State of California

Office of the Attorney General

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July 15, 2020

Via Federal eRulemaking Portal
Chad Wolf, Acting Secretary
Department of Homeland Security
Hon. William Barr
Attorney General
Assistant Director Lauren Alder Reid
Office of Policy
Executive Office for Immigration Review
Department of Justice
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RE: Comments on *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 36,264 (Proposed June 15, 2020), RIN: 1125–AA94

Dear Acting Secretary Wolf, Attorney General Barr and Assistant Director Reid:

We, the Attorneys General of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia (the States), write to urge the U.S. Department of Homeland Security (DHS) and U.S. Department of Justice (US DOJ) (collectively, the Departments) to withdraw the Joint Notice of Proposed Rulemaking: *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 36,264 (proposed June 15, 2020), RIN: 1125–AA94 (Proposed Rule or the Rule). The Proposed Rule introduces numerous sweeping changes to the asylum system that effectively nullify the meaningful right to apply for humanitarian protection in the United States. Consequently, it inflicts serious harm on asylum seekers and the States that welcome them. The Proposed Rule further undermines the Constitutional promise of due process and runs counter to the asylum protections provided for by Congress in the Immigration and Nationality Act.

The States have a significant interest in the Proposed Rule because every year, they welcome thousands of potential asylees who have suffered persecution in their home

countries.[1] In 2015-2017, the most recent years for which this data is available, the States signatory to this letter constituted six of the top ten states of residence for individuals whose affirmative asylum applications were granted.[2] Combined, these six States were home to 68 percent of the total number of individuals granted affirmative asylum applications in the United States.[3] In fiscal year (FY) 2019, immigration courts in the States issued approximately 42,700 asylum decisions.[4] There is a backlog of over 180,000 immigration cases pending in California immigration courts alone, many of which are asylum cases.[5]

The Proposed Rule will have an immeasurable impact on thousands of the States' current and future asylum seeking residents. By severely restricting asylum eligibility and eliminating several procedural protections, the Proposed Rule will result in the deportation of bona fide asylum seekers who are certain to face persecution or torture in their home countries. These consequences will fall hardest on survivors of trauma, and victims of gender, gang, and homophobic, violence. Because of the increased risk of deportation attendant with applying for asylum under the Rule, many otherwise eligible asylum seekers will be relegated to the shadows where they are more likely to face exploitation or other abuses. The Departments are leaving asylum seekers—many of whom journeyed thousands of miles just to reach safety—without any safe options.

By harming the States' current and future residents, the Proposed Rule also harms the States themselves. Immigrants are integral to the States' social fabric and economic success. These contributions have been especially evident during the COVID-19 crisis, where immigrants have served in essential positions that keep the States' communities running. In recognition of the contributions that asylum seekers and asylees add to the States, the States invest significant resources to provide education, health care, and other services, enabling them to thrive in the States' communities. The Proposed Rule undermines these investments, while burdening State programs that serve these populations. The Proposed Rule also hinders the States' ability to enforce their own labor and civil rights laws, by pushing putative asylees into the underground economy.

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[1] Dep't of Homeland Sec., *2017 Yearbook of Immigration Statistics* 43 tbl.16 (Apr. 1, 2019), https://www.dhs.gov/immigration-statistics/yearbook/2017/table16; Nadwa Mossad, Office of Immigration Statistics, Dep't of Homeland Sec., *Annual Flow Report: Refugees and Asylees: 2017* (Mar. 2019), https://tinyurl.com/MossadReport2019.
[2] Mossad, *supra* note 1, at tbl. 13.
[3] *Id.*
[4] TRAC Immigration, Asylum Decisions, https://trac.syr.edu/phptools/immigration/asylum/.
[5] TRAC Immigration, Immigration Court Backlog Tool, https://trac.syr.edu/phptools/immigration/court_backlog/.

Finally, the Proposed Rule is unlawful. Significantly, the Proposed Rule would result in systemic due process violations. The Rule would also violate the Administrative Procedure Act because the Departments failed to engage in reasoned decision making and several aspects of the Proposed Rule are contrary to the text of the Immigration and Nationality Act. For these reasons, the States urge the Departments to withdraw the Proposed Rule. [6]

I. THE PROPOSED RULE UPENDS THE CURRENT ASYLUM SYSTEM AND HARMS ASYLUM SEEKERS

Giving asylum seekers a safe haven from persecution is an essential value of the United States. The purpose of the Refugee Act of 1980, which established the present asylum system, was to codify "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. The Proposed Rule introduces a litany of changes to asylum eligibility standards and the asylum process. While the Rule changes a variety of aspects of the asylum system, all of the changes share a common theme: making asylum extremely difficult, if not impossible, for many applicants to obtain. The following is a non-exhaustive list of the Proposed Rule's changes to the asylum process:

Heightens eligibility standards. The Proposed Rule heightens substantive and procedural asylum eligibility standards in at least the following ways: (1) effectively bars claims based upon gender-based violence, gang-violence, or other violence at the hands of private actors, regardless of whether the government is unable or unwilling to that violence, *see* 85 Fed. Reg. 36,279, 36,281; (2) heightens the severity of harm that an applicant must have suffered in the past to be eligible, *id.* at 36,280; (3) creates a presumption that an applicant can internally relocate to avoid persecution, such that more applicants will be denied on that basis, *id.* at 36,282; (4) broadens the "firm resettlement" mandatory bar to asylum so that it will apply to any applicant who passed through any country with a refugee processing system, *id.* at 36,286; and (5) makes it more difficult for applicants to obtain protection under the Convention Against Torture (CAT), by specifying that applicants must prove their torturer was a public official acting under the "color of law," *id.* at 36,287.

Vastly increases the frequency of discretionary denials. The Proposed Rule enumerates three "significantly" adverse discretionary factors: (1) unlawful entry; (2) the applicant's failure to apply for humanitarian protection in at least one country that was

[6] The States also note that a 30-day comment period for a proposed rule of this magnitude is unreasonable. As set forth in this letter, the Proposed Rule contains numerous provisions that fundamentally reshape the asylum process. Thirty days is simply insufficient for commenters to fully account for the potential effects of the Proposed Rule.

transited through en route to the United States; and (3) the use of fraudulent documents. *See* 85 Fed. Reg. 36,283. The Proposed Rule further codifies nine negative discretionary factors that must result in denial, unless the applicant can establish "extraordinary circumstances, such as those involving national security or foreign policy considerations, or if the [applicant] demonstrates, by clear and convincing evidence, that the denial of asylum would result in an exceptional and extremely unusual hardship to the [applicant]." *Id.* at 36,293-94. These nine factors include: (1) 14-days of presence in any country that has an asylum or refugee processing system; (2) transiting through more than one country en route to the United States; (3) any criminal conviction, regardless of its severity; (4) one year or more of unlawful presence prior to the filing of the application; (5) failure to file taxes; (6) having two or more asylum applications denied for any reason; (7) having withdrawn a prior asylum application; (8) failure to attend an asylum interview; and (9) failure to file a motion to reopen an asylum case based on changed country conditions within one-year of the conditions changing. *Id.* at 36,293.

Creates a riskier and less fair asylum process. The Proposed Rule would allow immigration judges to pretermit cases and order deportation if the asylum application form does not illustrate prima facie eligibility. 85 Fed. Reg. 36,277. Thus, under the Proposed Rule, judges can terminate cases and order deportation without allowing an opportunity for the applicant to testify. The Rule then limits applicants' ability to file motions to reopen based on new grounds for asylum that were not articulated on the application, even when such motions are based on ineffective assistance of counsel. *See id.* at 36,279, 36,291. The Proposed Rule also expands upon when the Federal Government can label an application "frivolous," which will result in the applicant being permanently banned from receiving any immigration benefit. *Id.* at 36,273.

Makes the credible fear process more onerous. The Proposed Rule makes a host of changes that make it harder for applicants to pass the credible fear screening, including: (1) limiting the circuit law that immigration judges can consider when reviewing negative credible fear findings, so that judges need not consider the law most beneficial to the applicant; (2) raising the standard for the screening of CAT claims; (3) applying mandatory bars and considering whether internal relocation is reasonable; and (4) requiring applicants to affirmatively state their intent to appeal a negative credible fear finding. 85 Fed. Reg. 36,265-72. Additionally, the Proposed Rule would place applicants who received a positive credible fear screening into streamlined "asylum only" proceedings. *Id.* at 36,265-67.

Undermines confidentiality protections. The Proposed Rule "clarifies" that the confidential information contained in an asylum application can be disclosed "in certain circumstances that directly relate to the integrity of immigration proceedings, including situations in which there is suspected fraud or improper duplication of applications or claim." 85 Fed. Reg. 36,288.

When taken together, these provisions drastically reform the asylum system to an unrecognizable process in which only a narrow few can attain protection. The harms that the Proposed Rule's restrictive and punitive measures will inflict on asylum seekers are numerous and incalculable. The States highlight just a few of the Rule's cruel effects: (1) by making asylum out of reach, especially for particularly vulnerable applicants, the Proposed Rule will deliver asylum seekers into the hands of their persecutors; (2) the Proposed Rule encourages applicants to pursue asylum in dangerous countries that are not equipped to handle their claims; (3) the Proposed Rule effectively forces applicants to rely on withholding of removal and protection under the CAT, which are more difficult to receive, and encompass fewer benefits than asylum; and (4) the Proposed Rule discourages applicants from seeking asylum, resulting in more asylum seekers embarking on dangerous crossings and living in the shadows as undocumented immigrants.

A. Asylum Seekers Will Be Delivered into the Hands of Their Persecutors

Asylum seekers hail from dangerous and politically unstable countries all over the world. Such countries often include those with a high prevalence of organized criminal groups, like Honduras, El Salvador, and Guatemala, (collectively, the Northern Triangle), and Mexico; conflict-torn African countries like the Democratic Republic of Congo; and countries with governments intolerant of sexual or religious minorities, such as Iran. Not only does the Proposed Rule make the asylum process more difficult for most of these asylum seekers, but it will pose an even greater barrier to protection for those who may need it the most—such as women, unaccompanied children, and Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) persons. As a result of these changes, many bona fide asylum seekers will be deported and "deliver[ed] into the hands of their persecutors." *Leiva-Perez v. Holder*, 640 F.3d 962, 971 (9th Cir. 2011).

The States first discuss the Rule's outsized impact on these groups, and then describe the persecution that many will face if they are deported as a result of the Proposed Rule.

i. The Proposed Rule Will Preclude Women, Unaccompanied Children, and LGBTQ Persons From Protection and Result in Further Persecution

As set forth below, several of the Proposed Rule's changes to the asylum process will make it more difficult for women, unaccompanied children, and LGBTQ persons to obtain protection.

Nexus. The Proposed Rule reinterprets the nexus element in an extremely restrictive manner, so that women, LGBTQ persons, and unaccompanied children, are more likely to be denied protection and deported. To be eligible for asylum, an applicant

must establish that the harm they experienced, or would experience in the future, has a "nexus" to a protected ground. Statutory protected grounds include race, nationality, religion, political opinion, and membership in a particular social group.[7] 8 U.S.C. § 1101(a)(42). Courts have routinely recognized that gender-based violence, gang violence, and acts such as hate crimes committed by non-governmental actors, have a nexus to the protected grounds of membership in a particular social group and/or political opinion. For example, in *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014), the Ninth Circuit held that "persons taking concrete steps to oppose gang membership and gang authority" may be a particular social group, such that persecution due to gang opposition could be grounds for asylum. The Fourth Circuit has held that an applicant's opposition to a gang was a political opinion. *Alvarez Lagos v. Barr*, 927 F.3d 236, 250-51 (4th Cir. 2019). Recently, the Second Circuit found that opposition to male-dominated social norms could be a political opinion. *Hernandez-Chacon v. Barr*, 948 F.3d 94, 105 (2d Cir. 2020). The Ninth Circuit has also found that "all women in Guatemala" could be a cognizable particular social group. *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010); *see also Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005) (suggesting that "young girls in the Benadiri clan" and "Somalian females" could constitute particular social groups); *Cece v. Holder*, 733 F.3d 662, 673 (7th Cir. 2013) (holding that young Albanian women living alone are a particular social group). And for many years, the courts and the US DOJ's Board of Immigration Appeals (BIA) have recognized female genital mutilation as persecution on the basis of particular social groups defined by gender and societal practices. *Matter of Kasinga*, 21 I&N Dec. 357, 368 (BIA 1996) ("young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice" is a cognizable particular social group).

The Proposed Rule reinterprets the terms "political opinion" and "particular social group" to foreclose upon claims involving "interpersonal disputes," "private criminal acts," or opposition to "non-state organizations." *See* 85 Fed. Reg. 36,279, 36,281. This interpretation is likely to block many applicants who suffered persecution at the hands of private actors, such as victims of domestic violence, hate crimes, gender-based violence, and violence related to gangs. In fact, the Rule says as much, explicitly stating that despite circuit court recognition, gender related claims and claims involving opposition to a gang or other non-governmental group, including terrorist and guerrilla groups, have no

[7] To be cognizable, a particular social group must be (1) based on a common, immutable characteristic; (2) defined with particularity, meaning that it is defined by characteristics that "provide a clear benchmark for determining who falls within the group"; and (3) socially distinct, meaning that the group is perceived by the society in question as a group. *Matter of W-G-R-*, 26 I&N Dec. 208, 212-13 (BIA 2014); *Matter of M-E-V-G-*, 26 I&N Dec. 227, 239 (BIA 2014).

nexus to a protected ground. Such a narrow construction of these elements means many applicants—who will undoubtedly suffer extreme forms of harm if they are deported—will be denied protection in the United States.

The Meaning of Persecution. The Proposed Rule strips the meaning of persecution, making common forms of harm suffered by members of these groups not severe enough to be considered persecution. Specifically, the Rule provides that the existence of a persecutory law is not sufficient to establish past harm or a reasonable fear of future harm, unless there is credible evidence that the law has been or would be applied to an applicant personally. 85 Fed. Reg. 36,280. Thus, a law criminalizing same-sex relationships may no longer be the basis for asylum, unless the applicant could establish that they personally would be charged with a crime. Additionally, the Proposed Rule states that death threats alone are not sufficiently severe to constitute persecution.[8] Death threats are a common basis for asylum.[9]

Unlawful Presence Discretionary Factor. Under the Proposed Rule applicants who apply for asylum after one year of unlawful presence in the United States will ordinarily be denied on discretionary grounds, which will harm victims suffering from post-traumatic stress disorder (PTSD). It is well-recognized that PTSD can hinder an applicant's ability to file a timely application. *See Mukamusoni v. Ashcroft*, 390 F.3d 110, 117 (1st Cir. 2004) ("During the April 27, 2000 hearing, the [immigration judge (IJ)] excused Mukamusoni's late filing of her asylum application because the IJ found her to be suffering from PTSD during the year that she was in the United States, and that this constituted 'extraordinary circumstances' justifying the late filing."). PTSD is highly prevalent among victims of domestic violence, childhood abuse, and hate crimes.[10] This discretionary factor will be yet another obstacle to these applicants' ability to receive relief.

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[8] U.S. Citizenship & Immigration Servs., Refugee, Asylum, and International Operations Directorate, *Definition of Persecution and Eligibility Based on Past Persecution* at 24, https://tinyurl.com/USCISPersection ("receipt of threats over a prolonged period of time, causing the applicant to live in a state of constant fear" and "imminent threat of death" can amount to persecution).

[9] *Gomez-Saballos v. I.N.S.*, 79 F.3d 912, 913 (9th Cir. 1996); Molly Hennessy-Fiske, *For transgender migrants fleeing death threats, asylum in the U.S. is a crapshoot*, L.A. TIMES (Oct. 19, 2019), https://tinyurl.com/LATimesHennessyFiske.

[10] Guila Ferrari & Gene Feder et al., *Psychological advocacy towards healing (PATH): A randomized controlled trial of a psychological intervention in a domestic violence service setting*, PLOS ONE (2018), https://tinyurl.com/psychdv; International Society for Traumatic Stress Studies, *Global Perspectives on the Trauma of Hate-Based Violence*, https://tinyurl.com/traumaviolence.

Third Country Transit. The Proposed Rule, through its numerous discretionary factors and its expansion of the firm resettlement bar, dooms asylum applicants who transited through a third country but did not apply for relief there. As set forth in the States' prior comment letters regarding related rules, this will have a particularly negative impact on women, unaccompanied children, and LGBTQ persons, for whom applying in a third country may not be feasible or safe.[11]

Discretionary factors' application to children. The Proposed Rule applies its numerous discretionary factors to unaccompanied children making them more likely to be denied asylum. 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 U.S. Citizenship and Immigration Services (USCIS) Asylum Office in the first instance instead of in immigration court. *Id.* at § 235(d)(7)(C), 122 Stat. at 5081. USCIS officers "are trained to conduct non-adversarial interviews and to apply child-sensitive and trauma-informed interview techniques," which can facilitate a child's testimony. *J.O.P. v. U.S. Dep't of Homeland Sec.*, 409 F. Supp. 3d 367, 372 (D. Md. 2019). With the benefit of non-adversarial interviews, many unaccompanied children have been granted asylum.[12] Indeed, in FY 2017, 5,361 children under the age of twenty were granted affirmative asylum as principal applicants, comprising approximately 44 percent of all principal applicants granted affirmative asylum.[13]

The Proposed Rule will subject many unaccompanied children to discretionary denials of asylum for minute—but common—issues, like failing to file an application within one-year or entering unlawfully, thereby rendering the TVPRA's protections irrelevant. With asylum off the table, these unaccompanied children will be forced to present claims for withholding of removal and protection under the CAT, which can only

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[11] Attachment 2, Administrative Record for *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (proposed July 16, 2019) at AR1205. Administrative Record for *Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act*, 84 Fed. Reg. 63,994 (proposed Nov. 19, 2019) at USCIS AR79.

[12] U.S. Citizenship & Immigration Servs., *RAIO Combined Training Course* 56 (Nov. 30, 2015), https://www.aila.org/File/Related/18022100_Part3.pdf (instructing officers on the possible types of cognizable claims that children have); Mossad, *supra* note 1, at 7 ("In 2017, the three leading countries of nationality of persons granted either affirmative or defensive asylum were China (21 percent), El Salvador (13 percent), and Guatemala (11 percent) (Table 7). Nationals of these countries accounted for 45 percent of all persons granted asylum.").

[13] Dep't of Homeland Sec., *supra* note 1, at tbl.18,

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, immigration court is not the proper venue for children to present their claims for humanitarian protection. *See J.O.P.*, 409 F. Supp. 3d at 372 (citing 8 U.S.C. §§ 1158, 1232(d)).

Confidentiality. The Proposed Rule modifies the Departments' confidentiality requirements. Asylum applications often involve sensitive and traumatic topics, particularly for children, and victims of gender-based and homophobic violence. Relaxing confidentiality protections will make applicants less willing to fully testify about their experiences, which will be detrimental to their claims.

ii. Women, Unaccompanied Children, and LGBTQ Asylum Seekers Are Likely to Face Persecution in Their Home Countries

As set forth above, the Proposed Rule makes it particularly difficult for women, unaccompanied children, and LGBTQ persons to obtain protection, and as a result, many members of these groups will be deported, only to face harrowing forms of persecution in their home countries.[14]

Gender-based violence. Women around the world live in repressive and perilous conditions. For example, "[f]emale genital mutilation has been documented in 30 countries, mainly in Africa, as well as in the Middle East and Asia."[15] In Afghanistan, women experience honor killings, violent attacks as they try to attend school or work, and forced marriages.[16] Per Amnesty International, "87 [percent] of Afghan women are illiterate, while 70-80 [percent] face forced marriage, many before the age of 16." And in the Democratic Republic of Congo, "[a]rmed militias and members of state forces are notorious for brutal gang rapes as well as sexual and human trafficking."[17]

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[14] For purposes of this letter, the States mostly focus on the dangers that asylum seekers face in the Northern Triangle and Mexico, as asylum seekers are most commonly fleeing these areas, but the States also note particularly egregious forms of persecution worldwide.
[15] World Health Org., *Female genital mutilation (FGM)*, https://www.who.int/reproductivehealth/topics/fgm/prevalence/en/.
[16] Amnesty Int'l, *The World's Worst Places To Be A Woman*, https://www.amnestyusa.org/the-worlds-worst-places-to-be-a-woman/.
[17] *Id*.

Mexico and the Northern Triangle countries, the countries from which most asylum seekers hail, also suffer from extremely high levels of gender-based violence.[18] El Salvador ranks first globally for rates of female homicide, with Guatemala ranking third, and Honduras seventh.[19] According to some reports, a woman is murdered every 16 hours in Honduras, every 18 hours in El Salvador, and two women are killed each day in Guatemala.[20] According to a report in 2018, Mexico ranks sixth for gender crimes, globally.[21]

Gangs intentionally target women for violence and sexual abuse. Gangs are known to force girls and women to become their "girlfriends" and subject them to gang rape.[22] In a report documenting the stories of asylum seekers from the Northern Triangle and Mexico, "[w]omen described life-threatening and degrading forms of domestic violence, including repeated rapes, sexual assaults, and violent physical abuse, such as beatings with baseball bats and other weapons. Women repeatedly emphasized that the police could not protect them from harm."[23] It is for these, among other reasons, that the U.N. High Commissioner on Refugees (UNHCR) finds that women and girls in the Northern Triangle countries "may be in need of international refugee protection on the basis of their membership of a particular social group, and/or their (imputed) political opinion."[24] *See also Hernandez-Chacon*, 948 F.3d at 103.

Moreover, even when government actors are not the explicit perpetrators of gender-based violence, governments are often unable or unwilling to prevent violence

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[18] Mossad, *supra* note 1, at 7.
[19] UNHCR, *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.
[20] Kids in Need of Defense (KIND), *Sexual and Gender Based Violence (SGBV) & Migration Fact Sheet* 2 (Apr. 2018), https://tinyurl.com/KIND-SGBV.
[21] María Encarnación López, London School of Economics, *Femicide in Ciudad Juárez is enabled by the regulation of gender, justice, and production in Mexico* (Feb. 15, 2018) https://tinyurl.com/MexicoGenderViolence; 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.
[22] *Women on the RUN*, *supra* note 19, at 16.
[23] *Id*. at 4.
[24] UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras* 56 (July 2016), https://www.refworld.org/docid/579767434.html; UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador* 38 (Mar. 2016), https://www.refworld.org/docid/56e706e94.html; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of asylum-seekers from Guatemala* 48-49 (Jan. 2018), https://www.refworld.org/docid/5a5e03e96.html.

perpetrated by private actors such as gangs or domestic abusers.[25] *See Grace v. Whitaker*, 344 F. Supp. 3d 96, 128–30 (D.D.C. 2018); 8 U.SC. § 1101(a)(42). Despite these conditions, in a sweeping statement, the Proposed Rule disregards all claims based on gender.

Violence Against Unaccompanied Children. Unaccompanied children predominantly migrate from the Northern Triangle to escape severe forms of violence at the hands of gangs, as well as domestic and sexual abuse.[26] In a study of 180-asylum seeking children, 89 percent of whom fled the Northern Triangle, the organization Physicians for Human Rights found that children suffered widespread abuses in their home countries: 78 percent survived direct physical violence; 71 percent suffered threats of violence or death; 59 had witnessed acts of violence; and 18 percent had been sexually abused.[27]

It is well documented that children face severe forms of gang violence and threats in the Northern Triangle. In fact, in the Physicians for Human Rights study, 60 percent of children suffered gang-related violence.[28] In all three Northern Triangle countries, "children [are] targeted for recruitment, abuse and even murder."[29] Gangs target children when they are as young as twelve years old.[30] Due to the upsurge in gang violence since the early 2010's, El Salvador has the highest rate of homicide among children and adolescents in the world, with homicide as the leading cause of death among adolescent boys in the country.[31] Between the years of 2008 and 2016, approximately one child was murdered each day in Honduras.[32] Moreover, almost half of Honduran children living in

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[25] *See* Molly O'Toole, *Judge overturns Trump policy limiting asylum claims by victims of gangs and domestic violence*, LA TIMES (Dec. 19, 2018) https://tinyurl.com/OTooleGrace.
[26] Mossad, *supra* note 1.
[27] Physicians for Human Rights, *"There Is No One Here to Protect You" Trauma Among Children Fleeing Violence in Central America* (June 10, 2019), https://tinyurl.com/PhysiciansforHumanRightsNTC-1.
[28] *Id.*
[29] UNICEF, *Children returned to Central America and Mexico at heightened risk of violence, stigma and deprivation* (Aug. 15, 2018), https://tinyurl.com/UNICEFNorthernTriangle.
[30] Ion Grillo, *Childhood Stolen by street gangs*, UNHCR (Dec. 8, 2016), https://tinyurl.com/ChildhoodStolen.
[31] UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador* 35 (March 2016), https://www.refworld.org/docid/56e706e94.html.
[32] UNICEF, *supra* note 29.

neighborhoods with criminal gangs do not have access to education.[33] In Guatemala, too, children are targets of recruitment by criminal gangs,[34] and 942 children were murdered in 2017 alone.[35]

While the Proposed Rule discounts the gang violence experienced by unaccompanied children as non-political, there is voluminous evidence of the political power that organized criminal groups hold in some parts of the Northern Triangle, where they often control basic governmental functions. One report details how in areas it controls, MS-13 will "act as an effective arbiter in domestic or neighborly disputes; participate directly in community associations or non-governmental organizations; provide votes (or impede them) in elections as well as other services for local political actors; and open the door to economic opportunity."[36] In a recent example of their quasi-governmental role, in the wake of COVID-19, Salvadoran gangs enforced the national curfew, and coordinated across the country to establish schedules for stores to open residents to obtain food.[37] Opposition to these gangs is more than mere fear of private criminal acts—in many case, it is political in nature.

There are also startling levels of domestic and sexual abuse in the Northern Triangle. The Physicians for Human Rights' study found that 47 percent of child asylum seekers suffered violence perpetrated by a family member.[38] In Guatemala, child sexual exploitation and sex tourism remain a significant problem.[39] In Honduras, child abuse, including the commercial sexual exploitation of children, remains a serious problem and Honduras is a destination for child sex tourism.[40] Remarkably, Honduras does not have a

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[33] Norwegian Refugee Council, *Violence Has Pushed Thousands of Children in Honduras and El Salvador Out of School*, (May 16, 2019), https://tinyurl.com/NorwegianRefugeeCouncil.
[34] United Nations Human Rights, Office of the High Comm'r, *Committee on the Rights of the Child examines report of Guatemala* (Jan. 17, 2018), https://tinyurl.com/UNHR-Guatemala-Children.
[35] UNICEF, *supra* note 29.
[36] InSight Crime, *MS13 in the Americas* 49 (Feb. 2018), https://tinyurl.com/InSightCrime.
[37] The Armed Conflict Location & Event Data Project, *Central America and COVID-19: The Pandemic's Impact on Gang Violence*, https://tinyurl.com/ACLEDData.
[38] *Id.*
[39] U.S. Dep't of State, *Guatemala 2019 Human Rights Report* 17-18 (Mar. 2020) https://tinyurl.com/Guate2019Rep.
[40] U.S. Dep't of State, *Honduras 2019 Human Rights Report* 17 (Mar. 2020) https://tinyurl.com/Hond2019Rep.

statutory rape law.[41] In all three Northern Tringle countries, girls are frequently kidnapped and victimized by repeated gang rape.[42]

Under the Rule, despite the distressing violence and abuse unaccompanied children suffer, their claims are more likely to be denied as involving "private criminal acts," or because of the presence of discretionary factors like unlawful entry.

Violence Against LGBTQ Persons. LGBTQ persons are subject to discrimination and persecution in many parts of the world. "There are still more than 80 countries with sodomy laws, and punishment can include flogging, imprisonment, and in about a dozen jurisdictions, the death penalty."[43] As noted above, troublingly, under the Proposed Rule, the existence of such laws in an applicant's home country would be insufficient for them to obtain asylum.

LGBTQ migrants face special dangers in the Northern Triangle and Mexico, where homophobic and transphobic violence is widespread. In El Salvador, organizations reported violence and discrimination against LGBTQ people by public officials and police forces.[44] Moreover, LGBTQ persons reported that, when attempting to make allegations of violence committed against them, they were harassed by the Salvadoran national police and attorney general, including by being subjected to strip searches.[45] In Honduras, LGBTQ individuals are routinely subjected to physical violence.[46] In Guatemala, almost one third of transwomen identified police officers as their main persecutors, and LGBTQ women experience forced pregnancies through what is known as "corrective rape."[47] And in Mexico, two police officers were arrested in connection with the kidnapping, torture, and execution of a young gay couple.[48] In addition to these disturbing types of violence, discrimination in aspects of civil society is also common. In Mexico, El Salvador, and Honduras, the law prohibits discrimination

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[41] *Id*.
[42] Kids in Need of Defense (KIND), *Sexual and Gender Based Violence (SGBV) & Migration Fact Sheet* 2 (Apr. 2018), https://tinyurl.com/KIND-SGBV.
[43] Amnesty Int'l, *7 Discriminatory (Or Deadly) Countries For LGBT People*, https://tinyurl.com/Amnesty7Countries.
[44] U.S. Dep't of State, *El Salvador 2019 Human Rights Report* 22 (Mar. 2020), https://tinyurl.com/ElSalv2019Rep.
[45] *Id*.
[46] Dep't of State – *Honduras 2019, supra* note 40 at 19.
[47] Organización Trans Reinas de la Noche, *Human Rights Violations Against Transgender Women in Guatemala* at 7 (Feb. 2018), https://tinyurl.com/OTRN-LGBT; Dep't of State – *Guatemala 2019*, *supra* note 39, at 22.
[48] Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), *Mexico: Sexual Orientation and Gender Identity (SOGI)* 20 (May 2017), http://www.refworld.org/docid/5937f12d4.html.

based on gender identity or sexual orientation, but abuses are rampant.[49] Notably, in Guatemala, legal protections against anti-LGBTQ discrimination do not even exist.[50]

In light of the rampant abuses that befall LGBTQ asylum seekers, they have long been considered to merit asylum protection. *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005). But, as discussed above, under the Proposed Rule, many could see their claims denied due to discretionary and other reasons.

B. The Proposed Rule Requires Asylum Seekers to Request Protection in Dangerous and Ill-Equipped Countries

Through its codification of several discretionary factors and its broad reinterpretation of the firm resettlement bar, the Proposed Rule makes the failure to apply for protection in a third country a determining factor in an applicant's case. But, applying for relief in a third country is often a fruitless endeavor that can also be extremely dangerous. In previous comment letters opposing similar regulations, the States addressed the harms that applicants would suffer if forced to apply for protection in the third countries of Mexico, Guatemala, Honduras, or El Salvador. The States further discussed the inadequacy of these asylum systems. The States have attached those comment letters for the Departments' reference and maintain that forcing asylum seekers to apply for protection in a third country will have dangerous, trauma-inducing consequences.[51]

C. Applicants Will Be Deprived of Adequate Humanitarian Protection

The Proposed Rule makes it so many otherwise eligible applicants will be denied asylum because of new discretionary and reformulated mandatory bars. Such applicants will have to rely on the alternative forms of relief of withholding of removal and protection under the CAT. However, the availability of withholding of removal and CAT does little to protect bona fide asylum seekers. *First*, many will be denied withholding of removal and CAT protection because these forms of relief have much higher standards of proof than asylum. 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). For reference, in 2016, less than five

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[49] Dep't of State – *El Salvador 2019, supra* note 44, at 22; Dep't of State – *Honduras 2019, supra* note 40 at 19; U.S. Dep't of State, *Mexico 2019 Human Rights Report* 27 (Mar. 2020) https://tinyurl.com/Mex2019Rep.
[50] Dep't of State – *Guatemala 2019, supra* note 39 at 22.
[51] Attachment 2, Administrative Record for *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (proposed July 16, 2019) at AR1205. Administrative Record for *Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act*, 84 Fed. Reg. 63,994 (proposed Nov. 19, 2019) at USCIS AR79.

percent of CAT claims and only six percent of withholding of removal claims were granted.[52] By comparison, that same year, 48 percent of asylum cases were granted.[53]

Second, even the few applicants who are granted these alternative forms of relief will face additional trauma and obstacles because, unlike asylum, neither withholding of removal nor CAT offer any protection to an applicant's family members (like children or spouses). 8 U.S.C. § 1158(b)(3)(A); *see also* 84 Fed. Reg. at 33,832 (listing benefits of asylee status). 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. As the Second Circuit described, 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).

Third, individuals granted withholding of removal and CAT are in a constant state of limbo because they cannot obtain permanent residency and are at constant risk of removal to a third country.[54] 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").

D. Asylum Seekers Will be Forced into Unsafe Situations

i. The Proposed Rule Results in Dangerous Crossings

The Proposed Rule's severe narrowing of the grounds for claiming asylum results in asylum becoming out of reach for many asylum seekers. Thus, the Rule discourages asylum seekers from presenting themselves and asking for asylum at a port of entry. This is particularly so at the southern border, given DHS's "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, along with the Migrant Protection Protocols that force asylum seekers to remain in Mexico during the pendency

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[52] Human Rights First, *Withholding of Removal and the U.N. Convention Against Torture—No Substitute for Asylum, Putting Refugees at Risk* (Nov. 9, 2018), https://tinyurl.com/HRF-Withholding-CAT.
[53] Dep't of Justice, Exec. Office of Immigration Review (EOIR), *FY 2016 Statistics Yearbook* K6, fig.21 (Mar. 2017), https://www.justice.gov/eoir/page/file/fysb16/download.
[54] EOIR, *Fact Sheet: Asylum and Withholding of Removal Relief, Convention Against Torture Protections* 6 (Jan. 15, 2009), https://tinyurl.com/EOIR-FactSheet.

of their cases.[55] The effect of the Proposed Rule in the context of DHS policy puts asylum seekers in dangerous and vulnerable situations.[56]

With the prospect of a prolonged wait in Mexico to present a case that is likely to fail, many in desperate situations will choose to make a harrowing trek into the United States between ports of entry, without inspection. We have already seen the deadly consequences that can result from this calculus. For example, in June 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.[57] Nine people drowned trying to cross near the El Paso canals in June of 2019 alone.[58] Authorities also found the bodies of a mother, her one year old son, and two other infants, who crossed the river only to die of dehydration.[59] These heartbreaking stories are corroborated by evidence in the administrative record,[60] as well as in a report prepared by DHS's Inspector General,[61] which demonstrate that dangerous crossings have become more common-place due to other restrictive asylum policies.

Furthermore, the prospect of a prolonged wait and the Proposed Rule's significant hurdles to obtaining asylum may also increase the risk of asylum seekers being trafficked across the border. Notably, "[w]ould-be migrants turn to smugglers when legal pathways

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[55] 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.
[56] The States recognize that at this time, no individual can apply for asylum at the southern border due to restrictions the federal administration has imposed because of COVID-19. Dep't of Homeland Sec., *Fact Sheet: DHS Measures on the Border to Limit the Further Spread of Coronavirus* (March 23, 2020), https://tinyurl.com/DHS2020Coronavirus.
[57] 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.
[58] 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.
[59] Molly Hennessy-Fisk, *Migrants contemplate dangerous crossings despite border deaths and detention conditions*, L.A. TIMES (June 30, 2019), https://tinyurl.com/Hennessy-Fisk-LATimes.
[60] *See* Administrative Record for *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019) at AR664 (The irony of [the metering measure] is that it is going to drive people who are trying to apply for asylum at ports of entry and do things the right way into the mountains and deserts).
[61] Office of Inspector Gen., U.S. Dep't of Homeland Sec., *Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* 5-7 (Sept. 2018), https://tinyurl.com/OIGSpecial.

are limited, routes are dangerous to cross, and border controls harden."[62] Oftentimes, smugglers can become traffickers, who continue to exploit individuals even after bringing them across the border.[63] Should the Proposed Rule be implemented, these deaths will occur more frequently, and the risk of human trafficking will increase.

ii. Asylum Seekers Will be Pushed into the Shadows

Legal status facilitates the provision of services and allows individuals to integrate confidently into the community, rather than feeling consigned to the shadows. *See* 84 Fed. Reg. at 33,832 (listing benefits of asylee status); S. Rep. No. 96-256, at 9 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 141, 149 (noting that asylees' clear legal status 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"). For future asylum seekers who do make it across the border without inspection, and for those already living, working, and contributing to the prosperity of each State, many will be forced to live in the shadows when they would otherwise have legal status. As a result, asylum seekers will be less likely to seek the protections of state and federal laws designed to protect all individuals, regardless of immigration status; particularly the protection of labor and civil rights laws. This puts asylum seekers at risk of labor code and civil rights violations, and will leave the perpetrators of such violations unscathed.

Furthermore, in creating numerous hurdles to seeking asylum, the Proposed Rule perpetuates uncertainty for asylum seekers and exacerbates asylum seekers' trauma and mental anguish. Asylum seekers often face multiple layers of traumatic experiences before seeking asylum in the United States. Indeed, to be eligible for asylum, an individual must have suffered extreme harm that rises to the level of persecution in their home country or live under the threat of such persecution in the future. *See* 8 U.S.C. § 1158. The Center for Victims of Torture estimates that 44 percent of asylum seekers, asylees, and refugees in the United States are survivors of torture.[64] Studies show that "asylum seekers are at particular risk of developing mental illness, including post-traumatic stress disorder (PTSD), depression, and anxiety."[65] The fallout of the Proposed Rule's impact are vast and unquantifiable. Rather than offering asylum seekers a lawful

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[62] Jasper Gilardi, *Ally or Exploiter? The Smuggler-Migrant Relationship Is a Complex One*, MIGRATION POL'Y INST. (Feb. 5, 2020), https://tinyurl.com/MPIAlly.
[63] *See id*.
[64] Craig Higson-Smith, *Updating the Estimate of Refugees Resettled in the United States Who Have Suffered Torture*, CTR. FOR VICTIMS OF TORTURE, (Sept. 2015), https://tinyurl.com/y358lp3k; Dep't of Health & Human Servs., Office of Refugee Resettlement, *Services for Survivors of Torture*, https://tinyurl.com/yyjvt4u3.
[65] Piyal Sen, *The mental health needs of asylum seekers and refugees – challenges and solutions*, BJ PSYCH INTL. (May 1, 2016), https://tinyurl.com/yyqd79xt.

pathway to relief from persecution, as Congress intended, the Proposed Rule will result in compounding the trauma and vulnerabilities asylum seekers already face.

In all, under the Proposed Rule, asylum seekers' only options will be either trauma-inducing or dangerous: go through a severely limited asylum process that could very well result in deportation to the very country they fled, or try to enter the United States undetected through a dangerous trek and remain undocumented, but live in a constant state of fear and uncertainty.

II. THE RULE HARMS THE STATES

The States welcome thousands of potential asylees into their communities every year. All immigrants, including asylum seekers, have become integral to the fabric and success of each of the States. The Proposed Rule will make the asylum process more arduous for all asylum seekers. These increased hurdles to obtaining relief, and likely consequences of many asylum seekers being denied relief or foregoing the process altogether, will negatively impact the States in profound ways. Specifically, the Proposed Rule harms the States for the following reasons: (1) asylees and asylum seekers, like other immigrants, are vital to the success of the States' economies and the prosperity and health of the States' communities; (2) the Proposed Rule undermines the States' programs designed to support immigrants, including asylum-seekers; (3) the Rule burdens state programs designed to assist immigrants; (4) it undermines the States' interest in family unity; and (5) the Rule hinders the States' ability to enforce their own laws.

A. The Proposed Rule Will Deprive the States of Important Economic and Societal Contributions

The Proposed Rule will harm the States' economies. Immigrants, including asylum seekers, are the backbone of States' workforce and economy. In 2016, immigrants were majority owners of 33 percent of businesses in the accommodation and food services industry across the United States.[66] Currently, undocumented immigrants residing in the States pay approximately $7.6 billion in state and local taxes annually.[67] Notably, a draft 2017 report by the U.S. Department of Health and Human Services found that over the past decade, refugees, including asylees, have contributed $63 billion

[66] Rakesh Kochhar, *The financial risk to U.S. business owners posed by COVID-19 outbreak varies by demographic group* (April 23, 2020), https://tinyurl.com/KochharPEW.
[67] Inst. on Taxation and Econ. Policy, *Undocumented Immigrants' State & Local Tax Contributions* 3 (Mar. 2017), https://tinyurl.com/ITEP-UndocTaxes.

more in tax revenue than they cost in public benefits.[68] The following are examples of how immigrants have contributed to the States' economies:

- **California:** In California, there are 6.6 million immigrants in the State's workforce.[69] Immigrants fill over two-thirds of the jobs in California's agricultural and related sectors and almost half of those in manufacturing, just as 43% of construction workers and 41% of workers in computer and sciences are immigrants.[70] In 2018, immigrant business owners accounted for over 38% of all Californian entrepreneurs and generated almost $24.5 billion in business income.[71] And also in 2018, immigrant-led households in California paid over $38.9 billion in state and local taxes and exercised almost $290.9 billion in spending power.[72]

- **Connecticut:** In Connecticut, immigrants pay $7.4 billion in taxes and have a spending power of $16.1 billion.[73] There are over 41,000 immigrant entrepreneurs in Connecticut, employing over 95,000 people in the state.[74]

- **Hawaii:** The contributions of immigrants make up a significant portion of Hawaii's economy. Over 20,000 of Hawaii's business owners are foreign-born,[75] and in 2018, immigrants contributed $960.7 million in state and local taxes.[76]

- **Illinois:** Immigrants also play a big role in the economy of Illinois. According to a report by New American Economy and the Chicago Mayor's Office of New Americans, immigrants in Chicago alone contributed $1.6 billion to the state's economy through taxes and helped

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[68] Rejected Report Shows Revenue Brought In by Refugees, N.Y. TIMES (Sept. 19, 2017), https://tinyurl.com/2017DraftReport.
[69] Am. Immigration Council, *Immigrants in California* 2 (June 2020), https://tinyurl.com/AIC-ImmCA.
[70] *Id*. at 3-4.
[71] *Id.* at 5.
[72] *Id.* at 4-5.
[73] New Am. Econ., *Immigrants and the Economy in Connecticut*, (2018) https://tinyurl.com/CT-Immigration-Economy.
[74] *Id.*
[75] The Fiscal Pol'y Inst., *Immigrant Small Business Owners* 24 (June 2012), https://tinyurl.com/Imm-Business-Owners.
[76] New Am. Econ., *The Contributions of New Americans in Hawaii* (2018), https://tinyurl.com/2018Hawaii.

create or preserve 25,664 local manufacturing jobs.[77] Also, immigrant-owned businesses generated $63.9 billion in sales in Illinois in 2018.[78]

- **Massachusetts:** In Massachusetts, immigrants make up 20% of the state's workforce and immigrant-led households paid $4.5 billion in state and local taxes in 2018.[79]

- **Maryland:** In Maryland, immigrants make up 20% of the state labor force, and immigrant-led households paid $4.1 billion in state and local taxes in 2018.[80] Immigrant entrepreneurs make up almost 20% of Maryland's business owners, generating $1.7 billion in combined annual revenue.[81]

- **Michigan:** In Michigan, immigrants make up just under 10% of the state's workforce, pay approximately $7.1 billion in state and local taxes, have a spending power of $18.4 billion, and comprise over 33,000 of the state's entrepreneurs.[82]

- **Minnesota:** In Minnesota, immigrant workers comprised 11% of the labor force in 2018, and over 15% of all Minnesota healthcare support employees and over 20% of those working in the computer and math sciences are immigrants.[83] In 2018, immigrant-led households in Minnesota paid $1.5 billion in state and local taxes, and in 2018 immigrant business owners generated $576.2 million in business income.[84]

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[77] New. Am. Econ., *New Americans in Chicago* 1, 4 (Nov. 2018), https://tinyurl.com/Immigrants-Chicago.
[78] New Am. Econ., *The Contributions of New Americans in Illinois* (2018), https://tinyurl.com/2018Illinois.
[79] Am. Immigration Council, *Immigrants in Massachusetts* 2, 4 (June 2020), https://tinyurl.com/Imm-in-Mass.
[80] Am. Immigration Council, *Immigrants in Maryland* 2, 4 (June 2020), https://tinyurl.com/MarylandEcon.
[81] *Id*.
[82] *State Demographics Data: Michigan*, MIGRATION POL'Y INST., https://tinyurl.com/MI-Immigrant-Workforce (last visited June 25, 2020); New Am. Econ., *Immigrants and the Economy in Michigan*, (2018), https://tinyurl.com/MI-Immigration-Economy.
[83] Am. Immigration Council, *Immigrants in Minnesota* 2 (June 2020), https://tinyurl.com/AIC-Minn.
[84] *Id.* at 4.

- **Nevada:** In Nevada, the state's foreign-born households contributed more than one in every five dollars paid by Nevada residents in state and local tax revenues in 2014, and earned $13.2 billion dollars—or 19.3% of all income earned by Nevadans.[85]

- **New Jersey:** In New Jersey, immigrants comprise nearly 30% of the State's workforce and in 2018 they paid state and local taxes amounting to $9.5 billion.[86]

- **New York**: In New York, 2.8 million immigrant workers comprised 28 percent of the labor force in 2018. Immigrant-led households in New York paid $35.4 billion in federal taxes and $21.8 billion in state and local taxes in 2018.[87]

Asylum seekers also contribute to the States through increased tax revenue and increased purchasing power. Although unauthorized workers pay taxes, tax revenue increases when immigrants can legally work, and the States could stand to lose substantial revenue if the Proposed Rule is implemented. For example, in Massachusetts, undocumented immigrants pay an average of $184.6 million in state and local taxes every year, an amount that would increase to $240.8 if they had legal status and work authorization.[88] Similarly, according to a study by the Institute of Taxation and Economic Policy, undocumented immigrants in New Mexico would have paid in excess of $8 million more in taxes in 2017 if they had been granted full legal status.[89]

The vital role that immigrants, including asylum seekers, play in the States' economies and communities is particularly pronounced in the context of COVID-19. Immigrants, including refugees and asylum seekers, comprise 18 percent of the labor force deemed "essential," including 16 percent of health care workers, 31 percent of agricultural and farm workers, 26 percent of wholesale grocery workers, 18 percent of essential retail workers (restaurants, grocery stores, gas stations, pharmacies, etc.), 24 percent of construction workers, and 19 percent of workers providing service to maintain

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[85] New Am. Econ., *The Contributions of New Americans in Nevada* 6 (Aug. 2016), https://tinyurl.com/EconNevadaImmigrants.
[86] Am. Immigration Council, *Immigrants in New Jersey* 2, 4 (June 2020), https://tinyurl.com/Immigrants-in-NewJ.
[87] Am. Immigration Council, *Immigrants in New York* 2, 4 (June 2020), https://tinyurl.com/Immigrants-in-NY.
[88] Inst. on Taxation and Econ. Policy, *Undocumented Immigrants' State & Local Tax Contributions* 3 (Mar. 2017), https://tinyurl.com/ITEP-UndocTaxes.
[89] *Id.*

safety, sanitation, and operations of essential businesses.[90] In California, immigrants comprise almost 36 percent of essential workers. Notably, of the approximate 3 million immigrant-owned businesses that were active in February 2020 across the country, about 80 percent were in "essential" industries, the majority of which have been able to continue operation.[91] Even during a global health pandemic, immigrants continue to provide essential services, such as health care, as well as create employment opportunities to the States and their residents.

By adding hurdles to obtaining asylum, the Proposed Rule impedes asylum seekers from obtaining legal status, thereby significantly lowering the tax revenue, economic contributions, and essential services that the States receive from asylum seekers participating in the economy.

B. The Proposed Rule Undermines the States' Investments in Programs Designed to Assist Immigrants

In recognizing the contributions that asylum seekers and asylees add to the States, the States invest significant resources to provide them education, legal, health care, and other services, enabling them to transition into and thrive in the States' communities. For example, the California Department of Social Services (CDSS) allocated almost $43 million for FY 2019-20 to administer the Immigration Services Funding program, established in 2015.[92] Under the program, CDSS contracts with nonprofit legal service providers to offer legal services, such as (1) providing legal education and outreach to immigrants, (2) providing assistance with completing immigration forms and applications (such as for DACA renewals and naturalization), and (3) representing undocumented immigrants in deportation proceedings. Similarly, the State of Washington allocated one million dollars from its general fund for FY 2019 to legal services organizations serving asylum seekers and other migrant populations in the state.[93] 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.[94] The District of Columbia allocated $2.5 million for FY 2020 to programs that provide services and

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[90] Donald Kerwin, et al., *US Foreign-Born Essential Workers by Status and State, and the Global Pandemic* 8-12 (May 2020), https://tinyurl.com/SMCPandemic.
[91] Robert Fairlie, *The Impact of Covid-19 on Small Business Owners: Evidence of Early-Stage Losses from the April 2020 Current Population Survey* 8 (May 2020), https://tinyurl.com/SIEPRCovid.
[92] Cal. Dep't of Soc. Serv. (CDSS), *Immigration Services Funding*, https://tinyurl.com/CDSSImm.
[93] *See* Wash. Laws of 2018, ch. 299, § 127(65) (amending Laws of 2017, 3d Spec. Sess., ch. 1, § 128) (Mar. 27, 2018), available at https://tinyurl.com/yy3rduov.
[94] *See* N.Y. St., Div. of Budget, *Governor Cuomo Announces Highlights of the FY 2019 State Budget* (Mar. 30, 2018), https://tinyurl.com/y6qv2jev.

resources to its immigrant population, including asylum seekers.[95] New Jersey also allocated $2.1 million in state funds in FY 2019 and 2020 for legal assistance to individuals in removal proceedings.[96] Under Oregon House Bill 5050, passed in 2019, Innovation Law Lab, a non-profit that serves asylum seekers and other immigrants, would receive $2 million in state funding for a two-year project for immigration defense.[97] Delaware provides funding to legal and public service organizations such as Community Legal Aid Society, Inc. (CLASI), Catholic Charities Immigration Project (CCIP), and La Esperanza to provide services to the community.[98]

In addition to investing in legal services, the States also fund services to meet the healthcare needs of immigrants, including asylum seekers. California, New York, the District of Columbia, Illinois, Oregon, Massachusetts, and Washington all provide full scope health benefits to low-income children regardless of immigration status.[99] Starting January 1, 2020, California expanded these benefits to those who are 25 and younger.[100] In Illinois, asylum seekers can access state medical coverage and services by state-funded community agencies.[101] In Minnesota, immigrants residing there can access health care through Minnesota's Emergency Medical Assistance program, regardless of legal status.[102]

The States have also ensured that mental health services are available to immigrants, including asylum seekers. For example, every year, the Highland Human Rights Clinic in Oakland, California (operated by Alameda County) conducts approximately 80 to 120 health assessments of asylees, the vast majority needing mental

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[95] *Mayor Bowser Announces $2.5 Million Available for FY 2020 Immigrant Justice Legal Services Grant Program*, DC.gov (July 12, 2019), https://tinyurl.com/DC-Grant.
[96] *See* N.J. Office of Mgmt. & Budget, *The Governor's FY2020 Budget- Detailed Budget* 419 (Mar. 2019), https://tinyurl.com/NJ2020Budget.
[97] H.B. 5050, 80th Or. Legis. Assemb., 2019 Reg. Sess. (Or. 2019), available at https://tinyurl.com/Or-HB5050.
[98] Fiscal Year 2020 Appropriations Act, H.B. 260, 150 Gen. Assemb. (Del. 2019) (effective July 1, 2019), available at https://tinyurl.com/Grantsinaid.
[99] *Immigrant Eligibility for Health Care Programs in the United States*, Nat'l Conf. St. Legis. (Oct. 19, 2017), http://www.ncsl.org/research/immigration/immigrant-eligibility-for-health-care-programs-in-the-united-states.aspx.
[100] Bobby Allyn, *California is 1st State to Offer Health Benefits to Adult Undocumented Immigrants*, NPR (July 10, 2019), https://tinyurl.com/Allyn-NPR.
[101] *See PM 06-21-00: Medical Benefits for Asylum Applicants and Torture Victims*, Ill. Dep't of Hum. Servs., https://tinyurl.com/Ill-Med. The list of organizations can be found here: http://www.dhs.state.il.us/page.aspx?item=117419.
[102] Minn. Dep't Hum. Servs., *Health care coverage for people who are noncitizens*, (last updated March 19, 2016), https://tinyurl.com/MinnHealth.

health referrals, due to abuse and trauma. New York also provides inpatient psychiatric services to immigrant youth.[103]

The States have prioritized providing education for immigrants, including asylum seekers. For example, in 2011, the California State legislature passed the California DREAM Act, a set of two bills that allows certain undocumented students access to financial aid and tuition exemptions for California public higher education institutions.[104] [Other State education initiatives].

The States have also allocated funds for specialized programs to integrate asylees. In California, for example, the Immigration and Refugee Programs Branch of CDSS provides assistance for immigrants, through programs like the California Newcomer Education and Well-Being program (CalNEW), the Cash Assistance Program for Immigrants (CAPI), and the Trafficking and Crime Victims Assistance Program (TCVAP). CAPI provides cash assistance to certain aged, blind, and disabled noncitizens including asylees; TCVAP provides cash assistance, food benefits, employment and social services to victims of human trafficking, domestic violence and other serious crimes; and CalNEW provides funding to certain school districts to improve the well-being, English-language proficiency, and academic performance of their students.[105] The New York Office 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.[106] One of Washington State's social service programs partners with local governments, community and technical colleges, ethnic community-based organizations, and other service provider agencies to deliver educational services, job training skills, assistance establishing housing and transportation, language classes, and other comprehensive support services.[107]

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[103] *See generally* Decl. of Donna M. Bradbury at 362-68 (Exhibit 60), *Washington v. Trump*, No. 2:18-cv-00939-MJP (W.D. Wash. July 17, 2018), ECF No. 31.
[104] Cal. Ed. Code, §§ 68130.7, 68130.5, 66021.6, 66021.7, 76300.5.
[105] Cal. Dep't of Soc. Servs., *Cash Assistance Program for Immigrants (CAPI)*, http://www.cdss.ca.gov/CAPI; Cal. Dep't of Soc. Servs., *Trafficking and Crime Victims Assistance Program*, https://www.cdss.ca.gov/inforesources/TCVAP; Cal. Dep't of Soc. Servs., *California Newcomer Education and Well-Being*, https://tinyurl.com/CalNewcomer.
[106] *See* N.Y. St. Office New Ams., *Our Mission*, https://tinyurl.com/y5wb8dws; *see also* N.Y. St. Office New Ams., *Request for Applications, RFA #18-ONA-32*, https://tinyurl.com/y3oqjul6; N.Y. St., Pressroom, *Governor Cuomo Announces Expansion of Services for Immigrant Community Through Office for New Americans*, https://tinyurl.com/y3yd54sb.
[107] *See* Office of Refugee & Immigration. Assistance, Econ. Servs. Admin., Wash. Dep't of Soc. & Health Servs., *Briefing Book for State Fiscal Year 2018*, (Jan. 2020) https://tinyurl.com/y528prka.

The States have a strong interest in supporting immigrants, including asylum seekers, residing in their geographical boundaries. In furtherance of this statewide policy, the States have carefully crafted systems that function to welcome and deliver essential services to immigrants residing within their borders. The States have made significant financial investments in these programs and services, and have created state departments responsible for administering them. These systems, in turn, have resulted in thriving immigrant communities that strengthen the social fabric and economies of communities throughout the States. The Proposed Rule stands to upend these systems. Because the Proposed Rule severely narrows the grounds upon which asylum seekers may seek humanitarian relief and deprives asylum seekers of significant due process protections, fewer asylum seekers will enter the States, fewer will be granted legal status and authorization to work, and fewer will be able to lawfully contribute to State economies. Thus, the immigrant-centered policies and fiscal decisions that States have made in reliance on the ongoing contributions of immigrants, including asylum seekers, are undermined by the Proposed Rule.

C. The Proposed Rule Will Burden State Programs

Not only does the Proposed Rule undermine State priorities, but it will also burden the very programs in which the States have invested. Because of the Proposed Rule, state-funded programs will need to shift resources to respond to new and complicated requirements.

First, the Proposed Rule will burden legal services designed to serve immigrant communities. The Proposed Rule imposes barriers to asylum and other protection, as well as creates a new complex screening mechanism with a very high burden asylum seekers must meet. The Proposed Rule will also reduce the number of immigrants who are eligible for asylum, forcing them to pursue more difficult forms of relief. *See supra*, Section I. Further, the Proposed Rule puts applicants at risk of being deemed to have filed a frivolous application—a finding that has severe and lasting consequences—for merely filing unsuccessful claims. 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. Organizations will need to divert considerable resources to re-strategizing their approaches to representing clients and eligibility issues, revising their training, and re-allocating staff time. 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,[108] the Proposed Rule will imperil their sustainability unless the States increase funding accordingly. Thus, by making it more expensive for the States to support the current level of services

[108] *See* Compl. ¶¶ 114, 132, *E. Bay Sanctuary Covenant v. Barr*, No. 3:19-CV-04073-JST (N.D. Cal.).

to immigrant communities, the Proposed Rule directly harms the States' financial interests. Harms to these organizations redound to their funders, including the States, whose priorities and funding decisions will also bear the impact of the Proposed Rule.

Second, the Proposed Rule will place a heavy burden on the States' medical and mental health programs and resources. The added trauma that asylum seekers will suffer, due to the uncertainty surrounding their legal status given the numerous changes and obstacles to obtaining asylum that the Proposed Rule presents, will likely cause long-term negative health impacts. Studies have shown that long-term stress can contribute to serious physical health problems including heart disease, diabetes, and severe viral infections.[109] The States and local jurisdictions will need to allocate additional resources to identify, assess, and treat asylees and asylum seekers.[110] Additionally, because asylum seekers will be less likely to apply for asylum, or may be ordered removed and residing in the States with an order of removal, fewer people will have legal status. This means that they will be more fearful to obtain routine healthcare because they are afraid of potential immigration consequences for seeking care. This harms the States' initiatives expanding healthcare to as many people as possible, particularly during COVID-19, because the States recognize healthcare for all residents is better for the overall health of our communities. However, when individuals are too afraid to get routine healthcare, state healthcare systems are tasked with the burden of addressing more acute medical conditions, and scarce emergency room resources are burdened with the aftermath of preventable conditions or injuries.[111]

D. The Proposed Rule Will Harm States' Interest in Family Unity

The Proposed Rule will cause unnecessary family separation. Many immigrants fleeing from persecution choose to seek refuge in the States—often to reunite with relatives who already reside within our borders. These applicants will face a greater risk of being ordered removed at the credible fear stage because of the heightened screening standards imposed by the Rule. Additionally, the Proposed Rule will result in the denial of protection, and subsequent deportation, for many of those with pending applications already residing in the States. Further, with asylum out of reach for many, and withholding of removal and CAT as the only forms of relief available, many individuals that are granted protection will not be able to petition for family members to join them in the United States. The separation of asylum seekers from their family members will

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[109] *See Stress Fact Sheet*, Nat'l Inst. Mental Health (Dec. 2016), https://tinyurl.com/NIMH-Stress.
[110] Anna Gorman, *Medical Clinics that Treat Refugees Help Determine the Case for Asylum*, NPR (July 10, 2018), https://tinyurl.com/Gorman-NPR.
[111] Shamsher Samra, *et al.*, *Undocumented Patients in the Emergency Department: Challenges and Opportunities*, 20 West J. Emergency Med. 791, 792 (Sept. 2019), available at https://tinyurl.com/UndocPatients.

harm the States, which benefit from family units that provide stability and support for their members as well as irreplaceable care and nurturing of children. *See, e.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) ("It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."). The Select Commission on Immigration and Refugee Policy, a congressionally appointed commission tasked with studying immigration policy, expounded upon the necessity of family reunification in 1981:

> "[R]eunification . . . serves the national interest not only through the humaneness of the policy itself, but also through the promotion of the public order and wellbeing of the nation. Psychologically and socially, the reunion of family members with their close relatives promotes the health and welfare of the United States."[112]

Indeed, Congress recognized the importance of family unity when it adopted the modern immigration system. *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) ("The Immigration and Nationality Act ('INA') was intended to keep families together."). Separating asylum seeking families undermines these core principles, and irreparably harms the neighborhoods and communities within the States.

Because family units provide stability and support for their members as well as irreplaceable care and nurturing of children, separating families could further traumatize and endanger asylum seekers. Family separation can also result in negative health outcomes including irregular sleep patterns, which can lower academic achievement among children; toxic stress, which can delay brain development and cause cognitive impairment; and symptoms of post-traumatic stress disorder.[113] Separation can be particularly traumatizing to children, resulting in a greater risk of developing mental health disorders such as depression and anxiety. Trauma can also have negative physical effects on children, such as loss of appetite, stomachaches, and headaches, which can

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[112] Human Rights Watch, *US: Statement to the House Judiciary Committee on "The Separation of Nuclear Families under US Immigration Law"* (March 14, 2013), https://tinyurl.com/HRWFamilySeparation (quoting US Select Committee on Immigration and Refugee Policy, "U.S. Immigration Policy and the National Interest," 1981).

[113] Colleen K. Vesely, Ph.D., et al, *Immigrant Families Across the Life Course: Policy Impacts on Physical and Mental Health*, NAT'L COUNCIL ON FAMILY RELATIONS (2019) https://tinyurl.com/NCFRpolicybrief.

become chronic if left untreated.[114] Similarly, spousal separation can cause fear, anxiety, and depression.[115]

The States, their residents, and their healthcare programs, will be forced to bear the burden of the effect of the separation of families under the Proposed Rule. *See supra*, Section II.C.

E. The Proposed Rule Will Make It More Difficult for States to Enforce Their Own Laws

The Proposed Rule interferes with the States' ability to enforce their labor, civil rights, and penal laws. The States have a fundamental interest in being able to enforce their own laws. *State of Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 443 (D.C. Cir. 1989). When rulemaking impinges on that ability, the States suffer an injury. *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers).

As a result of the Proposed Rule, more applicants will be without status because of the likely chilling effect on asylum applications. Undocumented immigrants are increasingly likely to enter into the underground economy, and increasingly less likely to report ongoing labor and civil rights violations. Through labor and civil rights laws, the States protect their residents from wage theft, exploitation, and discrimination at work. *See generally*, N.J. Stat. Ann. § 34:11-56a to -56a38; N.J. Stat. Ann. § 10:5-1 *et seq.*; *Serrano v. Underground Utilities Corp.*, 970 A.2d 1054, 1064 (presuming that undocumented aliens may pursue relief under workers' compensation laws and obtain retrospective compensation under New Jersey prevailing wage laws); Cal. Gov. Code §§ 12900-12996; Cal. Bus. & Prof. Code § 17200 *et seq.*; Cal. Lab. Code § 200-1200; D.C. Code §§ 32-1301, *et seq.* (Wage Payment and Collection Law); D.C. Code §§ 32-1001, *et seq.* (Minimum Wage Revision Act); D.C. Code §§ 32-531.01, *et seq.* (Sick and Safe Leave Act); D.C. Code §§ 32-1331.01, *et seq.* (Workplace Fraud Act), and D.C. Code §§ 2-220.01, *et seq.* (Living Wage Act); N.Y. Labor Law Articles 5 (hours of labor), 6 (payment of wages), 19 (minimum wage standards), and 19-A (minimum wage standards for farm workers); N.Y. Workers' Comp. Law § 17 (McKinney). These laws are enforced without respect to immigration status, but effective enforcement relies on employees' ability and willingness to report violations.

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[114] Allison Abrams, *LCSW-R, Damage of Separating Families*, PSYCH. TODAY (June 22, 2018), https://tinyurl.com/AbramsSeparation.

[115] Yeganeh Torbati, *U.S. denied tens of thousands more visas in 2018 due to travel ban: data*, REUTERS (Feb. 29, 2019), https://tinyurl.com/TorbatiReuters (describing a U.S. citizen's plight to obtain a visa for his wife, and that their separation was causing them both to "break down psychologically").

Despite the significant labor and civil rights abuses that befall unauthorized workers, fear of reprisal and deportation often inhibits unauthorized workers from reporting such violations.[116] States are harmed when individuals do not come forward when their employers violate employment or civil rights law. Asylum seekers in particular have fail to report labor violations—including working weeks without pay and physical abuse at work—because they fear immigration consequences.[117] A study in Chicago found that, of the immigrant workers who have suffered a workplace injury and report it to their employer, 23 percent reported being either immediately fired or threatened with deportation.[118]

State law enforcement agencies will also be disadvantaged because asylum seekers, who under the Rule would likely be undocumented, will be less inclined to cooperate with law enforcement or provide helpful information when they are a victim of a crime, for fear of engaging with state actors and becoming subject to deportation. This disincentive to assist law enforcement will make it more difficult for States to enforce their penal laws, and puts immigrants at risk of being victims of crime themselves. This would also decrease the ability of State residents to apply for humanitarian relief, such as U-Visas or T-Visas. 8 U.S.C. § 1101(a)(15)(U) and (T).

The States' law enforcement interest in reducing "notario fraud" under consumer protection and criminal laws is likewise undermined by the Rule.[119] Notario fraud refers to immigration scams promulgated by individuals who represent themselves as immigration attorneys, but are not licensed as an attorney or as an authorized non-attorney for immigration purposes.[120] For example, because asylum seekers at risk of having their application deemed frivolous may opt to withdraw their application with prejudice and be deported, 85 Fed. Reg. 36,277, fewer asylum seekers will have an opportunity to file an ineffective assistance of counsel claim or otherwise alert authorities of a fraudulent scheme being conducted by the unscrupulous preparer and the States may never find out.

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[116] Human Rights Watch, *"At Least Let Them Work" The Denial of Work Authorization and Assistance for Asylum Seekers in the United States* (Nov. 12, 2013), https://tinyurl.com/yx9vp5wf; Daniel Costa, *California leads the way*, Economic Policy Institute (March 22, 2018), https://tinyurl.com/CostaEPI.
[117] Human Rights Watch, *"At Least Let Them Work" supra* note 115.
[118] Douglas D. Heckathorn, et al., *Unregulated work in Chicago: The Breakdown of Workplace Protections In the Low-Wage Labor Market* 18, CTR. FOR URBAN ECON. DEV., UNIV. OF ILL. AT CHICAGO (2010), available at https://tinyurl.com/UChicagoHeckathorn.
[119] *See e.g. People v. Guerrero et al.*, No. BA464427 (Cal. Sup. Ct. 2018); *People v. Cabrera et al.*, BA443944 (Cal. Sup. Ct. 2016).
[120] CA Office of the Attorney Gen., *Immigration Services Fraud, Know Your Rights!* (2015), https://tinyurl.com/CANotarioFraud.

Similarly, the Proposed Rule forbids motions to reopen that raise new particular social groups, for any reason, including ineffective assistance of counsel. *Id*. at 36,291. 85 Fed. Reg. 36,279. This provision will discourage motions to reopen based on ineffective assistance of counsel. Ordinarily, to succeed on such motions, the filer must have filed a complaint with the appropriate disciplinary body, such as the state bar. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). It is often through motions to reopen that State consumer protection agencies and attorney regulatory bodies learn of attorney or preparer misconduct. Together, the frivolous provisions and limitation on motions to reopen penalize applicants, while obstructing the States' ability to discipline fraudulent preparers.

In placing significant barriers within the asylum process, the Proposed Rule has a chilling effect on asylum seekers reporting violations of the law or engaging with law enforcement. The Proposed Rule directly harms States' interest and authority to enforce its laws.

III. THE PROPOSED RULE VIOLATES THE LAW

The Proposed Rule is unlawful for a number of reasons, including that it violates the Due Process Clause of the Fifth Amendment of the Constitution and the Administrative Procedure Act (APA).

A. The Proposed Rule Violates the Due Process Clause

The Proposed Rule deprives asylum seekers access to due process under the law, and therefore violates the Fifth Amendment of the Constitution. To meet due process requirements, among other things, noncitizens facing removal must have a hearing with the right to counsel, a neutral arbiter, the ability to examine evidence against them, and the opportunity to present their own evidence, including their own testimony. *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 926–27 (9th Cir. 2007) ("Where [a noncitizen] is given a full and fair opportunity to be represented by counsel, to prepare an application for . . . relief, and to present testimony and other evidence in support of the application, he or she has been provided with due process."); *Khan v. Ashcroft*, 374 F.3d 825, 829 (9th Cir. 2004) (due process requires that hearing notices be reasonably calculated to reach the noncitizen); *Bondarenko v. Holder*, 733 F.3d 899, 907 (9th Cir. 2013) (Immigration Judge's denial of a continuance to allow the respondent to inspect evidence against him was a denial of due process). Courts have also recognized that "competent counsel is particularly important in removal proceedings because "[t]he proliferation of immigration laws and regulations has aptly been called a labyrinth that only a lawyer could navigate." *See, e.g.*, *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008) (internal quotations omitted).

As it currently stands, asylum law is composed of complex rules and regulations. Pro se asylum seekers are particularly disadvantaged by the current system because of these complexities. Indeed, asylum seekers who are not detained and have legal representation in immigration court proceedings prevail in 74 percent of their cases; those without representation prevail only 13 percent of the time.[121] For asylum seekers who are detained, 18 percent prevail when represented, while only three percent prevail when not represented.[122] The Proposed Rule's changes to asylum law will exacerbate these preexisting discrepancies. Moreover, as referenced above, *supra* Section I.A.i., children will be more likely to be forced to present their claims in immigration court. Beyond the trauma that this is sure to produce, it also raises due process concerns as children are not guaranteed legal counsel and may not have a proper grasp of the consequences of these legal proceedings.

Should the Proposed Rule become final, thousands of current and future residents of the States will be deprived of humanitarian protection, and in many cases, will be deported without having the opportunity to be heard or present evidence. The following is a non-exhaustive discussion of particular provisions of the Proposed Rule that violate due process.

Pretermission of claims. The Proposed Rule would allow immigration judges to pretermit cases and order deportation of an application that does not illustrate prima facie eligibility for humanitarian relief. 85 Fed. Reg. 36,277. Even if an asylum seeker were to pass the credible fear interview with a positive outcome for asylum, or the heightened reasonable fear standard for withholding of removal or protection under CAT, the pretermission provision allows judges to terminate cases and order deportation without allowing the asylum seeker to testify or present all relevant evidence.

Empowering immigration judges to pretermit asylum claims on the basis of an application alone is especially detrimental to pro se asylum seekers. For individuals who are fleeing violence and traveling on foot for thousands of miles, meeting the exact legal requirements of asylum at the initial application stage can be impossible. To do so, asylum seekers would be required to have a high level of sophistication, an understanding of the United States' immigration laws, and a working knowledge of the conditions of countries from which they are fleeing. This difficulty is particularly pronounced for asylum seekers who are detained and have even less access to obtaining legal counsel, legal documents, or other evidence they may need to support their asylum claim within the required timeframes. Likewise, unaccompanied children, who are even more at a

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[121] Robert A. Katzmann, *Study Group on Immigrant Representation: The First Decade*, 87 FORDHAM L. REV. 485, 486 (2018).
[122] *Id*.

disadvantage due to their age, do not appear exempted from the Proposed Rule's pretermission provision.[123]

The pretermission provision unnecessarily bars asylum seekers from obtaining alternative forms of relief. Applicants who are also victims of trafficking or other crimes may have concurrently pending applications for U-Visas and T-Visas at USCIS. 8 U.S.C. § 1101(a)(15)(U) and (T). By cutting their asylum cases short, these applicants may be ordered removed before USCIS has had an opportunity to adjudicate their visas. Without guaranteeing asylum seekers a fair day in court, the Proposed Rule leaves thousands without protection for which they could qualify.

Additionally, the ten-day notice that the Proposed Rule would require immigration judges or DHS to provide to an asylum seeker before effectuating pretermission of their application is an insufficient amount of time for the individual to respond. 85 Fed. Reg. 36,277. Pro se asylum seekers may not fully grasp the kind of evidence or legal arguments that would be sufficient to respond to a pretermission determination, and may not have the ability to provide that response within the ten-day timeframe. Indeed, the Proposed Rule does not offer any explanation or examples as to the kind of evidence asylum seekers could put forth in order to overturn a pretermission determination, thus making this provision unlawfully vague. *See generally Hill v. Colorado*, 530 U.S. 703, 732 (2000). Detained applicants, with or without representation, are particularly disadvantaged because of procedural delays in receiving and sending legal mail while in immigration detention facilities. Furthermore, even if an applicant does respond within the allotted timeframe, they still are not given an opportunity to present evidence through testimony, and are therefore denied their fair day in court. *Vargas-Hernandez*, 497 F.3d at 926–27.

The Proposed Rule unlawfully allows immigration judges to pretermit bona fide claims for protection without due process of the law, thereby subjecting an unknown number of people to deportation to countries where they will face almost certain persecution or torture, in contravention of federal and international law.

Frivolous claims. Under 8 U.S.C. § 1158(d)(6), ''[i]f the Attorney General determines that [a noncitizen] has knowingly made a frivolous application for asylum and the [noncitizen] has received [the notice of privilege of counsel and the consequences of knowingly filing a frivolous application]," the asylum seeker will be permanently ineligible for any benefit under the INA. Currently, only an immigration judge can make a "frivolous" finding. And an application can only be deemed frivolous when it is found that the asylum seeker *deliberately* fabricated a material element of their claim.

[123] The Proposed Rule only explicitly states that unaccompanied minors are exempt from the expedited removal process. 85 Fed. Reg. 36,265, n.5 (citing 8 U.S.C. § 1232(a)(5)(D)(i)).

The Proposed Rule expands upon when the Federal Government can label an application frivolous. Current regulations provide that an application is frivolous if "any of its material elements is deliberately fabricated." *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10,312, 10,344 (Mar. 6, 1997). Under the Proposed Rule, an application may be found frivolous under three new grounds. *First*, an application may be found frivolous if the asylum seeker "knowingly" includes a "fabricated material element." 85 Fed. Reg. 36,275. The Proposed Rule defines "knowingly" as actual knowledge or willful blindness, thereby expanding the circumstances under which an asylum seeker acts "knowingly" beyond "deliberate[]." *Id*. at 36,273. This definition does not adequately account for inadvertent mistakes, or for the complexity of asylum law that may be beyond the grasp of a pro se asylum seeker. It also does not account for situations in which an asylum seeker may have reasonably relied on an unscrupulous preparer or notario. The Ninth Circuit, for example, has recognized that asylum applications are frequently filled out by "poor, illiterate people who do not speak English and are unable to retain counsel," and who may seek the assistance of preparers. *Alvarez-Santos v. I.N.S.*, 332 F.3d 1245, 1254 (9th Cir. 2003) (citing *Aguilera-Cota v. I.N.S.,* 914 F.2d 1375, 1382 (9th Cir.1990)). But, "[a]ll too often, vulnerable immigrants are preyed upon by [these] unlicensed *notarios* and unscrupulous appearance attorneys" who provide "false promises and shoddy, ineffective representation." *Morales Apolinar v. Mukasey*, 514 F.3d 893, 897 (9th Cir. 2008) (emphasis in original). In *Alvarez-Santos*, the court found that inconsistences due to an unscrupulous preparer do not provide an adequate basis for an adverse credibility finding. 332 F.3d at 1254. There is no reason this reasoning should not apply to applications when assessing frivolousness, particularly when accounting for the significant disadvantages asylum seekers face when applying for asylum, and the severe consequences of a frivolous finding.

Second, an application may be found frivolous if it contains claims foreclosed by applicable law. 85 Fed. Reg. 36,276. This is troubling because different circuit courts, which have jurisdiction to review determinations made by the BIA, may reach different outcomes when considering similar sets of facts. *See generally Lopez v. Gonzales*, 549 U.S. 47, 52 (2006) (Court granted certiorari to resolve circuit split on whether a state law constituted an aggravated felony in immigration context, as this classification bears on deportability of a noncitizen). What may be "applicable law" in one circuit may not be in another, and here, this inconsistency alone – which is no fault of the asylum seeker – has the absurd result of rendering the asylum seeker permanently ineligible for protection merely based on where they file their application.

Third, if an application is found to have been made without "regard to the merits of the claim," it may be deemed frivolous. 85 Fed. Reg. 36,276. The Proposed Rule does not offer a reasoned, or any, explanation of what "without regard to the merits" entails, and is thereby vague, in violation of due process protections. *See Hill v.*

Colorado, 530 U.S. at 732 (statute is impermissibly vague when it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "authorizes or even encourages arbitrary and discriminatory enforcement"). An asylum seeker could "knowingly" file a claim that is in fact not meritorious in the eyes of an immigration judge, but they may not know why or how the claim is unmeritorious when it was filed, because of the level of sophistication required to prevail on asylum claims. Such an application could not reasonably be found abusive of the asylum process. 85 Fed. Reg. 36,276 (citing *Cooter & Gell v. Hartmax, Corp.*, 496 U.S. 384, 398 (1990)). Notably, this provision would severely disadvantage pro se asylum seekers, who are not in the best position to meaningfully decipher what does and does not constitute a meritorious asylum claim. This is particularly troubling given how much the Proposed Rule stands to change asylum law and narrow the grounds upon which asylum seekers can seek relief. Allowing an asylum seeker to be permanently ineligible from applying for any benefit under the INA based on this vague ground of frivolousness, without an opportunity to present their testimony or evidence, or to correct their application, is disproportionately punitive and violates due process protections.

In addition to the expansion of what constitutes "frivolous," the Proposed Rule eliminates the requirement that immigration judges provide certain warnings before issuing a frivolous finding, thereby allowing the federal government to rely upon the notice provided on the application form alone. 85 Fed. Reg. 36,276. This disadvantages pro se asylum seekers who may be unfamiliar with asylum law or otherwise unable to understand the severity of consequences for filing a frivolous claim based on a written notice, asylum seekers who may face language barriers to filling out the asylum application, and asylum seekers who are unable to read. In denying asylum seekers a second, verbal, and meaningful opportunity to be notified about the consequences of filing a frivolous application, the Proposed Rule violates due process rights of asylum seekers to have their cases heard in front of an immigration judge.

In an equally unlawful attempt to mitigate the severe consequences of a finding of frivolousness, the Proposed Rule offers that as an alternative to having one's application dismissed on frivolous grounds, the asylum seeker may opt to withdraw their application with prejudice, to "ameliorate the consequences of knowingly filing a frivolous application." 85 Fed. Reg. 36,277. Far from avoiding the penalties of frivolousness, this "ameliorat[ive]" mechanism effectively subjects asylum seekers to the same result – inability to pursue benefits under the INA. This alternative disparately disadvantages pro se asylum seekers for the reasons discussed above, including their lack of sophisticated understanding of the law, and potential inability to grasp the weight of the consequence of withdrawing their application with prejudice.

Waiver of motions to reopen and reconsideration. The Proposed Rule would preclude asylum seekers from raising a claim for asylum on the basis of a particular social group if that particular social group is not specifically articulated in their

application form or otherwise in the record. 85 Fed. Reg. 36,279. Thus, the Proposed Rule would prevent asylum seekers from filing motions to reopen or for reconsideration based on grounds for asylum that are not listed on the application form, even when such motions are based on ineffective assistance of counsel. *Id*. at 36,291. Some courts have found that appealing an immigration decision based on a claim for ineffective assistance of counsel is a constitutional due process guarantee that extends to removal proceedings. *See Nehad*, 535 F.3d at 967. The Proposed Rule, however, would bar an asylum seeker from reopening their case even if the court were to determine that the asylum seeker's due process rights were not effectuated due to ineffective assistance of counsel. This is an unconstitutional result that deprives asylum seekers their right to effective assistance of counsel during their immigration court proceedings.

This waiver also disproportionately disadvantages pro se asylum seekers who may not be as familiar with the "labyrinth" that is asylum law and all the grounds for claiming asylum, or the specific requirements under each. *Nehad*, 535 F.3d at 967. This disadvantage is further pronounced given the vast amount of changes to asylum law that this Proposed Rule would enact. Moreover, given the absurd and severe consequences for filing a potentially unmeritorious claim (permanent ineligibility), the Proposed Rule will have a chilling effect on asylum seekers because the changes completely eliminate critical procedural due process protections for asylum seekers. As discussed *supra*, Section I.D., more individuals are eligible for relief may forgo seeking asylum altogether and be forced to live in the shadows, without documentation.

Waiver of appeal of credible fear interview. The Proposed Rule changes the means for asylum seekers to appeal negative determinations made after their credible fear interview. Current regulations provide that when an asylum seeker receives a negative determination from a credible fear interview, the asylum officer inquires as to whether the asylum seeker would like to appeal the decision. If the asylum seeker does not respond, the assumption is that they do opt for review. 8 C.F.R. §§ 208.30(g) and 1208.30(g)(2). These regulations comport with a common sense understanding that any number of barriers – language access, trauma, misunderstanding, lack of knowledge – could impede an asylum seeker from understanding the specific immigrations procedures in the United States. The Proposed Rule inexplicably removes any semblance of due process from this portion of the process. Should the Proposed Rule go into effect, when an asylum seeker receives a negative determination from a credible fear interview, and the asylum seeker does not indicate whether they want to appeal the decision, the asylum officer will automatically consider the lack of indication as a refusal and thus, a waiver of review of their credible fear interview. 85 Fed. Reg. 36,273. These changes flout basic notions of due process and fairness, and they introduce the type of procedural hurdles that are likely to disproportionately affect individuals who cannot afford or otherwise obtain legal representation, individuals for whom English is not their first language, and individuals who are experiencing trauma, among others.

Consideration of internal relocation during credible fear interview and presumption of reasonableness of internal relocation when persecution involves non-governmental actors. The Proposed Rule would allow asylum officers to consider internal relocation as a factor during credible fear interviews. 85 Fed. Reg. 36,272. Whether internal relocation is a reasonable option for a particular asylum seeker is a fact-specific inquiry that should be reserved for immigration proceedings, where asylum seekers would have the opportunity to be heard by an immigration judge and present evidence regarding this specific element. Moreover, requiring consideration of internal relocation at the credible fear interview stage disadvantages asylum seekers who may not yet have access to legal representation or evidentiary documents to demonstrate that internal relocation is not reasonable.

Furthermore, for asylum seekers who claim persecution from non-governmental actors, the Proposed Rule shifts the burden of internal relocation from the federal government proving that internal relocation is reasonable—as current regulations provide—to the asylum seeker, who must disprove that internal relocation is reasonable by a preponderance of the evidence. 85 Fed. Reg. 36,282. In doing so, the Proposed Rule establishes a presumption that internal relocation would be reasonable, unless the asylum seeker demonstrates that it is not. *Id*. The Proposed Rule does not make clear whether this burden shift would apply at the credible fear interview stage, whereby an asylum seekers would have to disprove that internal relocation is reasonable by a preponderance of the evidence. Thus, this provision is unlawfully vague as to its applicability to the credible fear interview, and in violation of the right to due process under the law. *See Hill v. Colorado*, 530 U.S. at 732.

B. The Proposed Rule Violates the APA

Should the Proposed Rule be enacted, it would violate the APA because it is (1) arbitrary and capricious; and (2) contrary to the INA.

i. The Proposed Rule is Arbitrary and Capricious

Under the APA, federal agencies must consider "the advantages *and* the disadvantages of agency decisions" before taking action. *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (emphasis in the original). As the Supreme Court has held, "agency action is lawful only if it rests on a consideration of the relevant factors," and an agency may not "entirely fail to consider an important aspect of the problem" when deciding whether a regulation is appropriate. *Id.* at 2706-07 (quoting *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Automobile Ins. Co*. (*State Farm*), 463 U.S. 29, 43 (1983) (brackets and quotation marks omitted)). If an agency action is not "based on a consideration of the relevant factors," that action is arbitrary and capricious under the APA. *State Farm*, 463 U.S. at 41–43 (citing 5 U.S.C. § 706(2)(A)). An agency action is also arbitrary and capricious if the agency "offered an explanation for its decision that

runs counter to the evidence before the agency," or if it considered "factors that Congress has not intended it to consider." *Id.* at 43.

Should the Proposed Rule be finalized, it would be arbitrary and capricious because the Departments have not fully considered its harmful effects. *Michigan*, 135 S. Ct. at 2707. Additionally, the Departments' justifications for the Proposed Rule are unreasonable. *State Farm*, 463 U.S. at 52 (agency explanations must show that the rulemaking is the result "of reasoned decision making").

1. The Departments Must Consider the Disadvantages of the Proposed Rule

In the Notice of Proposed Rulemaking, the Departments failed to adequately analyze, and in some instances failed to even mention, several negative consequences, including: (1) the injuries it will inflict on asylum seekers; and (2) the harms to the States, their economies, their programs, and their ability to enforce the law. The Departments must address these concerns.

First, the Departments do not recognize any of the harms that will befall asylum seekers, such as those discussed in Section I, should the Proposed Rule be adopted. In focusing on deterring and penalizing what they perceive as frivolous asylum claims, the Departments do not adequately reconcile that objective with the likelihood that the Proposed Rule will result in the deportation of many bona fide asylum seekers. The Departments do not address the chilling effect that the Rule will have on eligible applicants, who will now fear applying for asylum because of the increased likelihood of denial, or worse yet, a frivolous finding. To be sure, as discussed above, in discouraging asylum seekers from coming forward, the Departments are keeping these applicants in the shadows—where they are more likely to attempt dangerous crossings, more likely to suffer civil rights and labor abuses, and more likely to avoid using critical services like healthcare. And finally, in enacting numerous procedural hurdles to a fair day in court, the Departments fail to grapple with the disastrous impact that the Proposed Rule would have on pro se asylum seekers. The Departments must consider, and appropriately weigh, these humanitarian considerations.

Second, the Departments do not adequately address harms to the States, their workforces, their programs, their fiscal health, or their law enforcement agencies. As set forth above, the States benefit greatly from immigration, and by deporting the States' residents and encouraging others to stay in the shadows, the Rule inflicts great harm on the States' communities. There are substantial economic and fiscal benefits to an operating asylum system, in which eligible applicants can lawfully work and eventually obtain status. The Proposed Rule would deprive the States of these benefits. The harm to States is even more pronounced during the COVID-19 crisis, in which immigrants have courageously served their communities as essential workers. Relatedly, the Departments

do not appear to have considered the Rule's potential impact on crucial State initiatives, such as those that expand healthcare. These initiatives are even more imperative during COVID-19. Indeed, if putative asylees forego healthcare because they fear deportation, the health consequences will be felt community wide. The Departments must grapple with the very likely prospect that the Proposed Rule will have a chilling effect not just on asylum applications, but also on programs and benefits in which the States have invested that protect the health and prosperity of their communities.

The Departments also must consider the full range of consequences of the Rule's provisions prohibiting certain motions to reopen based on ineffective assistance of counsel and expanding frivolous findings. As discussed above, these provisions infringe on the States' ability to investigate and discipline bad actors, like notarios or unethical attorneys who take advantage of immigrants, because the States will not be made aware of fraudulent schemes. Thus, under the Rule, such fraudulent schemes will proceed without interruption, while asylum seekers face steep consequences for falling victim to them. Likewise, the Departments have not considered that by driving asylum seekers into the shadows the Proposed Rule undermines the States' enforcement of their own labor, civil rights, and criminal laws. The Departments must consider these undesirable consequences.

2. The Departments' Justifications for the Proposed Rule are Unreasonable

The Departments argue that various aspects of the Proposed Rule are necessary to deter what they perceive as frivolous, non-urgent, or generally unmeritorious asylum claims, reduce the "strain" on the definition of refugee, and to mitigate the administrative burden of the asylum system. Below, the States provide a non-exhaustive list of examples of the Proposed Rule's flawed and unreasonable justifications.

The Departments' reasoning regarding deterrence and "strain" on the INA's definition of refugee. The Departments' goal of "avoid[ing] further strain on the INA's definition of refugee" and deterring, what they perceive as, meritless claims is unreasonable and improper for several reasons. 85 Fed. Reg. 36,279-80, 36,283, 36,274-5. To begin, these two goals seemingly conflict with each other. The Departments' decry that the "strain" on the INA's definition of refugee—which apparently is caused by applicants having cognizable claims for asylum—makes it necessary for them to stringently construe eligibility requirements. While the Departments address this "strain" by making it so fewer applicants can meet eligibility requirements, the Departments also lament that too many applicants have unmeritorious claims. It is because of these purportedly meritless claims that the Departments propose the punitive expansion of the frivolous grounds, among other things, in the Proposed Rule. Essentially, the Departments take away asylum seekers' grounds for eligibility, and then punish those same asylum seekers for now being ineligible. From these actions, it is not hard to

deduce the true goal of the Rule: to lower the number of people applying for and receiving asylum.

But, the Departments' simple desire for fewer people to seek and be eligible for asylum is not a valid reason for the Departments to decimate the asylum system. In enacting 8 U.S.C. § 1158(a), Congress expressly provided noncitizens the right to apply for, and if they make the requisite showing, receive asylum. While the Departments have the power to reasonably interpret the asylum requirements, the Departments cannot restrict eligibility simply because, in the Departments' view, too many people are receiving protection. *See* id. Neither can the Departments punish asylum seekers through punitive measures, as they seek to do via the massively expanded frivolous grounds, in order to deter them from filing claims for relief. *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" and finding deterrence is not a valid reason to force someone to be civilly committed); *Ms. L. v. U.S. Immigration & Customs Enf't*, 302 F. Supp. 3d 1149, 1166–67 (S.D. Cal. 2018) (denying motion to dismiss substantive due process claim, holding that alleged "government practice. . . to separate parents from their minor children in an effort to deter others from coming to the United States . . . is emblematic of the exercise of power without any reasonable justification . . . .").

Indeed, the Proposed Rule does not even weed out weak claims. In fact, it does the opposite—it prevents applicants with strong claims from obtaining relief. The Proposed Rule will preclude applicants who fear persecution on account of their gender characteristics and/or political opinion against non-governmental groups. *See supra* Section I.A.ii. These common grounds for asylum have been recognized by the courts as cognizable, and yet, with no explanation or analysis, the Rule attempts to invalidate them. The Proposed Rule will also block bona fide asylum seekers for insignificant "discretionary" reasons, like having a layover in a third country, that are wholly unrelated to the merits of their claim. Further, the Proposed Rule's punitive use of the frivolous label will have a chilling effect on individuals with valid claims for relief. Indeed, the many procedural hurdles that the Rule introduces into the process will only serve to block applicants, including those with meritorious claims, from exercising their right to claim asylum in a meaningful way.

The discretionary factors. The Proposed Rule's discretionary factors are unreasonable and unjustified. The discretionary determination is meant to "balance the adverse factors evidencing [a noncitizen's] undesirability as a permanent resident of the United States with the social and humane considerations presented." *Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978). But many of the Proposed Rule's discretionary factors have no bearing on an applicant's desirability as a resident nor any reasonable connection to the applicant's worthiness for the relief.

- *Unlawful Entry*

To begin, the Proposed Rule makes unlawful entry a "significantly" adverse factor, because of the "resources required to apprehend, process, and adjudicate the cases of the growing number of [noncitizens] who illegally enter the United States putatively in order to seek asylum." 85 Fed. Reg. 36,283. At the outset, it is unclear how an applicant can overcome this "significantly adverse" factor; presumably, since it is deemed significant by the Departments, the mere presence of this factor alone will result in a denial. Simply that the Departments do not wish to expend resources to process these asylum seekers' claims does not make these asylum seekers any less worthy of relief. The statute, the courts, and even the US DOJ's own administrative appellate body, the BIA, have recognized that unlawful entry is almost never a valid reason to deny asylum. *Id.* at 36,282-83. Indeed, the INA is clear that *all* noncitizens within the United States have the right to claim asylum, regardless of "whether or not [they arrived] at a designated port of arrival." 8 U.S.C. § 1158(a). Based on this fundamental principle, the courts preliminarily struck down the Departments' prior attempt to block applicants who entered without inspection from asylum, finding it was arbitrary and capricious. *See Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55,934 (Nov. 9, 2018); *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 772 (9th Cir. 2018), *stay denied* 139 S. Ct. 782 (Dec. 21, 2018). The Ninth Circuit explained that an applicant's manner of entry "has nothing to do with asylum itself." 932 F.3d at 772. In fact, the court found that entering without inspection could be "wholly consistent with [a] claim to be fleeing persecution." *Id.* at 773 (quoting *Akinmade v. INS*, 196 F.3d 951, 955 (9th Cir. 1999)). The Ninth Circuit's ruling is consistent with the BIA's decision in *Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987), which states that unlawful entry alone "should not be considered in such a way that the practical effect is to deny relief in virtually all cases." Interestingly, the Departments cite to *Matter of Pula* in the Proposed Rule, but contradict it by deeming unlawful entry as a strong basis for discretionary denials. It must also be noted that the Departments label unlawful entry as a "significantly" adverse factor, yet the Rule itself discourages applicants from coming forward to affirmatively seek protection at ports of entry thereby increasing the unlawful entries the Departments condemn. *See supra* Section I.D.

- *Use of Fraudulent Documents*

The Departments also make the use of fraudulent documents a "significantly" adverse factor. Putting such weight on this factor is unreasonable because "there may be reasons, fully consistent with the claim of asylum that will cause a person to possess false documents ... to escape persecution by facilitating travel." *Nreka v. U.S. Attorney Gen.*, 408 F.3d 1361, 1368 (11th Cir. 2005) (quoting *Matter of O-D-*, 21 I&N Dec. 1079, 1083 (BIA 1998)).

- *Factors Related to Third Country Transit*

Likewise, the Departments' three discretionary factors related to third country transit are not reasonably justified. According to the Departments, "the failure to seek asylum or refugee protection in at least one country through which an [applicant] transited while en route to the United States may reflect an increased likelihood that the [applicant] is misusing the asylum system as a mechanism to enter and remain in the United States rather than legitimately seeking urgent protection." 85 Fed. Reg. 36,283. However, courts have found that this premise is unreasonable and inconsistent with asylum protections. "[A] refugee need not seek asylum in the first place where he arrives" and that denying a claim based on an applicant's failure to apply in a third country is erroneous as a matter of law. *Melkonian v. Ashcroft*, 320 F.3d 1061, 1071 (9th Cir. 2003). Failing to apply for protection in a third country has no bearing on the credibility or reasonableness of an applicant's fear of persecution. *Damaize-Job v. INS*, 787 F.2d 1332, 1337 (9th Cir. 1986); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374-75 (9th Cir. 1985) ("We do not find it inconsistent with a claimed fear of persecution that a refugee, after he flees his homeland, goes to the country where he believes his opportunities will be best. Nor need fear of persecution be [a refugee's] only motivation for fleeing."). Particularly pertinent with respect to applicants at the southern border, who may be especially harmed by the Proposed Rule, in *Damaize-Job*, the Ninth Circuit explained that it is "quite reasonable" for an applicant who experienced persecution in Nicaragua to "to seek a new homeland that is insulated from the instability of Central America." 787 F.2d at 1337.

It was for these reasons, among others, that on July 6, 2020, the Ninth Circuit found that the Departments' third country transit interim final rule was likely arbitrary and capricious in *E. Bay Sanctuary Covenant v. Barr* (EBSC III), No. 19-16487, 2020 WL 3637585, at *13 (9th Cir. July 6, 2020); *E. Bay Sanctuary Covenant v. Barr* (EBSC IV), 385 F. Supp. 3d 922, 956 (N.D. Cal. 2019), order reinstated, 391 F. Supp. 3d 974 (N.D. Cal. 2019); see also *Capital Area Immigrants' Rights Coalition (CAIR) v. Trump*, No. 19-2117 (D.D.C. June 30, 2020) (granting Plaintiffs' motion for summary judgment regarding the third country transit interim final rule because the Federal Government did not demonstrate good cause or the foreign affairs exception to notice and comment); *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019), RIN: 1125-AA91 (Aug. 15, 2019).

The expansion of the firm resettlement mandatory bar. The firm resettlement bar makes ineligible any asylum applicant who "was firmly resettled in another country prior to arriving in the United States." 8 U.S.C. § 1158(b)(2)(A)(vi). For the bar to apply, DHS must provide prima facie evidence that an applicant was offered "permanent resident status, citizenship, or some other type of permanent resettlement." 8 C.F.R. § 208.15; *Maharaj v. Gonzales*, 450 F.3d 961, 964 (9th Cir. 2006); *Matter of A-G-G-*, 25 I&N Dec. 486, 501-502 (BIA 2011). If there is no direct evidence of an offer of

permanent residence in a third country, such as a visa or other immigration document, DHS can provide evidence that the applicant was entitled to permanent residence in that country. *A-G-G-,* 25 I&N Dec. at 502 (citing *Elzour v. Ashcroft*, 378 F.3d 1143, 1152 (10th Cir. 2004)). Under the current implementing regulations, the firm resettlement bar does not apply if the applicant establishes that their entry "into that country was a necessary consequence of [their] flight from persecution"; they "remained in that country only as long as was necessary to arrange onward travel;" and they did not have "significant ties" to the third country. 8 C.F.R. § 208.15(a). An applicant is also not subject to the bar if they prove that the "conditions of [their] residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled." *Id.* § 208.15(b).

Under the Proposed Rule, an applicant is considered to have firmly resettled if they were present in a country where they could have resided indefinitely as an asylee or refugee, regardless of the length of time they were there. 85 Fed. Reg. 36,286. In essence, this means that an applicant could be barred if they transited through any country with a functioning refugee processing system, because theoretically, they might have been offered asylee or refugee status there. This reading of the firm resettlement bar is a major departure from the current understanding of the bar and an unreasonable one at that. Indeed, as discussed above in reference to the Proposed Rule's third country-related discretionary factors, an applicant's decision to forgo applying for protection in a third country is very rarely relevant to the asylum determination.

The administrative burden. The Departments argue that several aspects of the Proposed Rule are necessary to mitigate the administrative burden of the asylum process; and yet, at the same time, it adds several additional burdens for adjudicators. For example, the Departments claim that raising the standard of proof for withholding of removal and CAT screenings will save resources. *See* 85 Fed. Reg. 36,271. This is illogical. There is no reason why imposing a higher burden of proof would mitigate the resources expended during this screening. If anything, it will make the screening more time consuming, as asylum officers will now be forced to switch between two different standards of proof during the same initial screening interview. Likewise, credible fear screenings will now have to encompass consideration of mandatory bars. If a bar is raised, then again, the standard of proof switches mid-interview to the higher "reasonable possibility" standard. These changes obscure what is supposed to be a quick screening process and make it more onerous on all of the parties involved.

Lack of clarity about key aspects of the Proposed Rule. The States finally note that the Departments fail to sufficiently explain how many of the Proposed Rule's changes will operate, leaving serious ambiguity and confusion about potential impacts of the Rule. For example, the Proposed Rule requires adjudicators to consider internal relocation at the credible fear stage, where applicants need only show a significant possibility of eligibility for asylum. At the same time, the Rule also shifts the burden of

proof to the applicant to prove by a preponderance of the evidence that internal relocation is unreasonable. The States assume that this preponderance standard would only apply at the merits stage of a claim (i.e., at an individual immigration hearing), rather than at the credible fear stage. But the Departments provide no such explanation and fail to clarify how these two different burdens of proof may interact during the credible fear screening. Similarly, the Departments enumerate three "significantly adverse" factors that must be considered. The Departments fail to discuss how one can rebut these factors and whether the presence of one or more factor will result in a denial. As some of these factors will be present in many, if not most cases, it is vital that the Departments clarify their consequences.

In light of the Departments' failure to adequately assess the disadvantages of the Proposed Rule and the Departments' dubious or altogether nonexistent reasoning in promulgating it, the Proposed Rule, if adopted, would be arbitrary and capricious.

ii. The Rule is Contrary to Law

Under the APA, agency action may be set aside where it is "not in accordance with law." 5 U.S.C. § 706(2)(A). Where a statute is unambiguous and the "intent of Congress" is clear in foreclosing agency action, "that is the end of the matter." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If the statute is ambiguous, a court will defer to the agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. Applying these well settled principles, the Proposed Rule is contrary to the INA, and the treaties it implements, in a variety of respects. The States only address a few of these inconsistencies, and note that there are many other ways in which the Proposed Rule likely conflicts with the INA.[124]

[124] For example, the States take significant issue with the Proposed Rule's several discretionary provisions and newly expanded firm resettlement bar that make mere transit through a third country a reason for denial of asylum. The States discussed similar concerns in the comment letter opposing *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019) at AR1205, and believe that the arguments raised in that letter are also relevant here and, in fact, the Ninth Circuit recently agreed that the Departments' other third country related asylum rule was contrary to law. *EBSC* III, No. 19-16487, 2020 WL 3637585, at *10. The States also take issue with the Departments' interpretation of the terms political opinion and particular social group, which would foreclose upon grounds for asylum that are court recognized. Additionally, the States believe that the Departments' contention that the CAT requires applicants to prove their torturer was acting under "color of law" is dubious at best. The Proposed Rule is simply so omnibus and makes so many changes, that it likely there are even more legally questionable provisions.

The Proposed Rule frustrates the right to apply for asylum under 8 U.S.C. § 1158. Congress enumerated three classes of immigrants ineligible to apply for asylum, *see* 8 U.S.C. § 1158(a)(2), and six categories of immigrants who cannot be granted asylum, *see id.* § 1158(b)(2). Yet, the Proposed Rule codifies a vast array of restrictions on eligibility such that the meaningful right to asylum has been frustrated to the point of having been effectively denied to several classes of immigrants whom Congress never intended to exclude. To provide just a few examples, the Proposed Rule will effectively exclude applicants who failed to file taxes or worked under the table, applicants with two layovers en route to the United States, and pro se asylum seekers who are not prepared to articulate the complex legal elements of asylum on their applications. Congress did not intend to reserve asylum protection to just the very few refugees who can overcome the Proposed Rule's numerous hurdles—Congress created the right to apply for asylum to provide protection to those in need. Accordingly, the Rule is contrary to the INA.

The Proposed Rule does not employ an appropriate discretionary standard. The term "discretion" is not defined in the INA, but traditionally, discretion has meant a flexible test involving the weighing of equities. *Zuh v. Mukasey*, 547 F.3d 504, 511 (4th Cir. 2008) ("we explicitly reject such an 'inflexible test' and recognize the 'undesirability and 'difficulty, if not impossibility, of defining any standard in discretionary matters of this character") (citing *Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978)). Understanding that "each case must be judged on its own merits," the BIA previously set forth a number of positive and negative discretionary factors to be weighed, but stressed the importance of considering "the totality of the circumstances." *Matter of Pula*, 19 I&N. Dec. at 473. Even in weighing all of the circumstances, however, the BIA provided that the danger of persecution will generally outweigh "all but the most egregious of adverse factors." *Id*. at 474.

The Proposed Rule lists nine "discretionary" factors that if present, must result in denial unless an applicant can establish "extraordinary circumstances, such as those involving national security or foreign policy considerations, or if the [applicant] demonstrates, by clear and convincing evidence, that the denial of asylum would result in an exceptional and extremely unusual hardship to the [applicant]." 85 Fed. Reg. 36,283-84. Thus, despite calling these factors "discretionary," the Proposed Rule requires an adjudicator to deny several categories of cases unless the applicant cannot meet an unreasonably high burden of establishing a narrow set of "extraordinary circumstances." This is an inflexible test that does not weigh all of the equities or consider the totality of the circumstances of a particular case. As such, the Rule presents an unreasonable, if not contradictory, interpretation of the discretionary showing required for asylum.

The Proposed Rule's discretionary factor involving unlawful presence conflicts with 8 U.S.C. § 1158(b)'s one-year filing deadline. The Proposed Rule is inconsistent with the INA's statutory exemptions to the one-year filing deadline and the TVPRA. Under the INA, an applicant is only eligible to apply for asylum if they applied within

one year of their entry into the United States, unless they can establish that a statutory exception to the deadline applies. 8 U.S.C. § 1158(b). The exceptions include changed circumstances materially effecting the asylum claim (i.e., a change in law or conditions) or an exceptional circumstance (i.e., physical or mental illness, injury, being a minor, or maintaining lawful status) relating to the delay of the application. Additionally, per the TVPRA, the one-year filing deadline does not apply to unaccompanied children. 8 U.S.C. § 1158(a)(2)(E). In essence, Congress has determined that under certain specific circumstances, applicants are excused from filing their applications within one-year of entry into the United States.

Under the Rule, even if an applicant falls within the statutory exceptions to the one-year filing deadline or is protected under the TVPRA, that applicant will still be denied asylum based on discretion unless they meet the "extraordinary circumstances" standard set forth in the Proposed Rule. The Proposed Rule thus makes the INA and TVPRA's exceptions to the filing deadline irrelevant. Even when applicants meet these exceptions, they are still denied asylum unless they can meet the heightened standard delineated by the Departments. Congress could not have intended for the applicants it expressly excluded from the filing deadline to be denied on that same basis under the guise of "discretion."

The Proposed Rule's unlawful entry discretionary factor conflicts with the law. The Proposed Rule makes entry without inspection a "significantly" adverse discretionary factor that will likely result in denial. However, 8 U.S.C. § 1158(a) specifically provides that an applicant may apply for asylum regardless of whether they entered unlawfully. The Departments contend that this discretionary factor does not conflict with § 1158(a), because applicants are still eligible to *apply* for asylum. This argument is unavailing. By making this factor "significantly" adverse, the Departments are effectively nullifying the right to apply for impacted applicants. In the *East Bay Sanctuary Covenant* cases, the Ninth Circuit held that the Departments cannot summarily deny asylum applicants to applicants who entered between ports of entry. As the Ninth Circuit explained, "[e]xplicitly authorizing a refugee to file an asylum application because he arrived between ports of entry and then summarily denying the application for the same reason borders on absurdity." *E. Bay Sanctuary Covenant v. Trump* (EBSC II), 950 F.3d 1242, 1272 (9th Cir. 2020)(upholding the preliminary injunction on the Departments' rule: "*Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims"*). The Ninth Circuit's ruling comported with the BIA's interpretation in *Matter of Pula*, which recognized that manner of entry "should not be considered in such a way that the practical effect is to deny relief in virtually all cases." *Matter of Pula*, 19 I&N Dec. at 473.

Furthermore, as the Ninth Circuit explained, § 1158's provisions on unlawful entry "reflect[] our understanding of our treaty obligation to not 'impose penalties [on refugees] on account of their illegal entry or presence.'" *EBSC* I, 932 F.3d at 772

(quoting Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 174 art 31); *see also* 8 U.S.C. § 1158(a)(1). Creating a blanket-rule that results in the denial of applicants based on their manner of entry is precisely such an impermissible "penalty."

The Proposed Rule effectively heightens the credible fear standard. Because the consequence of an applicant failing at the credible fear interview stage—removal without a hearing—is so high, the standard for passing the credible fear screening is deliberately low. An individual can proceed to a full court hearing if there is only a "significant possibility" that they would be eligible for asylum. *See* 8 U.S.C. § 1225(b)(1)(B)(v).

The Proposed Rule imposes several changes to the credible fear process that upset this deliberately low standard. Most obviously, the Proposed Rule restricts immigration judges who are reviewing negative credible fear findings from considering case law from circuits outside of their jurisdictions. 85 Fed. Reg. 36,267. However, the Departments were preliminarily enjoined from placing a similar circuit law restriction on asylum officers in *Grace v. Whitaker*, 344 F. Supp. 3d 96, 139–40 (D.D.C. 2018). In that case, the court considered a policy memorandum that required asylum officers to apply the circuit law from where the applicant was located during the credible fear screening. In finding this provision was contrary to law, the court explained, "if there is a disagreement among the circuits on an issue, the [applicant] should get the benefit of that disagreement since, if the removal proceedings are heard in the circuit favorable to the [the applicant's] claim, there would be a significant possibility the [applicant] would prevail on that claim." *Id*. Thus, the court held, that the Departments' policy was contrary to the low credible fear standard that Congress intended. The Proposed Rule raises these same issues. To be sure, reviewing immigration judges do not always sit in the jurisdiction where the applicant's claim will ultimately be heard, and it is possible that an applicant's case will be heard in a more favorable circuit. Further, given the rapidness with which asylum law develops, even if a circuit does not yet recognize certain grounds for asylum, it is possible that through the course of an applicant's proceedings it will. As such, this provision is contrary to law.

* * *

The States strongly urge the Departments to withdraw the Proposed Rule. For the reasons set forth above, the Proposed Rule violates the law and will have damaging and irreparable impact on individuals escaping some of the most dangerous, persecutory conditions in the world. Moreover, the Proposed Rule will undoubtedly harm the States' current and prospective residents and their families, as well as the States' economic and social interests.

Sincerely,

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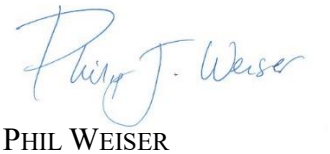

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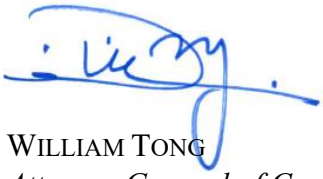

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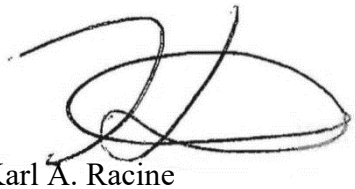

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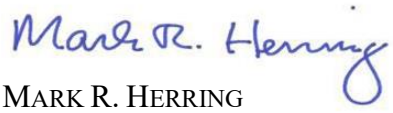

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