinyurl.com/CT-Immigration-Economy> (last visited July 24, 2019).

⁵¹ Inst. on Taxation and Econ. Pol'y, *Undocumented Immigrants' State & Local Tax Contributions* 3 tbl.1 (Mar. 2017), <https://tinyurl.com/ITEP-UndocTaxes>.

⁵² *Id.*

B. The Rule Will Cause the States to Divert Resources and Increase Demand for Health, Education, and Other Services

Recognizing the importance of proper legal guidance during immigration proceedings, several of the States fund nonprofit organizations to provide legal assistance in immigration-related matters. For example, since FY 2015-16, California has allocated \$147 million to nonprofit legal service organizations through the Unaccompanied Undocumented Minors and Immigration Services Funding programs.⁵³ Asylum services have comprised 80% of the services provided through the Unaccompanied Undocumented Minors program.⁵⁴ Plaintiffs Al Otro Lado and CARECEN-LA are among those receiving funds from California.⁵⁵ These providers use a combination of funds from California and

⁵³ Cal. Dep't of Soc. Servs., *Immigration Services Program Update 1* (Mar. 2019).

⁵⁴ *Id.*

⁵⁵ Cal. Dep't of Soc. Servs., *Immigration Services Contractors*, <https://tinyurl.com/Cal-DSS-ISC> (last visited July 26, 2018). For FY 2018-19, the California Department of Social Services provided close to \$44 million, including \$602,920 to EBSC, \$239,320 to Al Otro Lado, and \$2,503,200 to CARECEN-LA. Cal. Dep't of Soc. Servs., *Immigration Branch Immigration Services Funding Tentative Award Announcement* (Jan. 3, 2019), <https://tinyurl.com/CDSS-ImmigrationFunding>.

private donors to ensure their cases are filed properly and adjudicated fairly.⁵⁶ *See* Compl. ¶ 111, Doc. 1.

Similarly, Washington allocated \$1 million in FY 2019 to legal service organizations serving asylum seekers and other migrant populations.⁵⁷ Among other programs, New York funds the Liberty Defense Project, a State-led, public-private legal defense fund designed to ensure that immigrants have access to legal counsel.⁵⁸ The District of Columbia allocated \$2.5 million for FY 2020 to programs that provide legal services to its immigrant population, including asylum seekers.⁵⁹ New Jersey also allocated \$2.1 million in state funds in FY 2019 and 2020 for legal assistance to individuals in removal proceedings.⁶⁰ Under an

⁵⁶ 97% of the almost 5,000 affirmative asylum petitions filed by Plaintiff East Bay Sanctuary Covenant were granted. *See* Compl. ¶ 111, Doc. 1.

⁵⁷ *See* Wash. Laws of 2018, ch. 299, § 127(65) (amending Laws of 2017, 3d Spec. Sess., ch. 1, § 128) (Mar. 27, 2018), <https://tinyurl.com/WashLaws>.

⁵⁸ *See* N.Y. St., Div. of Budget, *Governor Cuomo Announces Highlights of the FY 2019 State Budget* (Mar. 30, 2018), <https://tinyurl.com/NYBudget2019>.

⁵⁹ Office of the Mayor, Press Release, *Mayor Bowser Announces \$2.5 Million Available for FY 2020 Immigrant Justice Legal Services Grant Program* (July 12, 2019), <https://tinyurl.com/DC-Grant>.

⁶⁰ *See* N.J. Office of Mgmt. & Budget, *The Governor's FY2020 Budget: Detailed Budget 419* (Mar. 2019), <https://tinyurl.com/NJ2020Budget>.

Oregon law, passed in 2019, Plaintiff Innovation Law Lab would receive \$2 million in funding for immigration defense.⁶¹

The Rule reduces the number of immigrants who are eligible for asylum and forces them to pursue more difficult forms of relief. *See supra*, Part I (B). These changes will frustrate the missions of legal services organizations in the States and require the allocation of additional time and resources for each case. *See Compl.* ¶¶ 115-16, 119, 121-22, 133. The Rule will cause these organizations to divert considerable resources to re-strategizing their approaches to representing clients and eligibility issues, revising their training, and re-allocating staff time. *See id.* ¶¶ 116-17, 121, 123, 133, 135. As a result, the number of cases these organizations can undertake will decrease. Because their funding is based, in part, on the number of cases handled per year, and the number of clients they anticipate serving, *see id.* ¶¶ 114, 132, the Rule will imperil their sustainability unless the States increase funding accordingly. *See id.* ¶¶ 115-16, 119, 121-22. Thus, the States' financial interests will be directly affected by the Rule, which will make it more expensive for them to support the current level of services to immigrant communities. A nationwide injunction is necessary to ameliorate these harms.

⁶¹ H.B. 5050, 80th Or. Legis. Assemb., 2019 Reg. Sess. (Or. 2019), <https://tinyurl.com/Or-HB5050>.

In addition to investing in legal services, the States also fund services to meet the mental health needs of asylees and asylum seekers. Due to the extended time asylum seekers who comply with the Rule will be forced to spend in Mexico or Guatemala before seeking asylum in the United States, they will be more likely to endure abuse and trauma. *See supra*, Part I (A)(2). Consequently, the States and local jurisdictions will need to allocate additional resources to identify, assess, and treat these asylees and asylum seekers.⁶² For example, New York provides inpatient psychiatric services to youth.⁶³ As minor asylum seekers may experience further trauma as result of the Rule, more youth may be in need of New York State's inpatient services.⁶⁴ This increased demand for resources will also affect public schools in the States, which will need to offer increased mental health and early intervention services to students who have been traumatized and needlessly missed schooling while languishing in Mexico or Guatemala. *See* 20 U.S.C. § 1411 (requiring States to provide special education services to students with

⁶² Anna Gorman, *Medical Clinics that Treat Refugees Help Determine the Case for Asylum*, NPR (July 10, 2018), <https://tinyurl.com/Gorman-NPR>.

⁶³ *See generally* Decl. of Donna M. Bradbury at 362-68 (Ex. 60), *Washington v. Trump*, No. 2:18-cv-00939-MJP (W.D. Wash. July 17, 2018), ECF No. 31.

⁶⁴ *Id.*

learning or emotional disabilities). These additional educational costs will be borne by the States.⁶⁵

The States may also see an increased demand for state health programs and an increase in health costs as a result of the Rule. The Rule's likely effect of depriving individuals of legal status, thereby making many more asylum seekers undocumented, will increase the States' health care costs.⁶⁶ While asylees that meet eligibility requirements can receive federally funded benefits, such as Medicaid, undocumented immigrants are generally blocked from Medicaid.⁶⁷ See 8 U.S.C. § 1641(b). Some states fill this gap in coverage by providing health benefits to low-income undocumented children.⁶⁸ With fewer minor asylum

⁶⁵ See, e.g., Patrick Murphy & Jennifer Paluch, *Financing California's Public Schools*, Pub. Pol'y Inst. of Cal. (Nov. 2018), <https://tinyurl.com/PPIC-CA-Schools> (noting 90% of funding for California public schools came from state and local sources in 2018-19).

⁶⁶ Bobby Allyn, *California is 1st State to Offer Health Benefits to Adult Undocumented Immigrants*, NPR (July 10, 2019), <https://tinyurl.com/Allyn-NPR>.

⁶⁷ Nat'l Conf. St. Legis., *Immigrant Eligibility for Health Care Programs in the United States* (Oct. 19, 2017), <https://tinyurl.com/NCSLhealthcare>.

⁶⁸ California, New York, the District of Columbia, Illinois, Oregon, Massachusetts, and Washington provide full health benefits to low-income children regardless of immigration status. *Id.* Starting January of 2020, California will expand these benefits to those 25 and younger. Bobby Allyn, *California is 1st State to Offer Health Benefits to Adult Undocumented Immigrants*, NPR (July 10, 2019), <https://tinyurl.com/Allyn-NPR>.

seekers able to receive Medicaid, there will be a greater need for health programs funded solely by the States.

Additionally, undocumented individuals are more likely to forego preventative care for themselves and their children due to lack of insurance or fear of immigration enforcement.⁶⁹ Increasingly, health care providers are finding that undocumented families are skipping health care appointments and abstaining from scheduling routine prevention or primary care appointments.⁷⁰ The long term impact will be more expensive medical conditions that may need to be treated in emergency care settings, costs that may be borne by the States and their public and private institutions, as well as a decline in the public health of the States' population.⁷¹

Moreover, the added trauma that asylum seekers who comply with the Rule will suffer due to Mexico's and Guatemala's precarious conditions will likely

⁶⁹ See Kaiser Family Found., *Health Coverage and Care of Undocumented Immigrants* (July 15, 2019), <https://tinyurl.com/KaiserFound>.

⁷⁰ The Children's Partnership, *Healthy Mind, Healthy Future: Promoting the Mental Health and Wellbeing of Children in Immigrant Families in California* 25 (Sept. 22, 2018), <https://tinyurl.com/ChildrensPship-Healthy>.

⁷¹ Cal. Ass'n of Public Hosps. and Health Sys., *About California's Public Health Care Systems*, <https://tinyurl.com/CalPublicHealth> (California public hospital account for 40% of hospital care to the uninsured in the communities they serve)(last visited October 3, 2019).

cause long-term negative health impacts that could increase costs for state programs. Studies have shown that long-term stress can contribute to serious physical health problems including heart disease, diabetes, and severe viral infections.⁷² Once these individuals reach the United States, the States will have to address these increased healthcare needs. For example, in Illinois, asylum seekers can access state medical coverage and services by state-funded community agencies, a program that may need further funding due to the health problems inflicted upon this population by the Rule.⁷³

The States have also allocated funds for specialized programs to integrate asylees, which may become increasingly strained. California, for example, provides assistance benefiting some asylees, including cash assistance, food benefits, and funding to certain school districts to improve the well-being, English-language proficiency, and performance of their students.⁷⁴ The New York Office

⁷² See Nat'l Inst. Mental Health, *Stress Fact Sheet* (Dec. 2016), <https://tinyurl.com/NIMH-Stress>.

⁷³ See Ill. Dep't of Hum. Servs., *PM 06-21-00: Medical Benefits for Asylum Applicants and Torture Victims*, <https://tinyurl.com/Ill-Med> (last visited Sept. 11, 2019). The list of organizations can be found here: <https://tinyurl.com/IllHS-Orgs>.

⁷⁴ Cal. Dep't of Soc. Servs., *Cash Assistance Program for Immigrants (CAPI)*, <https://tinyurl.com/CDSSCapi> (last visited Sept. 11, 2019); Cal. Dep't of Soc. Servs., *Trafficking and Crime Victims Assistance Program*, <https://tinyurl.com/TCVAP> (last visited Sept. 11, 2019); Cal. Dep't of Soc. Servs.,

for New Americans has established neighborhood-based Opportunity Centers throughout the state to provide, among other things, English language courses and business development skills for immigrants.⁷⁵ One of Washington's social service programs partners with local governments, community and technical colleges, ethnic community-based organizations, and other service providers to deliver educational services, job training skills, assistance establishing housing and transportation, language classes, and other comprehensive support services.⁷⁶ Because serving people who have been traumatized is naturally more difficult than serving those who have not, by inflicting greater trauma on asylees who comply with the Rule, the Rule will affect these state-provided resources.

California Newcomer Education and Well-Being, <https://tinyurl.com/CalNEWRefs> (last visited Aug. 5, 2019).

⁷⁵ See N.Y. St. Off. for New Ams., *Our Mission*, <https://tinyurl.com/y5wb8dws> (last visited Sept. 11, 2019); see also N.Y. St. Off. for New Ams., *Request for Applications, RFA #18-ONA-32*, <https://tinyurl.com/y3oqjul6> (last visited Aug. 5, 2019); N.Y. St., Pressroom, *Governor Cuomo Announces Expansion of Services for Immigrant Community Through Office for New Americans* (Dec. 18, 2019), <https://tinyurl.com/NYOfficeofNewAm>.

⁷⁶ See Office of Refugee & Immigration Assistance, Econ. Servs. Admin., Wash. Dep't of Soc. & Health Servs., *Briefing Book for State Fiscal Year 2018* at 28-29 (Jan. 2019), <https://tinyurl.com/WashBriefingBook>.

C. Implementing the Rule Without Notice and Comment Harms the States and the Public Interest

The Rule at issue here was made effective upon publication. 84 Fed. Reg. at 33,830. This promulgation violates the APA's procedural requirements of notice and comment and the 30-day waiting period, as required by 5 U.S.C. § 553(c) and (d), and contravenes the public interest. The APA's notice and comment procedures "ensure public participation in rulemaking," *Paulsen v. Daniels*, 413 F.3d 999, 1004 (9th Cir. 2005) (citation omitted), as well as "due deliberation of agency regulations, and [they] foster the fairness and deliberation that should underlie a pronouncement of such force," *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1251 (9th Cir. 2018) (internal citations and quotation marks omitted). Allowing comments *after* the Rule becomes effective does not satisfy the notice and comment requirements. *See* 84 Fed. Reg. at 33,830 (allowing the submission of public comments for 30 days after the Rule's effective date). In fact, it is "antithetical to the structure and purpose of the APA for an agency to implement a rule first, then seek comment later." *United States v. Valverde*, 628 F.3d 1159, 1164 (9th Cir. 2010) (citation omitted).

The Departments' failure to engage in pre-rule notice and comment procedures as required by the APA deprived the States of the ability to influence the agencies' decision. *See Citizens for Better Forestry v. U.S. Dep't of Agric.*,

341 F.3d 961, 976 (9th Cir. 2003) (stating, in standing context, that “[i]t suffices that the agency’s decision *could be influenced*” by public participation) (citation and ellipses omitted) (emphasis in original). As sovereigns responsible for the health, safety, and welfare of millions of people within their respective borders, the States have unique interests and perspectives to contribute on issues of national importance and widespread impact, particularly when such policies will directly harm the States. If the States had been provided with an opportunity to comment on the Rule before it took effect, they would have raised the myriad harmful impacts that will result from it.⁷⁷ “The public interest is served by compliance with the APA” and allowing the Rule to go into effect prior to notice and comment contravenes this interest. *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) (upholding preliminary injunction in plaintiff states and noting lower court’s finding that plaintiff states would face “potentially dire public health and fiscal consequences as a result of a process as to which they had no input”).

⁷⁷ Several of the States submitted a comment letter asking for the Rule to be withdrawn after it took effect. Attorneys General of California, Massachusetts, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, Comment Letter on *Asylum Eligibility and Procedural Modifications* (Aug. 15, 2019), <https://www.regulations.gov/document?D=EOIR-2019-0002-1205>.

CONCLUSION

For these reasons, this Court should uphold the district court's nationwide preliminary injunction.

Dated: October 15, 2019

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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/s/ Marissa Malouff

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