State of California
Office of the Attorney General
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ATTORNEY GENERAL

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Via electronic submission to www.regulations.gov
ATTN: Docket No. USCIS-2019-0021, and EOIR Docket No. 19-0021

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RE: Comments from States Attorneys General Regarding Interim Final Rule: Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63,994 (Nov. 19, 2019), RIN 1125-AA98, Docket No. USCIS-2019-0021, and EOIR Docket No. 19-0021

Dear Chief Davidson and Assistant Director Alder Reid:

We, the Attorneys General of California, Connecticut, Delaware, Hawaii, Iowa, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia (collectively, the States), write to strongly urge the U.S. Department of Justice (U.S. DOJ) and the U.S. Department of Homeland Security (DHS) (collectively, the Departments) to withdraw the Interim Final Rule (IFR) relating to the implementation of safe third country agreements: Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63,994 (Nov. 19, 2019) (to be codified at 8 C.F.R. Parts 1003, 1208, and 1240). The IFR, which is effective immediately, bars asylum, withholding of removal, and relief under the Convention Against Torture, to those who are subject to the Asylum Cooperative Agreements (ACAs). The United States has entered into

ACAs with Guatemala, Honduras, and El Salvador.[1] At this point, the United States has only published the ACA with Guatemala in the Federal Register, and thus, it is the only ACA currently in effect. *See* 84 Fed. Reg. 64,095 (Guatemala ACA). It is anticipated that the United States will soon publish the ACAs with Honduras and El Salvador.[2] These agreements, in conjunction with the IFR, allow the United States to remove asylum applicants to the signatory countries of Guatemala, Honduras, and El Salvador to seek protection there and will result in the removal of a great majority of those seeking protection.

The IFR is contrary to law and harms thousands of already vulnerable individuals by barring them from asylum, withholding of removal, and protection under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT), in the United States, instead forcing them into dangerous circumstances in third countries that are not equipped to handle their claims.

The IFR also harms the States that open their doors to those in search of humanitarian protection. In 2018, 10,264 individuals were granted asylum by the immigration courts located in the States (known as "defensive asylum").[3] And in 2015-2017, the most recent years for which this data is available, the States constituted five of the top ten states of residence for individuals who were granted asylum after filing an application with U.S. Citizenship and Immigration Services (USCIS) (known as "affirmative asylum").[4] As home states to such large numbers of asylees, the States will be greatly affected by the IFR. Further, the States have a strong interest in presenting their views when important agency actions, like the IFR, are proposed. Thus, the implementation of the IFR without first allowing for notice and comment has harmed the States.

I. THE IFR WILL ENDANGER 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 humanitarian

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[1] The IFR will apply to ACAs that the United States enters into with any country other than Canada. 84 Fed. Reg. 63,994. Thus far, the United States has announced ACAs with Guatemala, Honduras, and El Salvador, and is reportedly in discussion with other countries, including Brazil and Panama. Nick Miroff, *U.S. Seeks Deal to Send Asylum Seekers from Africa and Asia to Panama*, WASH. POST (Aug. 21, 2019), https://tinyurl.com/MiroffPanamaACA.

[2] The ACA with Honduras was recently published by the Los Angeles Times. This agreement is substantially similar to the Guatemalan ACA. Molly Hennessy-Fiske & Molly O'Toole, *U.S. to Send Asylum Seekers to Honduras, Bypassing American Asylum*, L.A. TIMES (Dec. 17, 2019), https://tinyurl.com/LATimes-HondurasACA.

[3] U.S. Dep't of Justice, Executive Office for Immigration Review (EOIR), *Statistics Yearbook 2018* 28, https://www.justice.gov/eoir/file/1198896/download.

[4] Nadwa Mossaad, Office of Immigration Statistics, Dep't of Homeland Sec., *Annual Flow Report: Refugees and Asylees: 2017* tbl.13 (Mar. 2019), https://tinyurl.com/mossaad.

protection 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. In barring asylum, withholding of removal, and CAT protection to thousands of individuals in need, the United States is departing from these core principles. The IFR will inflict harm on asylum seekers as it threatens to "deliver [them] into the hands of their persecutors." *Leiva-Perez v. Holder*, 640 F.3d 962, 971 (9th Cir. 2011) (per curiam)).

A. Asylum Seekers Cannot Safely Seek Protection in Guatemala, El Salvador, or Honduras

Under the IFR, asylum seekers will be sent to countries that are unable to provide protection because they lack full and fair asylum systems and suffer from some of the worst violence in the world.

1. The Asylum Systems in Guatemala, El Salvador, and Honduras are Inadequate

The asylum systems in Guatemala, El Salvador, and Honduras are not equipped to provide humanitarian protections to the potentially thousands of asylum seekers who will be sent to those countries pursuant to the IFR.

Only as recently as 2017, Guatemala first implemented a law that overhauled its immigration system and defined the term "refugee," codified the rights of those seeking protection, and implemented a refugee application process.[5] Guatemala has insufficient staff to handle humanitarian claims, with only 12 officials to work on asylum cases, including only three staff members to interview asylum applicants.[6] Currently, the federal government is only applying the Guatemalan ACA to citizens of El Salvador and Honduras.[7] The total number of affirmative asylum applications filed with USCIS by applicants from these two countries provides some context of the volume of applications that Guatemala could now face. Between 2015 and 2017, Salvadorans filed 28,490 and Hondurans filed 17,823, for a combined total of 46,313 affirmative asylum applications.[8] This number does not include the number of applications filed in immigration court by individuals in removal proceedings. Even beyond the sheer unfeasibility of handling large volumes of asylum claims, Guatemala is unlikely to grant

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[5] Bureau of Democracy, Human Rights & Labor, U.S. Dep't of State, *Guatemala 2018 Human Rights Report* at 12 (Mar. 2019) [hereinafter *State Dep't – Guatemala 2018*], https://tinyurl.com/State-Dept-Guatemala2018.

[6] *Is Guatemala Safe for Refugees and Asylum Seekers?*, Hum. Rights First (July 1, 2019), https://tinyurl.com/HumanRightsFirstGuatemala.

[7] U.S. Citizenship & Immigration Servs. (USCIS), *US-Guatemala Asylum Cooperation Agreement (ACA) Threshold Screening, Guidance for Asylum Officers and Asylum Office Staff* 10 (Nov. 19, 2019) [hereinafter *USCIS – Guatemala ACA Guidance*], https://tinyurl.com/USCISacaguidance.

[8] Mossaad, *supra* note 4, at 7.

relief. In fact, in 2018, Guatemala granted did not grant a single asylum application.[9] In Guatemala, according to the United Nations High Commissioner of Refugees (UNHCR), "[t]here are no national reception mechanisms or transit centres for persons in need of international protection, and all humanitarian assistance and information on asylum procedures are being provided by civil society organizations–whose resources are already overstretched."[10]

Asylum seekers in El Salvador also face insurmountable challenges. In a recent interview, the president of El Salvador acknowledged that the country is not prepared to take in asylum seekers, adding: "we don't have asylum capacities, but we can build them [. . .] we don't have it now."[11] El Salvador's legal framework on refugee law and standard operating procedures on asylum seekers is still in progress. In 2017 and 2018, UNHCR reported its ongoing work to help El Salvador enhance its technical capacity of the National Commission for Refugees, strengthen the country's legal framework toward refugee law reform, and assist in the development of "standard operating procedures" on asylum seekers and refugee children.[12] Asylum claims in El Salvador are processed by a commission under the Foreign Ministry, which according to a Salvadoran newspaper, has only one officer working directly with asylum claims.[13] From 2015 to 2017, USCIS received 48,995 affirmative asylum applications by applicants from Honduras and Guatemala, therefore El Salvador could face similar a volume of applications.[14] It is unclear how a single officer will be able to handle all asylum applications filed in El Salvador.

Moreover, asylum applicants in El Salvador face strict deadlines. Upon arrival into the country, an individual has only five business days to apply for asylum. [15] If filing after this period, the applicant has the burden of furnishing a justification for the delay, which can be

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[9] Seung Min Kim, et al., *Trump Says He Has Agreement with Guatemala to Help Stem Flow of Migrants at the Border*, WASHINGTON POST (July 26, 2019), https://tinyurl.com/ThirdCountry.

[10] United Nations High Comm'r for Refugees (UNHCR), *Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report: Universal Periodic Review: Guatemala* 4 (Mar. 2017), https://tinyurl.com/UNHCRGuatemala.

[11] Sharyn Alfonsi, *"Our Whole Economy Is In Shatters":El Salvador's President Nayib Bukele on the Problems Facing His Country*, 60 MINUTES (Dec. 15, 2019) https://tinyurl.com/60minutes-Bukele-Interview.

[12] UNHCR, *El Salvador Factsheet* 2 (Mar. 2017), https://tinyurl.com/ElSalvador-2017FactSheet; UNHCR, *El Salvador Factsheet* 2 (Jul. 2018), https://tinyurl.com/ElSalvador-2018FactSheet.

[13] Nelson Rauda Zablah, *El Salvador Signs Agreement to Accept Asylum Seekers the US Won't Protect*, EL FARO (Sept. 21, 2019), https://preview.tinyurl.com/ElFaro-Asylum.

[14] Mossaad, *supra* note 4, at 7.

[15] *Solicitud de la Condición de Refugiado,* UNHCR , https://tinyurl.com/unhcrHelpElSalvador (last visited Dec. 2, 2019).

rejected.[16] If denied protection, asylum seekers have only three business days to appeal the determination.[17] In light of this unforgiving process and the country's glaring understaffing, it is no surprise that the number of asylum applications granted in El Salvador is exceedingly low. In 2016, El Salvador's Foreign Ministry issued a release stating that only 49 asylum claims had been granted in El Salvador "in recent years," but omitted the time frame.[18] Between January and July 2018, a mere four asylum applications had been filed, three of which had been denied and one remained pending.[19] The lack of infrastructure to process asylum claims and the aggressive deadlines make humanitarian relief in El Salvador unrealistic to obtain.

Similarly, Honduras lacks an adequate system to provide humanitarian relief. While Honduran law provides for the granting of asylum status, Honduras has a history of detaining foreigners transiting through the country.[20] The 2016 United Nations Human Rights Council report of the Special Rapporteur on the human rights of internally displaced persons reported that Honduran "immigration and asylum policies and practices fail to live up to international standards required for those fleeing violence or persecution."[21] In 2017, UNHCR reported the National Migration Institute still needed trainings on international protection and UNHCR was assisting in the strengthening of the organization's technical capacity.[22] Moreover, Honduras itself suffers from extreme poverty and internal displacement of its own citizens seeking to escape the country's violence.[23] Honduras has not been known as a country capable of offering refuge, and in 2016 saw only nine applications for asylum.[24]

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[16] *Id.*

[17] *Id.*

[18] Ministerio de Relaciones Exteriores de El Salvador, *Gobierno de El Salvador Entrega Nacionalidades por Naturalización en el Día Mundial de los Refugiados* (June 20, 2016) https://tinyurl.com/Ministerio-de-Relaciones-Exter.

[19] Bureau of Democracy, Human Rights & Labor, U.S. Dep't of State, *El Salvador 2018 Human Rights Report* at 13 (Mar. 2019) [hereinafter *State Dep't – El Salvador 2018*]. https://www.state.gov/wp-content/uploads/2019/03/EL-SALVADOR-2018.pdf.

[20] Global Detention Project, *Honduran Immigration Detention Profile* (Sept. 2015), https://www.globaldetentionproject.org/countries/americas/honduras.

[21] UNHRC, *Report of the Special Rapporteur on the human rights of internally displaced persons on his mission to Honduras* (Apr. 2016), https://tinyurl.com/UNHCR-Honduras.

[22] UNHCR, *Honduras Factsheet* 2 (Mar. 2017) https://tinyurl.com/UNHCR-HondurasFactsheet.

[23] UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras 6* (July 2016) https://www.refworld.org/pdfid/579767434.pdf; Bureau of Democracy, Human Rights & Labor, U.S. Dep't of State, *Honduras 2018 Human Rights Report* at 14 (Mar. 2019) [hereinafter *State Dep't – Honduras 2018*], https://www.state.gov/wp-content/uploads/2019/03/HONDURAS-2018.pdf.

[24] *Honduran Immigration Detention: Quick Facts,* Global Detention Project, https://www.globaldetentionproject.org/countries/americas/honduras (last visited Dec. 2, 2019).

2. Guatemala, El Salvador, and Honduras Are Among the Most Dangerous Countries in the World

Guatemala, El Salvador, and Honduras, collectively known as the Northern Triangle, are among the most dangerous countries in the world. According to the United Nations, between 2010 and 2017, homicide rates in these three countries were between nine and thirteen times higher than the world average, and the death tolls were comparable to those of countries at war.[25] The Northern Triangle countries have experienced a surge in organized criminal organizations whose reach often transcends national boundaries.[26] These organized criminal organizations are reported to maintain communication with their counterparts in other Northern Triangle countries, sometimes sending their members to these other countries to carry out assassinations and other criminal activity.[27]

Guatemala, which according to the U.S. Department of State has "an alarmingly high murder rate,"[28] suffers from widespread corruption (particularly in the police and judicial sectors), trafficking in persons, and extortion.[29] In Honduras and El Salvador, there have been reports of unlawful killings by government agents.[30] In all three countries, these crimes are committed with impunity.[31] Recently, the President of El Salvador stated that the country's "economy is in [. . .] shatters. Nothing works."[32] In light of these conditions, UNHCR has expressed "serious concerns" with the IFR, stating that it is "at variance with international law

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[25] UNHCR, *The MIRPS: A Regional Integrative Response to Forced Displacement* (Dec. 20, 2018) 3 (citing United Nations 2018: Executive Committee (February 2018), Briefing paper, Violence in the North of Central America (internal document)); UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* 2 (Oct. 2015) [hereinafter *Women on the Run*], https://www.unhcr.org/5630f24c6.html ("According to data from the UN Office on Drugs and Crime, Honduras ranks first, El Salvador fifth, and Guatemala sixth for rates of homicide globally.").

[26] *See also Women on the Run*, *supra* note 25, at 2.

[27] UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador* 16 (March 2016) [hereinafter *UNHCR – Eligibility Guidelines for El Salvador Asylum Seekers*], https://www.refworld.org/docid/56e706e94.html.

[28] Overseas Sec. Advisory Council, U.S. Dep't of State, *Guatemala 2019 Crime & Safety Report* (Feb. 26, 2019), https://tinyurl.com/OSAC-Guatemala.

[29] Bureau of Democracy, Human Rights & Labor, U.S. Dep't of State, *Guatemala 2017 Human Rights Report* 1 (Apr. 20, 2018) [hereinafter *State Dep't – Guatemala 2017*], https://www.state.gov/wp-content/uploads/2019/01/Guatemala.pdf.

[30] *State Dep't – El Salvador 2018*, *supra* note 19, at 2, 14; *State Dep't – Honduras 2018*, *supra* note 23, at 1, 2.

[31] *State Dep't – Guatemala 2017*, *supra* note 29, at 1, 6, 10, 14; *State Dep't – El Salvador 2018*, *supra* note 19, at 2, 14; *State Dep't – Honduras 2018*, *supra* note 23, at 1.

[32] Alfonsi, *supra* note 11.

[and] could result in the transfer of highly vulnerable individuals to countries where they may face life-threatening dangers."[33]

These conditions are particularly dangerous for some especially vulnerable groups, including women, children, and Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) asylum seekers. Murders of women are prevalent in the three Northern Triangle Countries. El Salvador ranks first globally on rates of female homicide, with Guatemala ranking third, and Honduras seventh. [34] 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. [35]

Conditions for children in these countries are also grim. In Guatemala, children are targets of recruitment by criminal gangs, [36] and child sexual exploitation and sex tourism remain a significant problem.[37] In Honduras, child abuse, including the commercial sexual exploitation of children, remains a serious problem and Honduras is a destination for child sex tourism.[38] Remarkably, Honduras does not have a statutory rape law.[39] Moreover, almost half of Honduran children living in neighborhoods with criminal gangs do not have access to education.[40] In El Salvador, children suffer widespread abuse, including sexual abuse.[41] 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.[42] In all three Northern Tringle countries, girls are frequently kidnapped and victimized by repeated gang rape.[43]

LGBTI migrants face special dangers in the Northern Triangle, as homophobic and transphobic violence is widespread in these countries. In El Salvador, nongovernment

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[33] UNHCR, *Statement on New U.S. Asylum Policy* (Nov. 19, 2019) https://tinyurl.com/UNHCR-ACAStatement.

[34] *Women on the Run*, *supra* note 25, at 2.

[35] Kids in Need of Defense (KIND), *Sexual and Gender Based Violence (SGBV) & Migration Fact Sheet* 2 (Apr. 2018) [hereinafter *KIND – SGBV & Migration*], https://tinyurl.com/KIND-SGBV.

[36] United Nations Hum. Rts. Off. High Commissioner, *Committee on the Rights of the Child examines report of Guatemala* (Jan. 17, 2018), https://tinyurl.com/UNHR-Guatemala-Children.

[37] *State Dep't – Guatemala 2018*, *supra* note 5, at 18.

[38] *State Dep't – Honduras 2018*, *supra* note 23, at 18-19.

[39] *Id*.

[40] Norwegian Refugee Council, *Violence Has Pushed Thousands of Children in Honduras and El Salvador Out of School* (May 16, 2019), https://tinyurl.com/NorwegianRefugeeCouncil.

[41] *State Dep't – El Salvador 2018*, *supra* note 19, at 17-18.

[42] *UNHCR – Eligibility Guidelines for El Salvador Asylum Seekers*, *supra* note 27, at 35.

[43] *KIND – SGBV & Migration*, *supra* note 35, at 2.

organizations reported violence and discrimination against LGBTI people by public officials and police forces.[44] Moreover, LGBTI 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, LGBTI individuals are subject to threats and violence.[46] In Guatemala, almost one third of transwomen identified police officers as their main persecutors, and LGBTI women experience forced pregnancies through what is known as "corrective rape."[47] In addition to these harrowing types of violence, discrimination in aspects of civil society is also common. In El Salvador and Honduras, the law prohibits discrimination based on gender identity or sexual orientation, but abuses continue.[48] Transgender women in Honduras are particularly vulnerable to employment and education discrimination.[49] Notably, in Guatemala, legal protections against anti-LGBTI discrimination do not even exist.[50]

In large parts of the Northern Triangle, the countries' governments are simply unable to protect their own citizens from the rampant violence. Therefore, thousands of them have sought asylum in other countries, including the United States.[51] Requiring migrants to seek asylum in these countries is untenable—and, in fact, may itself result in further persecution.

B. The IFR Encourages Asylum Seekers to Pursue Treacherous Border Crossings Into the United States

The IFR threatens to send vulnerable asylum seekers to countries that are not safe for them, and therefore many migrants are likely to forgo their protection claims entirely. With humanitarian protections effectively out of reach, the IFR discourages these asylum seekers from presenting themselves and asking for asylum at a port of entry in the United States. This is particularly so given DHS's metering system, 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 applicants to remain in Mexico during the pendency of their cases.[52] As a particularly punishing twist, the vast majority

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[44] *State Dep't – El Salvador 2018*, *supra* note 19 at 20.

[45] *Id*.

[46] *State Dep't – Honduras 2018*, *supra* note 23, at 1.

[47] Organización Trans Reinas de la Noche, *Human Rights Violations Against Transgender Women in Guatemala* 7 (Feb. 2018), https://tinyurl.com/OTRN-LGBT; *State Dep't – Guatemala 2018*, supra note 5, at 22.

[48] *State Dep't – El Salvador 2018*, *supra* note 19, at 20; *State Dep't – Honduras 2018*, *supra* note 23, at 20, 21.

[49] *State Dep't – Honduras 2018*, *supra* note 23, at 21.

[50] *State Dep't – Guatemala 2018*, *supra* note 5, at 21.

[51] *Women on the Run*, *supra* note 25; 84 Fed. Reg. 63,995.

[52] 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.

of these individuals who have been patiently waiting in Mexico to claim asylum in the United States would now be ineligible for it under the IFR.[53]

With the prospect of a prolonged wait in Mexico, only to then be sent back to the Northern Triangle, many in desperate situations will choose to make a harrowing trek into the United States 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.[54] Nine people drowned trying to cross near the El Paso canals in June of 2019 alone.[55] Also this summer, authorities found the bodies of a mother, her one year old son, and two other infants, who crossed the river only to die of dehydration.[56] These heartbreaking stories are corroborated by evidence in the administrative record of the administration's July 2019 asylum interim final rule (*Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019)) ("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"),[57] as well as in a report prepared by DHS's Inspector General,[58] which demonstrate that dangerous crossings have become more commonplace due to other restrictive asylum policies. Under the IFR, these deaths will occur more frequently.

C. The IFR Provides No Safeguards to Avoid Family Separation

The IFR does not provide any safeguards to avoid family separation. In cases where the asylum seeker is subject to multiple ACAs, the applicant can receive an order of removal to each of the ACA countries. 84 Fed. Reg. 63,995. Ultimately, it would be up to the immigration officer's discretion to determine to which country the asylum seeker will be removed. *Id.* There is nothing in the IFR requiring that families who arrived together to the United States be

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[53] *Id.*

[54] 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.

[55] 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.

[56] 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.

[57] *See* Administrative Record for *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019) at AR664.

[58] Office of Inspector General, U.S. Dep't of Homeland Sec., OIG 18-84, *Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* 5-7 (2018).

removed to the same country, or that the immigration officer even consider these familial connections when determining the country of removal.

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.[59] 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 become chronic if left untreated. [60] Similarly, spousal separation can cause fear, anxiety, and depression.[61]

II. THE IFR VIOLATES THE LAW

The IFR violates the Administrative Procedure Act (APA) because: (1) it is contrary to law, (2) it is arbitrary and capricious, and (3) the Departments did not comply with the procedural requirements of notice and comment. The IFR also violates the Constitutional guarantee of equal protection under law.

A. The IFR Violates the Administrative Procedure Act

1. The IFR is Contrary to the Immigration and Nationality Act's Asylum Statute

The IFR is contrary to the Immigration and Nationality Act (INA)'s asylum statute, 8 U.S.C. § 1158. In determining whether a regulation is contrary to the law in violation of the APA, courts apply the two-step test set forth in *Chevron*. First, courts consider "whether Congress has directly spoken to the precise question at issue. Courts "must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). "If the intent of Congress is clear, that is the end of the

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[59] Colleen K. Vesely, Ph.D., et al, *Immigrant Families Across the Life Course: Policy Impacts on Physical and Mental Health* (2019) https://tinyurl.com/NCFRpolicybrief.

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

[61] 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").

matter." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc. (Chevron)*, 467 U.S. 837, 842 (1984). Second, if the court finds that the statute the agency is interpreting in its regulation is ambiguous, it will apply deference to the agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

Here, Congress has already "directly spoken to the question[s] at issue", *i.e.*, under what circumstances can an applicant be deemed ineligible to apply for asylum in the United States based on the safe third country bar, 8 U.S.C. § 1158(a)(2)(A). The IFR illegally expands upon those circumstances in conflict with the narrow bar that Congress promulgated.

An applicant is eligible for asylum in the United States if she or he was persecuted or has a well-founded fear of being persecuted on account of race, religion, political opinion, or membership in a particular social group, by the government or by private actors that the government is unable or unwilling to control. 8 U.S.C. § 1158(b)(1)(A); *Matter of Acosta*, 19 I&N Dec. 211, 219 (BIA 1985). The INA provides that an individual can be barred from applying for asylum under a "safe third country" agreement. 8 U.S.C. § 1158(a)(2)(A). This narrow exception only applies to individuals who may be removed: (1) pursuant to a bilateral or multilateral agreement, (2) to a country where the individual's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and (3) where they can access "a full and fair procedure for determining a claim to asylum or equivalent temporary protection." *Id.* Until the recently announced agreements with Guatemala, Honduras, and El Salvador, the United States had only one such safe third country agreement with Canada (Canadian Agreement).

Contrary to the safe third country bar, the IFR will remove applicants to ACA countries that do not have "full and fair procedure[s]" and where they will face persecution. In other words, the IFR will apply in the exact circumstances that Congress determined the statutory third country bar *should not* apply. As described in Part I(A) above, the asylum systems in Guatemala, El Salvador and Honduras are not capable of assessing claims of thousands of asylum seekers who would now be forced to invoke it under the IFR. The "still very nascent asylum systems"[62] in these countries clearly fall short of the INA's requirement that there be a "full and fair procedure" for humanitarian protection.

Moreover, many applicants subject to the ACA will face persecution in the third country. As the IFR itself recognizes, over half of all pending asylum claims in the United States are filed by individuals fleeing El Salvador, Guatemala, and Honduras. 84 Fed. Reg. 63,995. It is impossible to ignore that these countries' own conditions, which are "akin to the conditions found in the deadliest armed conflicts in the world today," have spurred much of this forced

[62] UNHCR, *Statement on New U.S. Asylum Policy* (Nov. 19, 2019), https://tinyurl.com/UNHCR-Statement.

displacement and the likelihood of vulnerable asylum seekers facing persecution there is high.[63] While the IFR purports that an individual consideration will be given as to whether each individual applicant would be subject to persecution in the ACA country, as explained below in Part II(A)(2)(b), the IFR's cursory threshold screening is inadequate and would result in the sending of many vulnerable asylum seekers into harm's way. The IFR thus makes the safe third country bar's statutory limitations superfluous.

Even if there were any ambiguity in the statute, the Departments' interpretation is "arbitrary, capricious, or manifestly contrary to the statute" because there is no consideration of the asylum systems or conditions in the ACA countries where the IFR requires individuals to apply for asylum. *Chevron*, 467 U.S. at 844. The purpose of asylum is to provide protection to those at risk for persecution. Refugee Act of 1980, Pub. L. No. 96-212, § 101, 94 Stat. 102 (1980). Here, the IFR seeks to implement the bar without any consideration of whether the asylum systems in the ACA countries will give asylum seekers a "full and fair" opportunity to apply for asylum, and without any consideration of whether these countries are actually safe.

2. The IFR is Contrary to the INA's Withholding of Removal Statute and United States' Binding Non-Refoulement Obligations

The IFR violates 8 U.S.C. § 1231(b)(3), which provides for withholding of removal and incorporates the binding international obligations of non-refoulement, and the CAT

The 1951 Convention Relating to the Status of Refugees and the corresponding 1967 Protocol set forth the signatory countries' legal obligations to protect refugees. These agreements are centered on the principle that no country can remove an individual to a territory where their life or freedom is threatened, referred to as the principle of non-refoulement (non-return). 19 U.S.T. 6276; *INS v. Stevic*, 467 U.S. 407, 416 (1984). Our country is bound by the non-refoulement obligation because the United States assented to the 1967 Protocol. *Stevic*, 467 U.S. at 416; 84 Fed. Reg. 63,999. Congress incorporated the non-refoulement principle into United States' law when it adopted the 1980 Refugee Act, which contained nondiscretionary withholding of deportation. *Matter of Q-T-M-T-*, 21 I&N Dec. 639, 645 (BIA 1996). The non-refoulement principle is currently codified in the INA at 8 U.S.C. § 1241(b)(3), referred to as withholding of removal. Under this provision an applicant cannot be removed to any country where the applicant will more likely than not be persecuted because of his or her race, religion, nationality, membership in a particular social group, or political opinion. *Id*.

[63] Medecins Sans Frontieres, *Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis* 4 (May 2017), https://tinyurl.com/MSF-ForcedFlee; *see also Women on the Run*, *supra* note 25, at 4 ("[T]he increasing violence from criminal armed groups occurred alongside repeated physical and sexual violence at home.").

In addition to the Protocol, the United States is bound by the non-refoulement obligation in Article 3 of the CAT. *See* Foreign Affairs Reform and Restructuring Act of 1998 § 2242(codifying CAT); *Zheng v. Ashcroft*, 332 F.3d 1186, 1193 (9th Cir. 2003) (describing Congress's implementation of CAT). Under CAT, an individual cannot be removed to a country where the applicant is more likely than not going to be tortured. 8 C.F.R. § 208.18.

Unlike asylum, withholding of removal and CAT are non-discretionary and must be provided to anyone eligible. 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16(d). Applicants, however, will be ineligible if they fall within any of the expressly listed mandatory bars to withholding of removal, which are distinct from those in the asylum statute. 8 U.S.C. § 1231(b)(3)(i)-(iv). Deferral of removal[64] under the CAT does not have any bars. 8 C.F.R. § 208.7. If an immigration judge grants withholding of removal or CAT, the applicant can be ordered removed only to an alternative country where the applicant would not be persecuted. 8 C.F.R. § 208.16(f). But, as set forth below, removing an applicant to a third country is not a simple process and there are several requirements that the agencies must first meet. 8 U.S.C. § 1231(b)(2)(D)-(E).

Critically, the Departments must abide by the non-refoulement obligations in *all* cases—regardless of whether the person is in removal proceedings, is subject to expedited removal, or is ineligible for asylum. *See Perez-Guzman v. Lynch*, 835 F.3d 1066, 1080 (9th Cir. 2016).

Here, the Departments violate the withholding statute, CAT, and the United States' international non-refoulement obligations, by: (1) applying the safe third country bar to withholding of removal and CAT; and (2) setting forth an inadequate procedure to determine whether an applicant will be subject to torture or persecution in a third country.

a. The Safe Third Country Bar Cannot Apply to Withholding of Removal and CAT

The IFR illegally bars applicants from applying for withholding of removal and CAT. A plain reading of 8 U.S.C. § 1231(b)(3) demonstrates that this bar cannot apply to these nondiscretionary forms of relief. The withholding statute, which also applies to CAT, expressly lists four bars to relief. 8 U.S.C. § 1231(b)(3)(i)-(iv); 8 C.F.R. § 1208.16(c). The safe third country bar is notably absent from that list. The withholding statute also contains no provision allowing for the Departments to establish additional limitations or conditions to the relief, as Congress provided for in the asylum statute at 8 U.S.C. §1158(c). Congress clearly spoke to the bars to withholding of removal and CAT—and by expanding upon those, the IFR is unlawful. *See Chevron*, 467 U.S. at 842.

The Departments claim that, because withholding and CAT grantees can be removed to an alternative safe country, applicants should be blocked from applying entirely and removed to

[64] There are two forms of relief under CAT: deferral of removal and withholding of removal.

an ACA country at the outset. 84 Fed. Reg. 64,000. This contention, however, ignores the key procedural differences between summary removal without a hearing under an ACA and removal to an alternative country after a hearing wherein an immigration judge granted withholding of removal or CAT.

First, in withholding proceedings, an immigration judge can only designate an alternative country of removal where the applicant has ties, including previously residing there, being born there, or being a subject, national, or citizen. 8 U.S.C. § 1231(b)(2)(D)-(E); *Himri v. Ashcroft*, 378 F.3d 932, 938-40 (9th Cir. 2004) (Jordan improperly designated as a country of removal for non-Jordanian citizen who had no ties to the country). Thus, an immigration judge cannot designate an alternative country merely because that country is a party to an ACA.

Second, in withholding proceedings, applicants are entitled to present full claims of protection from every alternative country of removal. An immigration judge must identify all of the possible countries of removal during the removal hearing. 8 C.F.R. § 1240.10(f). The Departments adopted this requirement, in part, so that applicants for humanitarian protection will know the potential countries of removal and "may apply for protection from [those] countries." *Execution of Removal Orders; Countries to Which Aliens May Be Removed*, 70 Fed. Reg. 666, 671 (Jan. 5, 2005); *Silva-Pereira v. Lynch*, 827 F.3d 1176, 1191 (9th Cir. 2016) (applicants must establish that they would be subject to persecution in the proposed country of removal); *She v. Holder*, 629 F.3d 958, 965 (9th Cir. 2010) (applicants must establish that they would be subject to torture in country where they will actually be removed). "[A]ny protection will then be addressed as part of the removal hearing," which, according to the Departments, would "adequately provide the process that is due." 70 Fed. Reg. 671. This process greatly contrasts with the ACA screening, wherein, as set forth below, applicants have minimal process. Thus, in denying applicants the ability to seek these forms of relief, the agency is denying them protections and safeguards to which they are entitled.

b. The Screening Process Violates Non-Refoulement Standards

Under the non-refoulement obligations, as incorporated at 8 U.S.C. § 1231(b)(3), the United States cannot remove an individual to a country where the Attorney General determines that the applicant's "life or freedom would be threatened." Even if the procedures for making this determination in the context of third country agreements are not specified in the INA, the IFR's screening mechanism provides such minimal process, and its standard is so high, that it is an arbitrary and capricious interpretation of this requirement. *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1127 (N.D. Cal. 2019) (finding that the MPP is contrary to law because the screening does not comply with non-refoulement obligations).

As set forth in UNHCR guidance, screenings to determine whether a person seeking humanitarian relief can be removed to a third country should afford adequate procedural

safeguards, given the "grave consequences" of erroneous determinations.[65] *See INS v. Cardoza–Fonseca*, 480 U.S. 421, 439 n. 22 (1987) (discussing UNHCR's handbook for adjudicators and explaining that it can provide "significant guidance in construing the Protocol, to which Congress sought to conform."); *Ndom v. Ashcroft*, 384 F.3d 743, 753 n. 4 (9th Cir. 2004) (UNHCR's Handbook is "persuasive authority in interpreting the scope of refugee status under domestic asylum law."). The IFR does not contain such safeguards because it: (1) only provides notice in writing; (2) does not provide a consultation or preparation period and potentially does not permit counsel to be present during interviews; (3) requires applicants to affirmatively state a fear during the screening; and (4) denies the right to appeal a negative determination to an immigration judge.

First, the IFR requires that immigration officers notify applicants in writing, rather than verbally, of their right to claim a fear in the third country. 84 Fed. Reg. 64,009. By providing this legally complex notification in writing only, the Departments will block illiterate applicants from presenting their claims. The IFR also contains no requirement that the notice be translated into the applicant's langauge.

Second, there is no "consultation period" allowed before the interview. 84 Fed. Reg. 64,003. Thus, under the IFR, it does not appear that the Departments are required to provide applicants any time for preparation prior to the screenings or to provide them with the ability to consult with a person of their choosing.[66] The IFR does not expressly address whether applicants can consult with counsel during and before the screening, but internal guidance suggests that the Departments may try to block this right as well.[67] If the IFR does indeed block access to counsel, this would not only violate the non-refoulement protocols, but also the right to counsel under the APA, 5 U.S.C. § 555(b). *Doe v. McAleenan*, No. 3:19-CV-2119-DMS-AGS, 2019 WL 6605880, at *4 (S.D. Cal. Nov. 12, 2019), *modified sub nom*. No. 3:19-CV-2119-DMS -AGS, 2019 WL 6605882 (S.D. Cal. Dec. 3, 2019). As a practical effect, without preparation or assistance of counsel, many applicants will go into screening interviews without understanding the purpose or consequences of the interview and without the ability to prove their claims.

Third, during the interview, officers will not question applicants about their fear of persecution or torture in a third country unless the applicant first affirmatively raises it to the

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[65] UNHCR, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum No. 30 (XXXIV)*, Rep. of Exec. Comm. on the Work of Its Thirty-Fourth Session, ¶ e, U.N. Doc. A/38/12/Add.1(Oct. 20, 1983), https://tinyurl.com/UNHCR-UnfoundedApplications.

[66] The consultation period is a period of time during which the asylum seeker would be able to consult with a person of their choosing and would be afforded time to prepare for the threshold screening. *See, e.g.*, *Canadian Agreement Rule*, 69 Fed. Reg. 69,482 (description of consultation period in the regulations implementing the safe third country agreement between the U.S. and Canada).

[67] *USCIS – Guatemala ACA Guidance*, *supra* note 7, at 5.

officer. 84 Fed. Reg. 64,002. If the applicant does not affirmatively state that s/he is afraid of removal to a third country, the applicant will be barred from applying for protection in the United States and removed to the third country. *Id*. Thus, if an applicant did not fully grasp the written notification, the applicant will never have been informed of his/her right to raise a fear during the interview. Even if the applicant understands the notice, many applicants will be fearful and unsure of when and how to raise the fear if the officer does not ask them.

Fourth, the risk of erroneous removals greatly increases because the asylum officer's decision is not reviewable by an immigration judge.[68] 84 Fed. Reg. 64,009; 8 U.S.C. § 1231(b)(3).

Significantly, UNHCR has advised that the presence of even one of the above-listed characteristics in a screening interview will violate non-refoulement requirements:

> Screening procedures that contain one or more of the following elements would be considered to lack key safeguards required by international law: applicants are not asked whether they fear harm in the receiving country and must express that affirmatively; applicants do not have access to counsel in the screening procedure; a decision is not appealable by the applicant; and applicants cannot meaningfully prepare their refugee status determination claims by meeting with lawyers[.][69]

The screening's several procedural defects make it an inadequate non-refoulement screening mechanism. The States also note that, in addition to non-refoulement safeguards, the Fifth Amendment's due process protections apply at the United States Border, and thus apply to the ACA screenings. *See Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1220 (S.D. Cal. 2019) (relying on *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) and *Rodriguez v. Swartz*, 899 F.3d 719, 730 (9th Cir. 2018), *petition for cert. filed*, No. 18-309(Sept. 7, 2018), to hold that the Fifth Amendment's due process protections apply to asylum processing at the border); *Rodriguez*, 899 F.3d at 730 (finding that the Fourth Amendment applied to the actions of an officer on United States soil, even though the subject of the seizure was on Mexican soil). The screening's many procedural infirmities also raise significant due process concerns.

In addition, the screening's legal standard is too high, particularly in light of the minimal process afforded. By way of guidance, UNHCR has explained that expeditious screenings should have a low standard, only denying cases that are "manifestly unfounded" or "abusive."[70] The criteria for a determination "should be defined in such a way that no application will be

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[68] The Departments argue that they can deny this right because they did in the Canadian Agreement interviews. 84 Fed. Reg. 64,001. But, this argument is unpersuasive, given that the risk of refoulement is much higher here due to the dangerous conditions of the ACA countries.

[69] Brief for UNHCR as Amici Curiae Supporting Appellees, *Innovation Law Lab v. McAleenan*, No. 19-15716 (9th Cir. 2019).

[70] *Id.*

treated as manifestly unfounded or abusive unless its fraudulent character or its lack of any connection with the relevant criteria is truly free from doubt." [71]

Under the IFR, the only way an applicant can pass the threshold screening is to establish that s/he will, more likely than not, be tortured or persecuted in a third country. 84 Fed. Reg. 63,996. That is the same standard that applicants must prove for an ultimate grant of withholding of removal or CAT.[72] 8 U.S.C. § 1231(b)(3). While testimony alone may be sufficient to meet this standard, the asylum seeker must also present a "satisfactory explanation of why corroborative documentation is not reasonably available." 84 Fed. Reg. 64,003. For individuals who are feeling violence and traveling on foot for thousands of miles, this is an extremely high burden and requires a high level of sophistication, an understanding of the United States' immigration laws, and a working knowledge of the conditions of countries through which they either merely transited, or have never even set foot on. Many applicants with bona fide claims for protection from a third country will not be able to establish a full claim for withholding of removal or CAT from the confines of detention, without an attorney, and without time to prepare. Thus, there is no way that the Departments can be "free from doubt" that they are not removing individuals who will face persecution or torture in third countries.

The unreasonableness of the IFR's burden of proof is also evident when it is compared to the United States' other non-refoulement screening tools. Expedited removal screenings (referred to as the credible and reasonable fear processes) employ intentionally low thresholds to avoid erroneously removing applicants without a hearing. 8 U.S.C. § 1225(b)(1)(A); 142 Cong. Rec. S11491-02, 1996 WL 565553(statement of Sen. Hatch) ("The standard adopted in the conference report is intended to be a low screening standard for admission into the usual full asylum process.") For example, applicants barred from asylum who are subject to expedited

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[71] *Id.* (quoting, UNHCR, *Follow-up on Earlier Conclusions of the Sub-Committee on the Determination of Refugee Status with Regard to the Problem of Manifestly Unfounded or Abusive Applications*, ¶ 19, U.N. Doc. EC/SCP/29 (Aug. 26, 1983), https://tinyurl.com/UNHCRFollowUp.)

[72] Internal guidance suggests that DHS will be employing an even higher withholding of removal standard during these screenings, potentially blocking victims who suffered past persecution while traveling through these countries. *See Guatemala ACA Guidance*, *supra* note 7, at 18. Under long standing withholding law, if an applicant establishes that they were persecuted in the past, they are entitled to a rebuttable presumption that they will face persecution in the future, and are entitled to withholding of removal. 8 C.F.R. § 208.16(b)(1); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1159 (9th Cir. 1999). This presumption is rebutted by a showing that they could avoid persecution by relocating or that circumstances or conditions have changed. *Id*. Yet, per the IFR's guidance issued to asylum officers, "if past persecution is established, presumption would not apply." *Guatemala ACA Guidance*, *supra* note 7, at 18. This indicates that DHS intends to ignore decades of established precedent to make an already onerous showing more difficult.

removal, go through the reasonable fear process, wherein they only have to prove a "reasonable possibility," or a 10% chance, of torture or persecution. 8 C.F.R. § 1208.31(c). Even these screenings, which themselves lack several key procedural protections, offer greater protections than the system put in place by the IFR. Unlike the ACA screenings, applicants in expedited removal screenings are informed of their right to ask for protection, do not need to affirmatively state a fear, have the right to consultation, and have the right to appeal a negative determination to an immigration judge. *Id*.; 8 C.F.R. § 208.30. Thus, expedited removal screenings have both a lower burden of proof, and more procedural safeguards, than the ACA screenings.

The Department avers that the IFR's burden of proof is reasonable because the Canadian Agreement's screenings also use a preponderance of the evidence standard. 84 Fed. Reg. 64,001. But, unlike the ACA applicants, applicants subject to the Canadian Agreement receive the same protections as applicants in expedited removal screenings. *Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry* (Canadian Agreement Rule), 69 Fed. Reg. 69,482 (Nov. 29, 2004) (codified at 8 C.F.R. pts. 208, 212, 235). Further, the Canadian Agreement did not raise the same refoulement concerns that are present here, given the dangerous conditions and seriously deficient asylum systems in the ACA countries. *See supra* Part I(A)(2). This ACA screening is unprecedented when compared to the expedited removal screenings and the Canadian Agreement screening.

The only comparable non-refoulement standard and process to the IFR is that used in the Migrant Protection Protocols, which was enjoined by a district court as contrary to law due to many of the same deficiencies that are present here. *Innovation Law Lab*, 366 F. Supp. 3d at 1127. Like here, the Departments' non-refoulement interviews place the burden on the applicant to affirmatively request protection, deny the right to appeal the determination to an immigration judge, and make applicants prove they more likely than not will subject to persecution or torture. *Id*. The district court found that these interviews do not provide the process required, explaining that "these procedures undeniably provide less protection than prior legislative and administrative rulemaking procedures have concluded is appropriate upon removal, either expedited or regular." *Id*.

3. The IFR is Arbitrary and Capricious

Under the APA, federal agencies must consider "the advantages *and* the disadvantages of agency decision" before taking action. *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1046 (N.D. Cal. 2018) (*Regents I*) (emphasis in original) (quoting *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015)). 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 regulation is appropriate. *Michigan*, 135 S. Ct. 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 40–43 (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.

Here, the INA only allows for asylum seekers to be subject to the safe third country where when the third country will offer "a full and fair procedure for determining a claim to asylum or equivalent temporary protection" and where "the individual's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1158(a)(2)(A). In adopting the IFR, which will implement agreements with Guatemala, El Salvador, and Honduras, the Departments did not analyze these statutory requirements. *See* 84 Fed. Reg. 63,994. The IFR does not address any of the countries' asylum systems, their procedures, or history or capacity to offer humanitarian protection. Moreover, while the IFR acknowledges that most asylum seekers hail from these three countries, it does not so much as reference these countries' conditions or the likelihood that vulnerable individuals will be subject to persecution there. *See* 84 Fed. Reg. 63,995.

In addition, the Departments failed to adequately justify their actions in implementing the IFR. The IFR contains discussion of the alleged crisis at the southern border and its strain on the immigration system, including the large backlog of asylum cases; the allegedly large percentage of asylum seekers who do not appear for their hearings; and the supposedly low ultimate rate of asylum grants compared with positive credible fear findings. 84 Fed. Reg. 63,995. A number of these claims are questionable at best. The Departments' suggestion that many asylum seekers fail to appear in court is contrary to the evidence; in fact, the U.S. DOJ's own statistics show that 89% of asylum seekers appear at their hearings.[73] Those who were released from DHS custody, such as those who had positive credible fear determinations, have high attendance rates: 86% of such asylum seeking families appear for their hearings and 81% of non-family individuals released from DHS custody appear.[74] These numbers are higher when the asylum seeker has an attorney, with attendance rates between 97% and 99%.[75]

In measuring the merit of asylum cases resulting from the credible fear process, the Departments muddle the statistics by focusing on the number of positive credible fear interviews received in 2018 with the number of asylum applications filed and granted that same year. 84 Fed. Reg. 63,996. This is not an accurate measure of the success rate or the merit of those applicants' claims. Asylum seekers have one year to file their applications; therefore, some of those individuals could still have been in the process of completing their applications. Moreover,

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[73] U.S. Dep't of Justice, Exec. Office for Immigration Review, *Statistics Yearbook Fiscal Year 2017* 33 fig.25, https://tinyurl.com/EOIRStats (showing that only 11% of removal orders in asylum matters were issued *in abstentia*, indicating that the asylum seeker failed to appear).

[74] Am. Immigration Council, *Immigrants and Families Appear in Court: Setting the Record Straight* (July 30, 2019), https://tinyurl.com/AIC-Court.

[75] *Id.*

most asylum cases remain pending for several years, therefore the applications of those who did apply in 2018 would most likely have continued pending through the end of that year. [76] Lastly, asylum applicants from the Northern Triangle, who will be particularly impacted by the IFR, have had comparable rates of success to other asylum seeking populations in the past. The countries of El Salvador, Honduras, and Guatemala had the second, third, and fourth, respectively, most nationals who received asylum in FY 2017.[77]

The IFR is also invalid because it greatly diverges from prior agency rules without offering a reasoned analysis for the departure. For example, the regulation implementing the Canadian Agreement provided important "procedural safeguards in the threshold screening interview." *Canadian Agreement Rule*, 69 Fed. Reg. 69,481. These include the "[o]ption to consult with a person of the [asylum seeker's] choosing; sufficient time to contact a consultant, relative, or relevant advocates, at no expense to the U.S. government; sufficient time to prepare for the eligibility interview; an assurance that the interview would not occur sooner than 48 hours after the asylum seeker's arrival at a detention facility, unless the individual waives this preparation period." *Id.* at 69,481-69,482. The IFR does away with these safeguards, only stating that "this rule does not mandate such a period […] Rather, this rule expands the threshold screening process itself to allow for an [asylum seeker] to demonstrate that he or she is 'more likely than not' to be subject to persecution." 84 Fed. Reg. 64,003. In reality this "expansion" simply means that asylum seekers must be prepared to prove the full merits of a persecution claim as soon as they present themselves at the port of entry or are apprehended. And they will have to do this without any assistance or time to gather information about a third country where they might have never been or know much about. The Departments fail to discuss why these safeguards are not necessary here, even though the consequences of erroneous determinations could make the difference between life or death for asylum seekers.

In sum, the Departments failed to consider important consequences of the IFR, and instead provided an unreasonable justification for it.

4. The IFR Was Improperly Promulgated Without Notice and Comment in Violation of the APA

The IFR at issue here was published on November 19, 2019, and made effective immediately. 84 Fed. Reg. at 63,994. This promulgation violates the APA's procedural requirements of notice and comment and the 30-day waiting period required by 5 U.S.C. § 553(c), (d). The notice and comment procedures "ensure public participation in rulemaking," *Paulsen v. Daniels*, 413 F.3d 999, 1004 (9th Cir. 2005) (internal citations omitted), as well as "due deliberation of agency regulations, and foster the fairness and deliberation that should

[76] *See* Syracuse U. Transactional Records Access Clearinghouse (TRAC), *Average Time Pending Cases Have Been Waiting in Immigration Courts as of September 2019*, https://tinyurl.com/TRACbacklog (last visited Dec. 17, 2019).

[77] Mossaad, *supra* note 4 at 6.

underlie a pronouncement of such force." *E. Bay Sanctuary Covenant v. Trump (EBSC II)*, 909 F.3d 1219, 1251 (9th Cir. 2018) (internal citations and quotation marks omitted). Allowing comments after the IFR becomes effective does not satisfy the notice and comment requirements. *See* 84 Fed. Reg. at 63,994 (allowing the submission of public comments for 30 days after the IFR's effective date). In fact, it is "antithetical to the structure and purpose of the APA for an agency to implement a rule first, then seek comment later." *United States v. Valverde*, 628 F.3d 1159, 1164 (9th Cir. 2010) (citation omitted). The Departments argue that the IFR is subject to the "good cause" and "foreign affairs" exceptions to notice and comment, 5 U.S.C. § 553(a)(1), (b)(B). 84 Fed. Reg. at 64,005-64,008. As set forth below, these arguments are unavailing.

To begin, the Departments have not established good cause for noncompliance with the notice and comment provisions. The Departments state that a notice and comment period would result in a "dramatic increase in the numbers of [immigrants] who enter or attempt to enter the United States to file asylum applications before the effective date." *See* 84 Fed. Reg. at 64,006. The Departments cite several rules previously issued without notice and comment, including November 2018 and July 2019 asylum interim final rules, which similarly bypassed notice and comment based on the same argument. *Id*. Tellingly, even though both rules were temporarily enjoined at various times, the Departments do not assert that those injunctions gave way to any surge in applications. *See id*. at 64,006-08. Moreover, the fact that the Departments have utilized the "good cause" exception in the past does not make the exception applicable now, as this is a consideration that must be made on a "case by case basis." *Valverde*, 628 F.3d at 1164 (citation omitted).

The Departments also cite a court order concerning the November 2018 asylum rule, which relied on an October 2018 article, to find that Departments could infer that smugglers might communicate the impending rule to potential asylum seekers and cause a surge in immigration during the notice and comment period. 84 Fed. Reg. at 64,006 (citing *E. Bay Sanctuary Covenant v. Trump* (*EBSC III*), 354 F. Supp. 3d 1095,1115 (N.D. Cal. 2018). Remarkably, that same court enjoined the subsequent July 2018 asylum rule that likewise relied on the same article, finding that "a single, progressively more stale article cannot excuse notice-and-comment for every immigration-related regulation ad infinitum." *E. Bay Sanctuary Covenant v. Trump (EBSC IV)*, 385 F. Supp. 3d 922, 950 (N.D. Cal. 2019), *order reinstated* 391 F. Supp. 3d 974 (N.D. Cal. 2019) (emphasis in original). The Departments' conjecture and past use of the exception, without more, do not constitute "a sufficient showing that good cause exists" now. *Nat. Res. Def. Council, Inc. v. Evans*, 316 F.3d 904, 912 (9th Cir. 2003) (citations and quotations omitted). The Departments have fallen short of the requirement to make clear that they cannot both follow section 553 and execute their statutory duties. *Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 14 F.3d 429, 441 (9th Cir. 1993) (quoting *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992)).

In addition, the Departments do not meet the required showing for the foreign affairs exception. For that exception to apply, an agency must demonstrate the notice and comment provisions "[would] provoke *definitely* undesirable international consequences." *Yassini v.*

Crosland, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980) (emphasis added) (internal citations omitted); accord *EBSC II*, 909 F.3d at 1252. Here, the Departments argue delay caused by notice and comment would disrupt continued diplomatic negotiations with the ACA countries, weaken the United States' ability to "to pursue the negotiating strategy it deems to be most appropriate as it engages its foreign partners," and hinder the ability to enter into other such agreements. 84 Fed. Reg. 64,005. These harms are both speculative and unsupported by the record. First, the IFR does not explain how, or cite anything to substantiate, its allegation that the comment period would disrupt current negotiations. Second, given that there are questions surrounding the legality of the ACA in Guatemala[78] and that the Northern Triangle countries do not have the capacity to adjudicate high volumes of cases, it is unclear why the Departments have a diplomatic interest implementing the ACAs immediately. *See supra* Part I(A)(1). If anything, delay would possibly mitigate these issues for the signatory countries, whereas the IFR's immediate implementation exacerbates them. Third, the Departments complied with the APA's procedural requirements in implementing the Canadian Agreement, and there were no accompanying negative consequences. For all of the foregoing reasons, these speculative and vague claims cannot support a foreign affairs exception.

The Departments' failure to engage in pre-rule notice-and-comment procedures as required by the APA deprived the States of the ability to influence the agencies' decision. *See Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 976 (9th Cir. 2003) (stating, in standing context, that "[i]t suffices that the agency's decision *could be influenced*" by public participation) (citation omitted) (emphasis in original). As sovereigns responsible for the health, safety, and welfare of millions of people within their respective borders, the States have unique interests and perspectives to contribute on issues of national importance and widespread impact, particularly when such policies will cause prospective residents of our States unnecessary, substantial, and enduring harm. If the States had been provided with an opportunity to comment on the IFR before it was promulgated, they would have raised the myriad harmful impacts and unlawful aspects of the IFR discussed above before it took effect.

B. The IFR Violates the Constitution

The IFR is unconstitutional because it discriminates against individuals based on their race, ethnicity, and national origin in violation of the Fifth Amendment's equal protection principles. In determining whether a proposed rule violates the equal protection clause, courts inquire into "circumstantial and direct evidence of [discriminatory] intent," starting at whether action "bears more heavily on one race than another," and looking to legislative and administrative history, statements by decision makers, and substantive and procedural departures from past rulemaking. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp. (Arlington Heights)*, 429 U.S. 252, 266 (1977).

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[78] *See* Sofia Menchu, *Guatemalan Court Halts 'Safe Third Country' Designation for Asylum Seekers*, REUTERS (July 19, 2019), https://tinyurl.com/MenchuReuters.

Courts have recognized equal protection claims relating to the federal government's immigration policies that primarily impacted non-European, non-white migrants. *See, e.g.*, *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec. (Regents II)*, 298 F. Supp. 3d 1304, 1315 (N.D. Cal. 2018) (denying motion to dismiss Equal Protection claims, holding that allegations raised "a plausible inference that racial animus towards Mexicans and Latinos was a motivating factor in the decision to end DACA"), *aff'd* 908 F.3d 476 (9th Cir. 2018), *petition for cert. granted* (No. 18-587)(June 28, 2019)*; see also Casa de Maryland, Inc. v. Trump*, 355 F. Supp. 3d. 307, 325-26 (D. Md. 2018); *Ramos v. Nielsen (Ramos II)*, 336 F. Supp. 3d 1075, 1098-1105 (N.D. Cal. 2018); *Centro Presente v. United States Dep't of Homeland Sec.*, 332 F. Supp. 3d. 393, 414-16 (D. Mass. 2018). The IFR bears many of the hallmarks of these earlier actions, including that it weighs more heavily on Latinos, that it follows several discriminatory comments by President Trump and members of his administration, and that it represents a significant departure from prior related rulemaking. *See Regents II*, 298 F. Supp. 3d at 1315 (finding the Administration's "about face" in policy, done "at lightning speed, suggests that the normal care and consideration within the agency was bypassed").

To begin, the IFR will have a disparate impact on Latinos. While the IFR itself does not contain specific a geographic limit, the Departments will primarily be applying it to Latino applicants who enter through the southern border. Indeed, at this point, the Departments are explicitly only applying the Guatemalan ACA to citizens of El Salvador and Honduras.[79] Further, the IFR only applies to applicants amenable to expedited removal, which mostly encompasses Central American applicants who enter through the southern border.[80] 84 Fed. Reg. 63,994. Also, the Canadian Agreement will continue to control the ports of entry at the northern land border, and therefore, the IFR cannot apply to those Canadian border entries. Even to the extent that the IFR applies to entries without inspection through the Canadian border, such entries are a tiny fraction when compared to entries at the southern border.[81] Thus, based on sheer geography, the IFR will have a disparate impact on asylum seekers fleeing the Northern Triangle.[82] The Departments seem to recognize this, explaining, "a far greater number of [immigrants] arriving at the southern border will be affected by the non-Canada ACAs currently

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[79] *USCIS – Guatemala ACA Guidance*, *supra* note 7, at 10.

[80] U.S. Customs and Border Protection, *U.S. Border Patrol Nationwide Apprehensions by Citizenship and Sector in FY2018* 36, https://tinyurl.com/CBPStats2018 (396,579 individuals were apprehended at the southern border, compared to 4,316 at the Canadian border and 3,247 at coastal borders)(last visited Dec. 13, 2019); U.S. Customs and Border Protection, *CBP Southwest Border and Claims of Credible Fear Total Apprehensions/Inaddmissibles* (FY2017-FR2018), https://tinyurl.com/CBPClaimsofFear (last visited Dec. 13, 2019).

[81] Kerry Sanders et al, *Illegal Border Crossings from Canada Quietly Rising, Data Shows*, NBC NEWS (March 9, 2019), https://tinyurl.com/SandersNBCCanada (960 individuals crossed without inspection from Canada in 2018).

[82] TRAC, *Border Patrol Arrests CBP Data through April 2018*, https://tinyurl.com/TRACcbp (showing data of CBP arrests and corresponding credible fear claims by country) (last visited Dec. 13, 2019).

under development" than the Canadian Agreement. *Id.* at 64,005. This outcome is also consistent with the stated purpose of the IFR, which laments that those arrested at the southern border are less likely to have bona fide asylum claims. *Id.* at 63,996.

In addition, the history of statements and actions by members of the Trump Administration indicating racial animus towards non-white immigrants and Latinos, Latino asylum seekers, and migrants from Central America evidences more than a plausible inference that racial animus was a motivating factor behind the IFR. *Arlington Heights*, 429 U.S. at 266-68; *Regents II*, 298 F. Supp. 3d at 1315 (finding President Trump's campaign rhetoric to be circumstantial evidence of animus); *Casa de Maryland*, 355 F. Supp. 3d. at 325-26; *Ramos II*, 336 F. Supp. 3d at 1100-1101; *Centro Presente*, 332 F. Supp. 3d. at 415 (finding that "statements of animus by people plausibly alleged to be involved in the decision-making process" was relevant evidence of an equal protection violation). For example, the President has claimed that asylum seekers at the southern border were "rapists," MS-13 gang members, and "unknown Middle Easterners," despite the lack of any supporting evidence for his claims.[83] Stephen Miller, a top advisor responsible for crafting the Trump Administration's immigration policies, has a history of connections to white nationalist organizations, and has promoted anti-immigrant conspiracy theories from white nationalist websites.[84] And acting USCIS Secretary Cuccinelli stated that *The New Colossus*, the famous poem welcoming immigrants inscribed on the Statute of Liberty, refers to "people coming from Europe."[85] These statements and actions are indicia of racial animus. *See Regents II*, 298 F. Supp. 3d at 1315 (finding President Trump's campaign rhetoric to be circumstantial evidence of animus); *Casa de Maryland*, 355 F. Supp. 3d. at 325-26; *Ramos II*, 336 F. Supp. 3d at 1100-1101; *Centro Presente*, 332 F. Supp. 3d. at 415.

The substantive and procedural differences between the ACA and the Canadian Agreement also evidence the IFR's discriminatory purpose. Substantively, the Canadian Agreement and its implementing regulations afford applicants more safeguards than the IFR. Unlike the IFR's screening mechanism, Canadian Agreement interviewees have the same protections as those in credible fear interviews, such as, preparation time. Canadian Agreement Rule, 69 Fed. Reg. 69,482. In addition, the Departments executed the Canadian Agreement with greater deliberation and consultation with experts. To be sure, the Departments implemented the Canadian Agreement through regular rulemaking procedures, whereas this IFR went to effect immediately without a notice and comment period. *Id.* at 69,480. Further, UNHCR entered into

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[83] *See* Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 22, 2018, 5:37 AM), https://tinyurl.com/mid-easterners-tweet; Ted Hesson, *Trump Has Whipped up a Frenzy on the Migrant Caravan*, POLITICO (Oct. 23, 2018), https://tinyurl.com/Hesson-Politico.

[84] Michael Edison Hayden, *Stephen Miller's Affinity for White Nationalism Revealed in Leaked Emails*, SOUTHERN POVERTY LAW CENTER (Nov. 12, 2019) https://tinyurl.com/SPLCMiller.

[85] Meagan Flynn, *'Clearly, He Did Not Take Part in Our Curriculum': Historians Bash Ken Cuccinelli's Revised Statue of Liberty Poem*, WASH. POST. (Aug. 14, 2019), https://tinyurl.com/FlynnCuccinelli.

an agreement with the United States and Canada to monitor the Canadian Agreement[86] and submitted a draft-monitoring plan prior the publication of the implementing regulations. *Id.* at 69485. Here, UNHCR is not a party to the agreement and has not drafted a monitoring plan. In fact, UNHCR indicated that it has limited knowledge of the IFR, has had few discussions with the signatory countries about the plans, and is in a dialogue with the countries to "enumerate [its] concerns" with the ACA.[87] The Departments' worse treatment of applicants covered by the IFR, who are more likely to be Latino asylum seekers, and less judicious implementation of it, mitigate strongly that there is a discriminatory purpose behind the IFR. *See Arlington Heights*, 429 U.S. at 267. The strong probability that the IFR was driven by animus in violation of the Constitution supports its withdrawal.

III. THE IFR HARMS THE STATES

The States welcome thousands of asylum seekers each year. For example, California is home to the highest number of individuals granted affirmative asylum of any state.[88] New York, New Jersey, Illinois, and Washington, are also in the top ten states for affirmative asylum grants.[89] Together, between 2015 and 2017, these five States were home to 29,709 affirmative asylees.[90] By blocking asylum seekers from the asylum process, the IFR harms the States in several ways: (1) the IFR deprives the States of immigrants' vital and significant economic contributions; (2) the IFR will cause the States' agencies and nonprofits to divert resources; and (3) the States have an interest in family unity, which is undermined by the IFR.

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

Asylees, like other immigrants, are vital to the States' workforce and economic success. The following are some examples of immigrants' significant contributions to the States:

- California: In great part due to the 6.6 million immigrants who form a part of California's workforce, the state has become the fifth-largest economy in the world.[91] 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.[92] In 2014, immigrant-led households in

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[86] UNHCR, *Monitoring Report Canada - United States "Safe Third Country" Agreement 29 Dec. 2004 – 28 Dec. 2005* 3 (June 2006), available at: https://tinyurl.com/UNHCRMonitoring.

[87] UNHCR, *Statement on New U.S. Asylum Policy*, *supra* note 33.

[88] Mossaad, *supra* note 4, at tbl. 13.

[89] *Id.*

[90] *Id.*

[91] Am. Immigration Council, *Immigrants in California* 2 (Oct. 4, 2017), https://tinyurl.com/CAP-Immigrants-in-CA.

[92] *Id.* at 3-4.

California paid over $26 billion in state and local taxes and exercised almost $240 billion in spending power.[93] In 2015, immigrant business owners accounted for over 38% of all Californian entrepreneurs and generated almost $22 billion in business income.[94]

- Connecticut: Immigrants pay $5.9 billion in taxes and have a spending power of $14.5 billion.[95] There are over 37,000 immigrant entrepreneurs in Connecticut, employing over 95,000 people in the state.[96]

- District of Columbia: Immigrants help power the District of Columbia's economy. In 2014, immigrant-owned businesses generated $121.9 million in income and employed 41,672 people in the District.[97] That same year, immigrants in the District earned $4 billion and paid $336.9 million in local taxes.[98]

- Hawaii: The contributions of immigrants make up a significant portion of Hawaii's economy. Over 22% of Hawaii's business owners are foreign-born,[99] and in 2014, immigrants contributed $668.5 million in state and local taxes.[100]

- 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 create or preserve 25,664 local manufacturing jobs.[101] Also, immigrant-owned businesses generated $2.6 billion in business income in Illinois in 2014.[102]

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[93] *Id.* at 4.

[94] *Id.*

[95] New Am. Econ., *Immigrants and the Economy in Connecticut*, https://tinyurl.com/CT-Immigration-Economy (last visited Dec. 13, 2019).

[96] *Id.*

[97] New Am. Econ., *The Contributions of New Americans in Washington, DC* 2 (Aug. 2016), https://tinyurl.com/immigrantsDC.

[98] *Id.* at 5.

[99] The Fiscal Pol'y Inst., *Immigrant Small Business Owners* 24 (June 2012), https://tinyurl.com/Imm-Business-Owners.

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

[101] New. Am. Econ., *New Americans in Chicago* 1, 4 (Nov. 2018), https://tinyurl.com/Immigrants-Chicago.

[102] New Am. Econ., *The Contributions of New Americans in Illinois* 2 (Aug. 2016), https://tinyurl.com/IL-Immigration-Economy.

- Massachusetts: Immigrants make up 20% of the state's workforce and immigrant-led households paid $3 billion in state and local taxes in 2014.[103]

- Maryland: Immigrant entrepreneurs make up almost 20% of Maryland's business owners, generating more than $1 billion in combined annual revenue.[104] Notably, many in Maryland hail from El Salvador, one of the nationalities particularly impacted by the Rule.[105]

- Michigan: Immigrants make up just under 10% of the state's workforce, pay approximately $6.7 billion in state and local taxes, have a spending power of $18.2 billion, and comprise close to 34,000 of the state's entrepreneurs.[106]

- Minnesota: Immigrant workers comprised 10% of the labor force in 2015, and over 15% of all Minnesota healthcare support employees and over 20 % of those working in the computer and math sciences are immigrants.[107] In 2014 immigrant-led households in Minnesota paid $1.1 billion in state and local taxes, and in 2015 immigrant business owners generated $489.1 million in business income.[108]

- Nevada: Nevada'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.[109]

- New Jersey: Immigrants make up over 22% of the population, nearly 28% of the labor force in New Jersey, and contribute over $24 billion in taxes each year.[110] Immigrant-owned businesses employee nearly 390,000 people in New Jersey.

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[103] Am. Immigration Council, *Immigrants in Massachusetts* (Oct. 5, 2017), https://tinyurl.com/AIC-Imm-MA.

[104] Am. Immigration Council, *Immigrants in Maryland* (Oct. 16, 2017), https://tinyurl.com/MarylandEcon.

[105] *Id.*

[106] Migration Pol'y Inst., *State Demographics Data: Michigan*, https://tinyurl.com/MI-Immigrant-Workforce (last visited Dec. 13, 2019); New Am. Econ., *Immigrants and the Economy in Michigan*, https://tinyurl.com/MI-Immigration-Economy (last visited Dec. 13, 2019).

[107] *See* Am. Immigration Council, *Immigrants in Minnesota* (2017), https://tinyurl.com/AIC-Minn.

[108] *Id.*

[109] New Am. Econ., *The Contributions of New Americans in Nevada* 6 (Aug. 2016), https://tinyurl.com/EconNevadaImmigrants.

[110] *See* New Am. Econ., *The Contributions of New Americans in New Jersey* (Aug. 2016), https://tinyurl.com/NewAmNJ.

- New Mexico: Almost 10% of New Mexico's population is foreign born.[111] Immigrants in New Mexico contributed over a billion dollars in yearly taxes in 2014 and undocumented immigrants in the state paid an estimated $67.7 million in state and local taxes. Immigrant entrepreneurs represent more than one in seven business owners in New Mexico, accounting for 15% of all self-employed New Mexico residents in 2015, and generated $375.1 million in business income[112]

- Vermont: Immigrants are a valued part of the community and economy in Vermont, which faces a declining birth rate. Vermont has an extremely low unemployment rate (*e.g.*, 3.2% in 2016), and many employers have found it difficult to fill positions. [113] As such, immigrants play an outsize role in several industries, and are vital to the success of many business.[114] Immigrants contributed roughly $58 million in state and local taxes in 2016.[115]

- Washington: One in six workers in Washington is an immigrant. Immigrants are particularly important to Washington's agricultural economy, which is the second-highest food-producer in the nation. Over half of the state's farmers, fishers, and foresters are immigrants. Immigrants are also a vital share of the state's small-business owners, accounting for 17.2% of all self-employed residents and generating $1.6 billion in business income.[116]

The States' interests, therefore, weigh heavily against policies, such as the IFR, that present significant hurdles to the safe arrival and integration of potential asylees.

Furthermore, by removing humanitarian protection as an option for legal status for many immigrants, the IFR will increase the numbers of immigrants without legal status who will be unable to work legally and will result in decreased economic contributions to the States. 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.[117] Similarly, according to a study by the Institute of Taxation and Economic

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[111] U.S. Census Bureau, *New Mexico*, https://tinyurl.com/CensusNM (last visited Dec. 14, 2019)(statistics based on the 2017 American Community Survey).

[112] Am. Immigration Council, *Immigrants in New Mexico* 4 (2017), https://tinyurl.com/AmImmCouncilNM.

[113] *See* Am. Immigration Council, *Immigrants in Vermont* 1, 6-8 (2017), https://tinyurl.com/AmImmCouncilVT.

[114] *Id.*

[115] *Id.* at 4.

[116] Am. Immigration Council, *Immigrants in Washington* (2017), https://tinyurl.com/AmImmCouncilWA.

[117] Inst. on Taxation and Econ. Policy, *Undocumented Immigrants' State & Local Tax Contributions* 3 (Mar. 2017), https://tinyurl.com/ITEP-UndocTaxes.

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.[118] Additionally, legal status facilitates the provision of services and allows individuals to integrate confidently into the community rather than feeling consigned to the shadows. 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").

B. The IFR Will Harm State Funded Legal Service Programs

Legal counsel is essential in immigration matters, and can be the difference between humanitarian protection and removal.[119] Recognizing the importance of proper legal guidance, several of the States fund nonprofit organizations to provide legal assistance in immigration-related matters. For example, since FY 2015-16, California has allocated $152 million to nonprofit legal service organizations through the Immigration Services Funding programs as well as for the California State University and California Community College Chancellor's Office.[120] 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.[121] Similarly, Washington allocated $1 million in FY 2019 to legal service organizations serving asylum seekers and other migrant populations.[122] And, 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.[123] The District of Columbia allocated $2.5 million for FY 2020 to programs that provide legal services to its immigrant population, including asylum seekers.[124] New Jersey also allocated $2.1 million in state funds in FY 2019 and 2020 for legal assistance to individuals in

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[118] *Id.*

[119] Philip Bump, *Most Migration to the U.S. Costs Money. There's a Reason Asylum Doesn't.*, WASH. POST (April 30, 2019), https://tinyurl.com/BumpWashPost ("In 2017, 90 percent of those without legal representation were denied asylum in immigration court while only 54 percent of those with legal representation were denied.").

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

[121] Fiscal Year 2020 Appropriations Act, H.B. 260, 150 Gen. Assemb. (Del. 2019) (effective July 1, 2019), https://tinyurl.com/Grantsinaid.

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

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

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

removal proceedings.[125] Under an Oregon law, passed in 2019, Innovation Law Lab, a legal services organization, would receive $2 million in funding for immigration defense.[126]

Because of the IFR, state-funded legal service providers will need to shift resources to respond to the IFR's new and complicated requirements. The IFR imposes a barrier to humanitarian protection, as well as a new complex screening mechanism with a very high burden for applicants to meet. *See supra* Part II(A)(2)(b). These changes will frustrate the missions of legal services organizations in the States and require the allocation of additional time and resources for each case. 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,[127] the IFR 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 to immigrant communities, the IFR directly harms the States' financial interests.

C. The IFR Harms the States' Interest in Family Unity

The States will feel the effect of the separation of families under the IFR. *See supra* Part I(C). Intact families provide crucial social support, which strengthens not only the family unit, but the neighborhood, community, and civic society. *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 well being of the nation. Psychologically and socially, the reunion of family members with their close relatives promotes the health and welfare of the United States."[128]

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

[126] H.B. 5050, 80th Or. Legis. Assemb., 2019 Reg. Sess. (Or. 2019), https://tinyurl.com/Or-HB5050.

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

[128] 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).

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.

* * *

The States strongly urge the Departments to withdraw the Interim Final Rule. For the reasons set forth above, the IFR is likely illegal and will have damaging and irreparable impact on individuals escaping some of the most dangerous conditions in the world. Moreover, the IFR runs counter to the United States' humanitarian obligations and it harm the States' current and prospective residents, their families, and the States' interests.

Sincerely,

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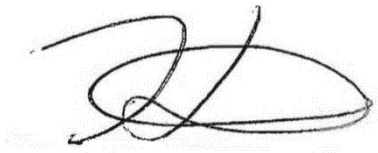

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