THE STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

XAVIER BECERRA
ATTORNEY
GENERAL

MAURA HEALEY
ATTORNEY
GENERAL

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Via Federal eRulemaking Portal
Hon. Kevin McAleenan, Secretary
Department of Homeland Security
Hon. William Barr
Attorney General
Assistant Director Lauren Alder Reid
Office of Policy
Executive Office for Immigration Review
Department of Justice
5107 Leesburg Pike, Suite 2616
Falls Church, VA 22041

RE: Comments on Interim Final Rule: EOIR Docket No. 19-0504, *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019), RIN: 1125-AA91

Dear Secretary McAleenan, Attorney General Barr and Assistant Director Reid:

We, the Attorneys General of California, Massachusetts, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington ("the States"), write to urge the U.S. Department of Homeland Security (DHS) and U.S. Department of Justice (US DOJ) (collectively, "the Departments") to withdraw the Interim Final Rule: *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019), RIN: 1125-AA91 (Rule). The Rule would harm thousands of already vulnerable individuals, as well as the States that open their doors to asylees and their families. It is also contrary to law in a number of respects and has already been preliminarily enjoined by a federal court. *E. Bay Sanctuary Covenant v. Barr (EBSC)*, No. 3:19-cv-04073-JST, 2019 WL 3323095, at *13 (N.D. Cal. July 24, 2019).

Asylum seekers coming through the southern border will be subject to unnecessary trauma and peril due to the Rule. By requiring that asylum seekers seek protection in the countries through which they travel, namely Mexico and/or Guatemala, the Rule puts vulnerable

populations at risk for further persecution in those countries and ignores those countries' lack of fair and functioning asylum systems. Ultimately, this will lead to more immigrants staying in the shadows, as well as bona fide asylum seekers being denied the United States' protection.

The States have a significant interest in the Rule because every year they welcome thousands of potential asylees who have suffered persecution in their home countries.[1] In 2015-2017, the most recent years for which this data is available, the States signatory to this letter constituted six of the top ten states of residence for individuals whose affirmative asylum applications were granted.[2] Combined, these six States were home to 68% of the total number of individuals granted affirmative asylum applications in the United States.[3] California, in particular, has more cases pending in immigration courts than any other state,[4] and is the recipient of the most affirmative asylees, with almost 44% of the total.[5] As home states to such large numbers of asylees, the States will be greatly affected by the Rule.

In recognizing the contributions that asylum seekers and asylees add to the States, the States invest significant resources to provide them education, health care, and other services, enabling them to transition into the States' communities. The Rule would make this transition more difficult and expensive. Asylum seekers who eventually come to the States would arrive after experiencing trauma caused by prolonged periods of waiting at the mercy of the inadequate asylum systems in Mexico and Guatemala without access to adequate health care, education, and other basic services.

Further, the States have already been harmed by the Departments' failure to comply with notice and comment requirements prior to issuing the Rule. The States have a strong interest in presenting their views when important agency actions, like the Rule, are proposed.

I. THE RULE HARMS ASYLUM SEEKERS AND THREATENS TO DELIVER THEM INTO THE HANDS OF THEIR PERSECUTORS

Giving asylum seekers a safe haven from persecution is an essential value of the United States. The purpose of the Refugee Act of 1980, which established the present asylum system, was to codify "one of the oldest themes in America's history—welcoming homeless refugees to

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[1] Dep't of Homeland Sec., *2017 Yearbook of Immigration Statistics* 43 tbl.16 (Apr. 1, 2019), https://www.dhs.gov/immigration-statistics/yearbook/2017/table16; Nadwa Mossad, Office of Immigration Statistics, Dep't of Homeland Sec., *Annual Flow Report: Refugees and Asylees: 2017* (Mar. 2019).
[2] Mossad, *supra* note 1, at tbl. 13.
[3] *Id.*
[4] *Individuals in Immigration Court by Their Address*, Syracuse U. Transactional Records Access Clearinghouse (TRAC), https://tinyurl.com/TRAC-Syr.
[5] Mossad, *supra* note 1.

our shores." S. Rep. No. 96-256, at 1 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 141, 141. In departing from these core principles, the Rule will endanger and inflict unnecessary trauma on asylum seekers during their pursuit of protection. This is why in preliminarily enjoining the Rule, the United States District Court for the District of Northern California has already found that the prospect of the United States "delivering aliens into the hands of their persecutors" is against the public interest. *EBSC*, 2019 WL 3323095, at *25 (quoting *Leiva-Perez v. Holder*, 640 F.3d 962, 971 (9th Cir. 2011) (per curiam)).

a. Asylum Seekers Cannot Safely Seek Protection in Mexico and Guatemala

Asylum seekers, many of whom hail from the Northern Triangle countries with some of the most dangerous conditions in the world, will be unable to obtain asylum in Mexico and/or Guatemala, where the Rule requires them to apply for protection prior to seeking it in the United States. 84 Fed. Reg. at 33,830. Individuals particularly in need of protection, such as women, children, and Lesbian, Gay, Bisexual, Transgender and Queer ("LGBTQ") individuals, will face dangerous conditions while attempting to use these systems.

i. Guatemala and Mexico Have Inadequate Asylum Systems

Guatemala and Mexico are particularly ill-equipped to provide humanitarian protections to the populations who will be affected by this Rule. Guatemala's asylum system is not capable of assessing claims of thousands of Hondurans and Salvadorans who would now be forced to invoke it under the Rule. It was only in 2017, that Guatemala began implementing a law that overhauled its immigration system and defined the term "refugee," codified the rights of those seeking protection, and implemented a refugee application process.[6] Guatemala has only 12 officials to work on asylum cases, and three staff members to interview asylum applicants.[7] In addition to the sheer infeasibility of determining asylum cases without sufficient staff, Guatemala would also fail to provide protection to those in need. In fact, in 2018, Guatemala did not grant a single asylum application of the 259 it received.[8] 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

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[6] 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.

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

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

and information on asylum procedures are being provided by civil society organizations–whose resources are already overstretched."[9]

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

Consequently, very few asylum seekers obtain protection in Mexico. Children are denied protection on nearly a categorical basis. For example, in recent years Mexico granted refugee status to less than 1% of the unaccompanied children it apprehended from El Salvador, Guatemala, and Honduras.[10] Central American LGBTQ applicants often feel pressured to accept "voluntary return" without being aware of the opportunity to request asylum, leading to their deportation in violation of the principle of non-refoulement (non-return).[11]

ii. Asylum Seekers Risk Persecution in Mexico and Guatemala

While going through the fruitless endeavor of requesting protection in Mexico and Guatemala asylum seekers will be at risk. Transiting through Mexico, migrants are often victimized by criminal groups, and in some cases by police, immigration officers, and customs officials.[12] Criminal groups are known to kidnap migrants in attempts to extort money from their

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[9] 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.

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

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

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

relatives or force them into carrying out crimes.[13] For example, in 2010, 72 migrants were massacred in the state of Tamaulipas after family members failed to pay ransoms and the migrants refused to serve as drug mules.[14] Again, in 2011 in Tamaulipas, 193 migrants were murdered, and police officers were reportedly involved.[15] Further, the presence of Central American gangs, which are the reason many of these migrants flee to the United States in the first place, is not confined to Central America, but, in fact, reaches into Mexico.[16] Guatemala also suffers from startling levels of violence and danger, "an alarmingly high murder rate,"[17] widespread corruption (particularly in the police and judicial sectors), trafficking in persons, and extortion.[18] These crimes occur with impunity.[19]

The situation is especially dire for the populations who tend to seek asylum in the United States, such as unaccompanied children, women, and LGBTQ migrants. Unaccompanied children are particularly unsafe in Mexico and Guatemala. In Guatemala, children are targets of recruitment by criminal gangs,[20] and girls are frequently kidnapped and victimized by repeated gang rape.[21] In Mexico, the National Registry of Missing and Disappeared Persons reported that as of April 2018, more than 6,600 children were recorded missing.[22] The UNHCR has expressed concern about the prevalence of discrimination in Mexico against children who are indigenous, migrants, or LGBTQ.[23]

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[13] *State Dep't - Mexico 2018*, *supra* note 12, at 20.
[14] Human Rights First, *Dangerous Territory: Mexico Still Not Safe for Refugees* 3 (July 2017), https://tinyurl.com/HRW-Mexico-NotSafe.
[15] *Id.*
[16] *State Dep't – Mexico 2018*, *supra* note 12, at 19.
[17] Overseas Sec. Advisory Council, U.S. Dep't of State, *Guatemala 2019 Crime & Safety Report* (Feb. 26, 2019), https://tinyurl.com/OSAC-Guatemala.
[18] 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.
[19] *Id.*
[20] *Committee on the Rights of the Child examines report of Guatemala*, United Nations Hum. Rts. Off. High Commissioner (Jan. 17, 2018), https://tinyurl.com/UNHR-Guatemala-Children.
[21] Kids in Need of Defense (KIND), *Sexual and Gender Based Violence (SGBV) & Migration Fact Sheet* 2 (Apr. 2018), https://tinyurl.com/KIND-SGBV.
[22] David Agren, *More than 6,600 children have gone missing in Mexico*, Guardian (Oct. 5, 2019, 5:38 EDT), https://tinyurl.com/Agren-Guardian.
[23] 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: Mexico* 16 (July 2018), http://www.refworld.org/docid/5b57009a7.html.

Conditions for women in Mexico and Guatemala are similarly perilous. As many as 60% of women and girls migrating from Central America are raped on their journey.[24] Migrant women are sometimes sold by smugglers to human trafficking operations or forced to engage in sex work at establishments frequented by law enforcement in Mexico's southern region.[25] Femicide is also prevalent. Guatemala ranks third globally on rates of femicide[26] with an average of two women murdered each day.[27] Not far behind, Mexico, as of 2017, ranked sixth in femicide, globally.[28]

LGBTQ migrants also face special dangers in Mexico and Guatemala, as homophobic and transphobic violence is widespread in these countries. According to an Amnesty International report, two-thirds of LGBTQ Central American asylum seekers reported suffering sexual violence while transiting through Mexico.[29] In both Mexico and Guatemala, law enforcement intimidate, threaten, and commit violence against LGBTQ individuals. For instance, two Mexican police officers were arrested in connection with the kidnapping, torture, and execution of a young gay couple.[30] In Guatemala, almost one third of transwomen identified police officers as their main persecutors, and LGBTQ women experience forced pregnancies through what is known as "corrective rape."[31] In addition to these harrowing types of violence, discrimination in aspects of civil society is also common. In Mexico, rampant anti-LGBTQ

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[24] *Most Dangerous Journey: What Central American Migrants Face When They Try to Cross the Border*, Amnesty Int'l, https://tinyurl.com/AmIntl-Danger (last visited July 18, 2019).
[25] Human Rights First, *supra* note 14, at 4.
[26] UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* 2 (Oct. 2015), https://www.unhcr.org/5630f24c6.html.
[27] KIND, *supra* note 21, at 2.
[28] *Statistics and Data: Global Study on Homicide*, United Nations Office on Drugs & Crime (2019), https://dataunodc.un.org/GSH_app; Kate Linthicum, *Why Mexico is giving out half a million rape whistles to female subway riders*, L.A. Times (Oct. 23, 2016), https://tinyurl.com/Linthicum-LATimes.
[29] Amnesty Int'l, *supra* note 11, at 7 (citing the UNHCR).
[30] Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), *Mexico: Sexual Orientation and Gender Identity (SOGI)* 20 (May 31, 2017), http://www.refworld.org/docid/5937f12d4.html.
[31] Organización Trans Reinas de la Noche, *Human Rights Violations Against Transgender Women in Guatemala* at 7 (Feb. 2018), https://tinyurl.com/OTRN-LGBT; *State Dep't – Guatemala 2018*, supra note 6, at 22.

discrimination exists despite the existence of some anti-discrimination laws.[32] Notably, in Guatemala these legal protections do not even exist.[33]

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

b. Asylum Seekers Will Undergo Treacherous Border Crossings

Given the circumstances described above, many migrants will forgo the asylum process in Mexico and/or Guatemala and, under the Rule, will therefore be ineligible for asylum in the United States. With asylum out of reach, the Rule thus discourages these asylum seekers from presenting themselves and asking for asylum at a port of entry. This is particularly so given DHS's "metering" policy, which keeps asylum seekers waiting for several weeks or even months in dangerous conditions in Mexico before they can ask for asylum in the United States.[34] In fact, in 9 out of the 14 days before the Rule was adopted, no asylum seekers were allowed to enter at the San Ysidro Port of Entry.[35] As a particularly punishing twist, the vast majority who were patiently waiting to claim asylum during that time would now be ineligible for it under the Rule.[36]

With the prospect of a prolonged wait in Mexico to present a case that is likely to fail, many in desperate situations will choose to make a harrowing trek into the United States between ports of entry. We have already seen the deadly consequences that can result from this calculus. For example, a Salvadoran father and his infant daughter recently drowned trying to cross the Rio Grande River after waiting two months in Mexico for the opportunity to ask for asylum.[37] Nine people drowned trying to cross near the El Paso canals in June of 2019 alone.[38] Authorities recently found the bodies of a mother, her one year old son, and two other infants, who crossed

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[32] Immigration & Refugee Bd. of Canada, *Mexico: Situation of sexual minorities, including in Mexico City; protection and support services offered by the state and civil society (2015-July 2017)* (Feb. 16, 2018), http://www.refworld.org/docid/5ad5c5d24.html; Immigration & Refugee Bd. of Can., *Mexico: Societal norms on gender identity expressions, including in indigenous communities (2016-May 2018)* (May 25, 2018), https://www.refworld.org/docid/5b9bdb404.html.
[33] *State Dep't – Guatemala 2018*, *supra* note 6, at 21.
[34] 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.
[35] *Id.*
[36] *Id.*
[37] 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.
[38] 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.

the river only to die of dehydration.[39] These heartbreaking stories are corroborated by evidence in the administrative record, as well as in a report prepared by DHS's Inspector General,[40] which demonstrate that dangerous crossings have become more common-place due to other restrictive asylum policies. AR664 (The irony of [the metering measure] is that it is going to drive people who are trying to apply for asylum at ports of entry and do things the right way into the mountains and deserts). Should the Rule be implemented, these deaths will occur more frequently.

c. Deserving Applicants Will Be Deprived of Adequate Humanitarian Protection

If the Rule is implemented, deserving applicants will be deprived of the United States' protection and deported to countries where they will be persecuted. Further, the available forms of relief under the Rule, withholding of removal and protection under the Convention Against Torture (CAT), are insufficient replacements for asylum for the reasons discussed below.

In particular, unaccompanied children, LGBTQ applicants, and women, for whom applying for asylum in a third country is extremely dangerous, will be precluded from asylum despite recognition from Congress and the courts that they are especially deserving of protection. Congress expressly recognized the vulnerabilities of children and their unique need for protection in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008. Pub. L. No. 110-457, 122 Stat. 5044 (TVPRA). Significantly, under the TVPRA, children are entitled to present their claims during non-adversarial interviews at the U.S. Citizenship and Immigration Services (USCIS) Asylum Office in the first instance instead of before an immigration judge. *Id.* § 235(d)(7)(C), 122 Stat. at 5081. Children are also excluded from the safe third country agreement bar to asylum, and those under the age of 18 are excepted from the one-year filing deadline. 8 U.S.C. § 1158(a)(2)(E); 8 C.F.R. § 208.4(a)(5)(i). With the benefit of these protections, many unaccompanied children have been granted asylum.[41] Indeed, in FY

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[39] 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.
[40] 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).
[41] U.S. Citizenship & Immigration Servs., *RAIO Combined Training Course* 56 (Nov. 30, 2015), https://www.aila.org/File/Related/18022100_Part3.pdf (instructing officers on the possible types of cognizable claims that children have); Nadwa Mossad, Office Of Immigration Statistics, U.S. Dep't of Homeland Sec., *Annual Flow Report: Refugees and Asylees: 2017* (Mar. 2019), https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2017.pdf; Mossad, *supra* note 1, at 7 ("In 2017, the three leading countries of nationality of persons granted either affirmative or defensive asylum were China (21 percent), El Salvador (13 percent), and

2017, 5,361 children under the age of twenty were granted affirmative asylum as principal applicants, comprising approximately 44% of all principal applicants granted affirmative asylum.[42]

The Rule will make most of these children ineligible for asylum, while also making the TVPRA's protections irrelevant. USCIS interviews will now be moot for the vast majority of children who did not apply in a third country. Children will thus be forced to present claims for withholding of removal and protection under the CAT that only can be granted by an immigration court. 8 C.F.R. § 208.16. In these adversarial proceedings, unaccompanied children will be subject to cross-examination about the worst moments of their lives. As Congress recognized in enacting the TVPRA, this is not the proper venue for children to present their claims.

LGBTQ and female applicants may also be denied asylum due to the Rule, regardless of the strength of their claims. Courts, along with DHS itself, have found that LGBTQ applicants, including applicants from Guatemala and Mexico, can merit asylum based on persecution due to their LGBTQ status.[43] *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) ("all alien homosexuals are members of a 'particular social group'"); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1055 (9th Cir. 2017) (finding a gay man eligible for asylum based on persecution suffered in Mexico); *see also Barrios-Aguilar v. Holder*, 386 F. App'x 587, 589-91 (9th Cir. 2010) (finding a Guatemalan applicant had established past persecution based on his status as a sexual minority). Courts have also considered that women may have valid claims to asylum due to persecution that occurred on account of gender. *See Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (remanding to determine the validity of a particular social group based on gender); *Cece v. Holder*, 733 F.3d 662, 676 (7th Cir. 2013) (finding a particular social group based on gender cognizable).

Contrary to the Departments' assertions, the availability of withholding of removal and CAT does little to protect these deserving applicants who will no longer be eligible for asylum. First, many will be denied withholding of removal and CAT protection because these forms of relief have much higher standards than asylum. INA § 241(b)(3); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987); *INS v. Stevic*, 467 U.S. 407, 424 (1984). For reference, in 2016, less than

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Guatemala (11 percent) (Table 7). Nationals of these countries accounted for 45 percent of all persons granted asylum.").

[42] Dep't of Homeland Sec., *supra* note 1, at tbl.18, https://www.dhs.gov/immigration-statistics/yearbook/2017/table18.

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

5% of CAT claims and only 6% of withholding of removal claims were granted.[44] By comparison, that same year 48% of asylum cases were granted.[45]

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

Third, individuals granted withholding of removal and CAT are in a constant state of limbo because they cannot obtain permanent residency and are at constant risk of removal to a third country.[46] This uncertainty is exactly what Congress intended to eliminate in adopting the Refugee Act of 1980. S. Rep. No. 96-256, at 9 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 141, 149 (explaining that the Act was meant to remedy the fact that previous "practice ha[d] often left the refugee in uncertainty as to his own situation and ha[d] sometimes made it more difficult for him to secure employment and enjoy . . . other rights.")

In all, this Rule will be harmful for asylum seekers at every stage of their flight from persecution, in many cases endangering their very lives. Asylum seekers' only options will be either trauma-inducing or dangerous: go through a fruitless asylum process in a potentially dangerous third country to remain eligible for asylum in the United States; try to enter the United States undetected through a dangerous trek and remain undocumented; or apply for alternative forms of protection that are nearly impossible to obtain and fail to provide any stability.

II. THE RULE VIOLATES THE LAW

The Rule is unlawful for a number of reasons and, as the *EBSC* court held, the Rule likely violates the Administrative Procedure Act's (APA) procedural and substantive requirements.

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[44] Human Rights First, *Withholding of Removal and the U.N. Convention Against Torture—No Substitute for Asylum, Putting Refugees at Risk* (Nov. 9, 2018), https://tinyurl.com/HRF-Withholding-CAT.

[45] Dep't of Justice, Exec. Office of Immigration Review (EOIR), *FY 2016 Statistics Yearbook* at K6 fig.21 (Mar. 2017), https://www.justice.gov/eoir/page/file/fysb16/download.

[46] EOIR, *Fact Sheet: Asylum and Withholding of Removal Relief, Convention Against Torture Protections* 6 (Jan. 15, 2009), https://tinyurl.com/EOIR-FactSheet.

a. The Rule Violates the APA Because It 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*) (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, in adopting the Rule, the Departments did not analyze, or even reference, the harm that it will inflict upon asylum seekers. The Rule fails to discuss the risk of persecution in Mexico or Guatemala, the countries where most asylum seekers will need to apply. While the Rule demands that asylum seekers use the system in Guatemala, neither the Rule nor the administrative record addresses Guatemala's asylum system. Inexplicably, even though the *EBSC* administrative record contains unrefuted evidence that Mexico does not have a suitable asylum system (AR286-307, 533, 699, 704-727, 771-776, 777-788), the Rule concludes that Mexico has "robust" protections. 84 Fed. Reg. at 33,835, 33,839-40; *Allied-Signal, Inc. v. Nuclear Reg. Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993) (explaining that an agency must explain what justifies their determinations with actual evidence beyond a "conclusory statement"). And even though Congress has found that children merit special protections in seeking asylum, the Departments sweep children into the Rule in a footnote, with zero consideration of whether doing so advances the Federal Government's interests. 84 Fed. Reg. at 33,839 n.7.

Moreover, the Departments failed to adequately justify their actions in implementing the Rule. The Rule contains voluminous discussion of the alleged crisis at the southern border and its strain on the immigration system, 84 Fed. Reg. at 33,830–32, 33,838–41, focusing on the increasing number of positive credible fear findings (an odd "problem" for the Federal Government to highlight, as it actually supports the legitimacy of many asylum seekers' claims); the large backlog of asylum cases; the allegedly large percentage of asylum seeking families who do not appear for their hearings; and the supposedly low ultimate rate of asylum grants compared with positive credible fear findings. A number of these claims are questionable at best.

The Departments' suggestion that many putative asylees, and particularly family units, fail to appear in court is contrary to the evidence; in fact, the US DOJ's own statistics show that

89% of asylum seekers appear at their hearings.[47] Those who were released from ICE 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 ICE custody appear.[48] These numbers are higher when the asylum seeker has an attorney, with attendance rates between 97% and 99%.[49] These high attendance rates after release from detention also undermine DHS's purported need to detain these individuals, which DHS alleges is costing "significant resources."[50] 84 Fed. Reg. at 33,831.

In measuring the merit of asylum cases coming from the credible fear process, the Departments muddle the statistics by focusing on the number of grants compared to the total number of "completed cases" in 2016-2018. 84 Fed. Reg. at 33,839. But, this is not an accurate measure of the success rate because: (1) most completed cases would have been pending for several years, since asylum proceedings take many years for courts to complete; [51] (2) those years may have simply had less credible fear-based asylum claims; and (3) the number of completed cases includes all types of immigration cases not just asylum cases. Rather, asylum applicants from the Northern Triangle, who will be particularly impacted by the Rule, 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.[52]

Furthermore, the Departments considered factors that Congress did not intend for them to consider when promulgating this Rule. Namely, the Rule is premised on the goal of deterring asylum seekers. 84 Fed. Reg. at 33,831. But, deterrence of asylum seekers, who have a right under the Immigration and Nationality Act (INA) to ask for protection in the United States, is not a proper reason to issue a Rule that effectively denies otherwise cognizable claims for asylum. 8 U.S.C. § 1158(a); *see also R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 188–90 (D.D.C. 2015) (granting preliminary injunction against policy of detaining asylum seekers to send "a message

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[47] U.S. Dep't of Justice, Exec. Office for Immigration Review, *Statistics Yearbook Fiscal Year 2017* 33 fig.25, https://www.justice.gov/eoir/page/file/1107056/download#page=34 (showing that only 11% of removal orders in asylum matters were issued *in abstentia*, indicating that the asylum seeker failed to appear).

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

[49] *Id.*

[50] With respect to detention, DHS claims the Rule is justified because there is a "lack of detention space," 84 Fed. Reg. at 33,841, yet DHS has increased detention rates 22% between 2016 to 2018, with over 60% of those detaining having no criminal record. *ICE Focus Shifts Away from Detaining Serious Criminals*, TRAC (June 25, 2019), https://tinyurl.com/TRACDetained.

[51] Am. Immigration Council, *supra* note 47.

[52] Mossad, *supra* note 1, at 6.

of deterrence to other Central American individuals who may be considering immigration" and finding deterrence is not a valid reason to force someone to be civilly committed); *Ms. L. v. U.S. Immigration & Customs Enf't*, 302 F. Supp. 3d 1149, 1166–67 (S.D. Cal. 2018) (denying motion to dismiss substantive due process claim, holding that alleged "government practice. . . to separate parents from their minor children in an effort to deter others from coming to the United States . . . is emblematic of the exercise of power without any reasonable justification . . . . Such conduct . . . is brutal, offensive, and fails to comport with traditional notions of fair play and decency.").

Finally, as expounded upon by the District Court in *EBSC*, the Rule is premised on an arbitrary and capricious "unrebuttable categorical inference" that an applicant does not have a valid claim for asylum if they did not apply for protection in the first country through which they transited. *EBSC*, 3323095 WL, at *15. Indeed, courts have found that this premise is unreasonable and inconsistent with asylum protections. The United States Court of Appeals for the Ninth Circuit held "that a refugee need not seek asylum in the first place where he arrives" and that denying a claim based on an applicant's failure to apply in a third country is erroneous as a matter of law. *Melkonian v. Ashcroft*, 320 F.3d 1061, 1071 (9th Cir. 2003). Failing to apply for protection in a third country has no bearing on the credibility or reasonableness of an applicant's fear of persecution. *Damaize-Job v. INS*, 787 F.2d 1332, 1337 (9th Cir. 1986); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374-75 (9th Cir. 1985) ("We do not find it inconsistent with a claimed fear of persecution that a refugee, after he flees his homeland, goes to the country where he believes his opportunities will be best. Nor need fear of persecution be an alien's only motivation for fleeing."). Particularly pertinent with respect to applicants at the southern border, in *Damaize-Job*, the Ninth Circuit explained that it is "quite reasonable" for an applicant that experienced persecution in Nicaragua to "to seek a new homeland that is insulated from the instability of Central America." 787 F.2d at 1337. In sum, the Departments failed to consider important consequences of the Rule, and instead provided an unreasonable justification for it.

b. The Rule Was Improperly Promulgated Without Notice and Comment in Violation of the APA

The Rule at issue here was published on July 16, 2019, and made effective immediately. 84 Fed. Reg. at 33,830. This promulgation violates the APA's procedural requirements of notice and comment and the 30-day waiting period as required by 5 U.S.C. § 553(c), (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 [they] foster the fairness and deliberation that should underlie a pronouncement of such force." *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1251 (9th Cir. 2018) (internal citations and quotation marks omitted). Allowing comments *after* the Rule becomes effective does not satisfy the notice and comment requirements. *See* 84 Fed. Reg. at 33,830 (allowing the submission of public comments for 30 days after the Rule's effective date). In fact, it is "antithetical to the structure and purpose of the APA for an agency to implement a rule first,

then seek comment later." *United States v. Valverde*, 628 F.3d 1159, 1164 (9th Cir. 2010) (citation omitted).

The Departments argue that the Rule 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 33,840-33,842. Concerning the good cause exception, the Departments state that a notice and comment period would result in a "surge of migrants hoping to enter the country before the rule becomes effective," but proffer insufficient support for that argument. *See* 84 Fed. Reg. at 33,841. The Departments cite several rules previously issued without notice and comment, including a November 2018 asylum interim rule, which similarly bypassed notice and comment based on the same "surge" argument. *Id*. Although the November 2018 rule was temporarily enjoined, the Rule now fails to assert that the injunction in that case gave way to the surge alleged by the Departments. *See id.* at 33,840-41. Moreover, the fact that the agencies 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).

In arguing that the Rule is subject to the good cause exception, the Departments also cite a court order which, relying on an October 2018 article, found that the agencies 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 33,841 (citing *East Bay Sanctuary Covenant v. Trump (EBSC III)*, 354 F. Supp. 3d at 1115). Remarkably, the same court has now enjoined the present Rule, finding that "a single, progressively more stale article cannot excuse notice-and-comment for every immigration-related regulation *ad infinitum.*" *EBSC*, 2019 WL 3323095, at *31 (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*, 958 F.2d 1479, 1485 (9th Cir. 1992)).

Similarly, regarding the foreign affairs exception, the Departments make conclusory statements that (1) the Rule implicates foreign policy and national security, (2) notice and comment would disrupt ongoing negotiations with foreign countries regarding migration issues, and (3) public participation "may impact and potentially harm the goodwill between the United States and Mexico and the Northern Triangle countries." 84 Fed. Reg. at 33,842. The Departments' argument fails. First, the mere implication of foreign policy and national security is not sufficient grounds for the exception to apply. *See, e.g., Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980). Instead, the requirement is that the notice and comment provisions "should provoke *definitely* undesirable international consequences." *Id.* (emphasis added) (internal citations omitted); *accord EBSC*, 909 F.3d at 1252. Second, the Rule does not

explain how, or cite anything to substantiate its allegation that the comment period would disrupt negotiations or what the undesirable international consequences of such disruption would be. Third, the Rule does not state how promulgating it *without* notice and comment avoids harm to the goodwill between the United States, Mexico, and the Northern Triangle countries. *See* 84 Fed. Reg. at 33,842. 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 Rule before it was promulgated, they would have raised the myriad harmful impacts and unlawful aspects of the Rule discussed above before it took effect.

c. The Rule is Contrary to the Immigration and Nationality Act in Violation of the APA

The Departments contend that this regulation is permitted under 8 U.S.C. § 1158(b)(2)(C), which gives the Attorney General the power to establish limitations and conditions on asylum "consistent with [the asylum] section." 84 Fed. Reg. at 33,832. However, as set forth below, and as the District Court in *EBSC* held, the limitation imposed by the Rule here is *inconsistent* with the asylum statute and is in violation of the APA.

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 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 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.

i. Congress Directly Spoke on This Issue

Congress has already "directly spoken to the question at issue" here, *i.e.*, under what circumstances can an applicant's relationship to a third country bar them from asylum and implemented two narrow bars: (1) the safe third country bar, 8 U.S.C. § 1158(a)(2)(A), and (2) the firm resettlement bar, 8 U.S.C. § 1158(b)(2)(A)(iv). The Rule illegally expands upon those circumstances in conflict with the narrow bars that Congress promulgated.

1. The Safe Third Country Bar

The safe third country bar, found at 8 U.S.C. § 1158(a)(2)(A), is a narrow exception to the right to apply for asylum for individuals who transited through a third country that has "a bilateral or multilateral [third country] agreement" with the United States; where they will not be harmed on account of a protected characteristic such as race, religion, nationality, membership in a particular social group, or political opinion; and where they can access "a full and fair procedure for determining a claim to asylum or equivalent temporary protection." The bar expressly does not apply to unaccompanied children. 8 U.S.C. § 158(a)(2)(E). The United States only has one such agreement, and it is with Canada.[53] Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Can.-U.S., Dec. 5, 2002.

Contrary to the safe third country bar, the Rule will apply regardless of whether there is an agreement, regardless of whether the third country has a full and fair asylum procedure, regardless of whether an applicant would be persecuted in the third country, and regardless of whether the applicant is an unaccompanied minor. In other words, the Rule will apply in the exact circumstances that Congress determined the statutory third country bar *should not* apply. The Rule thus makes the safe third country bar's statutory limitations superfluous.

2. The Firm Resettlement Bar

The firm resettlement bar makes ineligible any asylum applicant who "was firmly resettled in another country prior to arriving in the United States." 8 U.S.C. § 1158(b)(2)(A)(iv). For the bar to apply, DHS must provide prima facie evidence that an applicant was offered "a permanent resident status, citizenship, or some other type of permanent resettlement." 8 C.F.R. § 208.15; *Maharaj v. Gonzales*, 450 F.3d 961, 964 (9th Cir. 2006); *Matter of A-G-G-*, 25 I&N Dec.

[53] The States note that, separate from the Rule, DHS announced a purported safe third country agreement with Guatemala that would deport to Guatemala those who transited through the country and did not apply for protection there. Kim, *supra* note 8. While this comment only focuses on the harmful impact of the Rule, the States note that the dangerous conditions in Guatemala, and inadequate asylum system, described herein in that country also make such an agreement patently unreasonable.

486, 501-502 (BIA 2011). If there is no direct evidence of an offer of permanent residence in a third country, such as a visa or other immigration document, DHS can provide evidence that the applicant was entitled to permanent residence in that country. *A-G-G-*, 25 I&N Dec. at 502 (citing *Elzour v. Ashcroft*, 378 F.3d 1143, 1152 (10th Cir. 2004)). Under the implementing regulation, the firm resettlement bar does not apply if the applicant establishes that their entry "into that country was a necessary consequence of [their] flight from persecution"; they "remained in that country only as long as was necessary to arrange onward travel"; and they did not have "significant ties" to the third country. 8 C.F.R. § 208.15(a). An applicant is also not subject to the bar if they prove that the "conditions of [their] residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled." *Id.* § 208.15(b). For example, the bar does not apply if an applicant would be persecuted in the third country. *Rife v. Ashcroft*, 374 F.3d 606, 612 (8th Cir. 2004) (explaining that the firm resettlement bar will not apply if the applicant establishes a fear of persecution in the third country).

The Rule does not account for the basic requirements of the firm resettlement bar. Where the firm resettlement bar is only applied if an individual was actually eligible for permanent residency in the third country, the Rule bars asylum without any assessment of an applicant's eligibility for relief in the third country. *A-G-G-*, 25 I&N Dec. at 502. The Rule renders ineligible anyone who merely transited through a third country as was necessary to flee from persecution, which is the explicit type of transit that is an explicit exception to the firm resettlement bar. 8 C.F.R. § 208.15(a). And critically, unlike the Rule, the firm resettlement bar does not apply if there is a risk that an applicant would be persecuted in the third country. 8 C.F.R. § 208.15(b); *see Yang v. INS*, 79 F.3d 932, 939 (9th Cir. 1996) (noting that "firmly resettled aliens are by definition no longer subject to persecution"). In fact, the firm resettlement bar requires that adjudicators consider factors that are not as extreme as persecution to determine if the bar applies, such as the types and extent of employment available, the housing available, conditions for other residents, and availability of education. *A-G-G-*, 25 I&N Dec. at 489.

In promulgating the two narrow bars, Congress clearly spoke to the limited circumstances when an applicant could be denied based on ties to a third country. *See Chevron*, 467 U.S. at 842. Indeed, in *Andriasian v. INS* the Ninth Circuit held that the statutory and regulatory framework for firm resettlement sets forth the "minimum conditions" that must be met for "an opportunity to stay in a third country [to justify] a mandatory or discretionary denial of asylum by an IJ or the BIA." 180 F.3d 1033, 1044 (9th Cir. 1999). The court explained "[t]hat a refugee has spent some period of time elsewhere before seeking asylum in this country is relevant only if he can return to that other country. Otherwise, that fact can in no way, consistent with the statute and the regulations, warrant denial of asylum." *Id.* at 1047. Likewise, in *Mamouzian v. Ashcroft*, the court held that the firm resettlement requirements (listed in 8 C.F.R. § 208.15) must be met for an immigration judge to deny asylum based on an applicant's stay in a third country, and that if those requirements are not met, an applicant's time in a third country cannot be a valid basis for a denial even if that denial is discretionary. 390 F.3d 1129, 1138 (9th Cir. 2004); *see*

also Tandia v. Gonzales, 437 F.3d 245, 249 (2d Cir. 2006); *Prus v. Mukasey*, 289 F. App'x 973, 976 (9th Cir. 2008). The reasoning of these decisions is pertinent here. The statute has provided the requirements for an applicant to be denied based on transit through in a third country and whether it be through discretionary denials (at issue in those cases) or through a rule such as this, asylum cannot be denied on that basis if those requirements are not met.

ii. The Rule is Manifestly Contrary to the Statute

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 conditions in the third country where the Rule 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 bar would be applied without any consideration of the applicant's risk for persecution in the third country. Consequently, the Rule affects an unprecedented change to the asylum law. *See Matter of Pula*, 19 I&N Dec. 467, 473–74 (BIA 1987) (superseded by statute as described in *Andriasian*, 180 F.3d at 1043) (cited by the Departments as support of the Rule, but requiring adjudicators to consider the "living conditions" and "safety" of the third country for the applicant). It was for these, among other reasons, that the *EBSC* District Court found the Rule is likely to be unlawful. *EBSC*, 2019 WL 3323095, at *14.

The clear direction provided by the INA, along with the District Court's thoughtful, well-reasoned decision provides a convincing reason for the Departments to withdraw the Rule.

d. The Departments Failed to Consult with the States as Required by Federalism Policymaking Criteria

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that has substantial direct effects on the States, imposes substantial direct compliance costs on State and local governments, or has other federalism implications. Exec. Order No. 13132, 64 Fed. Reg. 43,255 (Aug. 10, 1999). These requirements include "consult[ing] with appropriate State and local officials in developing [national] standards" and having "an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies." *Id.* at 43,256, 43,257. Here, the Departments failed to comply with these requirements. Instead, they summarily concluded that the Rule "will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government," and therefore "this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement." 84 Fed. Reg. at 33,843. As discussed in Part III below, this conclusion is erroneous, particularly as to states like California, which provide services to the thousands of asylum applicants they receive annually. The Rule will significantly undermine the States' policies and programs and will

impose substantial costs on state governments. In failing to analyze these impacts, and to consult with the States prior to the implementation of the Rule, the Departments have disregarded the requirements imposed by Executive Order 13132.

e. The Rule is Unconstitutional

The Rule, which applies only to asylum seekers arriving to the United States at the southern border, 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.[54] Courts have recognized similar infirmities relating to the federal government's immigration policies that primarily impact 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); *see also Casa de Maryland, Inc. v. Trump*, 2018 WL 6192367, at *12 (D. Md. Nov. 28, 2018); *Ramos v. Nielsen (Ramos II)*, 2018 WL 4778285, at *16–21 (N.D. Cal. Oct. 3, 2018); *Centro Presente v. United States Dep't of Homeland Sec.*, 2018 WL 3543535, at *14–15 (D. Mass. July 23, 2018). The Rule bears many of the hallmarks of these earlier actions, including that it weighs more heavily on some racial/ethnic groups than others.[55] *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (noting a determination of "whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into [. . .] circumstantial and direct evidence of intent" including whether official action "bears more heavily on one race than another").

Here, President Trump's history of statements and actions 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 Rule.[56] For example, the President has claimed that asylum seekers at the southern border were "rapists,"[57] MS-13 gang members, and "unknown Middle Easterners," despite the

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[54] 84 Fed. Reg. at 33,830. The Rule is also purported to "better position" the United States in ongoing diplomatic negotiations with Mexico, El Salvador, and Guatemala regarding the flow of migrants to the United States. *Id*. at 33,831.

[55] *See Ramos II*, 2018 WL 4778285, at *18 ("[T]he impact of the TPS terminations clearly bears more heavily on non-white, non-European individuals; indeed, it affects those populations exclusively.").

[56] *Id.* at *17–18; *Centro Presente*, 2018 WL 3543535, at *4–5; *see also, e.g.*, Lisa Desjardins, *How Trump Talks About Race*, PBS News Hour (Aug. 22, 2017) (updated Aug. 23, 2018), https://tinyurl.com/Desjardins-PBS.

[57] Vivian Salama, *Trump Claims Women 'Are Raped at Levels Never Seen Before' During Immigrant Caravan*, NBC News (Apr. 5, 2018), https://tinyurl.com/Salama-NBC.

lack of any supporting evidence for his claims.[58] The strong probability that the Rule was driven by animus in violation of the Constitution supports its withdrawal.

Moreover, the Rule contradicts with the purpose of asylum under the INA of providing protection to those at risk for persecution, *see* 8 U.S.C. § 1158, and its stated goal of deterring asylum seekers does not qualify as a legitimate governmental interest. *See* 84 Fed. Reg. at 33,831. "If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare [. . .] desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

III. THE RULE WILL HARM THE STATES

The States welcome thousands of potential asylees into their communities every year. Thus, the States will be harmed by the Rule for the following reasons: (1) asylees and asylum seekers, like other immigrants, are vital to the success of the States' economies; (2) the Rule will cause States' agencies and non-profits to divert resources; (3) because the Rule will needlessly hurt asylum seekers, State health programs will face increased demand, *see California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) (upholding preliminary injunction in plaintiff states and noting lower court's finding that plaintiff states would face "potentially dire public health and fiscal consequences as a result of a process as to which they had no input"); and (4) the Rule will harm the States' interest in family unity.

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

Asylees, like other immigrants, are vital to the States' workforce and economic success. 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.[59] 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.[60] In 2014, immigrant-led households in California paid over $26 billion in state and local taxes and exercised almost $240 billion in spending power.[61] In 2015, immigrant business owners accounted for over 38% of all Californian entrepreneurs and generated almost $22 billion

[58] *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.
[59] Am. Immigration Council, *Immigrants in California* 2 (Oct. 4, 2017), https://tinyurl.com/CAP-Immigrants-in-CA.
[60] *Id*. at 3-4.
[61] *Id*. at 4.

in business income.[62] In Massachusetts, immigrants make up 20% of the state's workforce and immigrant-led households paid $3 billion in state and local taxes in 2014.[63] In New York and New Jersey, immigrants comprise nearly 30% of each states' workforce and in 2014 they paid state and local taxes amounting to $15.9 billion in New York and $6.5 billion in New Jersey.[64] In 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.[65] In Connecticut, immigrants pay $5.9 billion in taxes and have a spending power of $14.5 billion.[66] There are over 37,000 immigrant entrepreneurs in Connecticut, employing over 95,000 people in the state.[67] Immigrant entrepreneurs make up almost 20% of Maryland's business owners, generating more than $1 billion in combined annual revenue.[68] Notably, many in Maryland hail from El Salvador, one of the nationalities particularly impacted by the Rule.[69] Immigrants also play a big role in the economy of Illinois: according to a report by New American Economy and the Chicago Mayor's Office of New Americans, immigrants in Chicago alone contributed $1.6 billion to the state's economy through taxes and helped create or preserve 25,664 local manufacturing jobs.[70] Also, immigrant-owned businesses generated $2.6 billion in business income in Illinois in 2014.[71] Likewise, the contributions of immigrants make up a significant portion of Hawaii's economy. Over 22% of Hawaii's business owners are foreign-born,[72] and in 2014, immigrants contributed $668.5

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[62] *Id*.
[63] Am. Immigration Council, *Immigrants in Massachusetts* (Oct. 5, 2017), https://tinyurl.com/AIC-Imm-MA.
[64] Am. Immigration Council, *Immigrants in New York* 1, 4 (Oct. 4, 2017), https://tinyurl.com/Immigrants-in-NY; Am. Immigration Council, *Immigrants in New Jersey* 2, 4 (Oct. 13, 2017), https://tinyurl.com/Immigrants-in-NJ.
[65] *State Demographics Data: Michigan*, Migration Pol'y Inst., https://tinyurl.com/MI-Immigrant-Workforce (last visited July 24, 2019); *Immigrants and the Economy in Michigan*, New Am. Econ., https://tinyurl.com/MI-Immigration-Economy (last visited July 24, 2019).
[66] *Immigrants and the Economy in Connecticut*, New Am. Econ., https://tinyurl.com/CT-Immigration-Economy (last visited July 24, 2019).
[67] *Id.*
[68] Am. Immigration Council, *Immigrants in Maryland* (2017), https://tinyurl.com/MarylandEcon (last visited Aug. 2, 2019).
[69] *Id.*
[70] New. Am. Econ., *New Americans in Chicago* 1, 4 (Nov. 2018), https://tinyurl.com/Immigrants-Chicago.
[71] New Am. Econ., *The Contributions of New Americans in Illinois* 2 (Aug. 2016), https://tinyurl.com/IL-Immigration-Economy.
[72] The Fiscal Pol'y Inst., *Immigrant Small Business Owners* 24 (June 2012), https://tinyurl.com/Imm-Business-Owners.

million in state and local taxes.[73] In Nevada, the state's foreign-born households contributed more than one in every five dollars paid by Nevada residents in state and local tax revenues in 2014, and earned $13.2 billion dollars—or 19.3% of all income earned by Nevadans.[74] Finally, in 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.[75] 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.[76]

In light of this significant role that immigrants play in the signatory States' economies, the States have a strong interest in policies, such as the Rule, that present additional hurdles to the safe arrival and integration of potential asylees. Legal status facilitates the provision of services and allows individuals to integrate confidently into the community, rather than feeling consigned to the shadows. *See* 84 Fed. Reg. at 33,832 (listing benefits of asylee status); S. Rep. No. 96-256, at 9 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 141, 149 (noting that asylees' clear legal status was meant to remedy the fact that previous "practice ha[d] often left the refugee in uncertainty as to his own situation and ha[d] sometimes made it more difficult for him to secure employment and enjoy . . . other rights"). By removing asylum as an option for legal status for many immigrants, the Rule will increase the numbers of immigrants without legal status who will be unable to work legally and result in decreased economic contributions to the States. S*ee supra*, Part I (b)-(c). 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.[77] Similarly, according to a study by the Institute of Taxation and Economic Policy, undocumented immigrants in New Mexico would have paid in excess of $8 million more in taxes in 2017 if they had been granted full legal status.[78] The Rule will impede asylum seekers from obtaining legal status and thereby hurt the States' economies.

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[73] New Am. Econ., *The Contributions of New Americans in Hawaii* 7 (Aug. 2016), https://tinyurl.com/HI-Immigration-Economy.
[74] New Am. Econ., *The Contributions of New Americans in Nevada* 6 (Aug. 2016), https://tinyurl.com/EconNevadaImmigrants.
[75] *See* Am. Immigration Council, *Immigrants in Minnesota* (2017), https://tinyurl.com/AIC-Minn.
[76] *Id.*
[77] Inst. on Taxation and Econ. Policy, *Undocumented Immigrants' State & Local Tax Contributions* 3 (Mar. 2017), https://tinyurl.com/ITEP-UndocTaxes.
[78] *Id.*

b. The Rule Will Cause the States to Divert Resources and Result in Increased Demand for Health, Education, and Other Services

Recognizing the importance of proper legal guidance during immigration proceedings, the States fund nonprofit organizations to provide legal assistance in immigration-related matters. For example, the State of Washington allocated one million dollars from its general fund for FY 2019 to legal services organizations serving asylum seekers and other migrant populations in the state.[79] 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.[80] The District of Columbia allocated $2.5 million for FY 2020 to programs that provide services and resources to its immigrant population, including asylum seekers.[81] New Jersey also allocated $2.1 million in state funds in FY 2019 and 2020 for legal assistance to individuals in removal proceedings.[82] Under Oregon House Bill 5050, passed in 2019, Innovation Law Lab, a plaintiff in the *EBSC* litigation, would receive $2 million in state funding for a two-year project for immigration defense.[83]

Similarly, since FY 2015-16, California has allocated $147 million to non-profit legal service organizations through the Unaccompanied Undocumented Minors and Immigration Services Funding programs.[84] Asylum services have comprised 80% of the services provided through the Unaccompanied Undocumented Minors program.[85] Plaintiffs in the *EBSC* litigation, Al Otro Lado and CARECEN-LA, are among those receiving funds from California.[86] These

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[79] *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/yy3rduov.
[80] *See* N.Y. St., Div. of Budget, *Governor Cuomo Announces Highlights of the FY 2019 State Budget* (Mar. 30, 2018), https://tinyurl.com/y6qv2jev.
[81] *Mayor Bowser Announces $2.5 Million Available for FY 2020 Immigrant Justice Legal Services Grant Program*, DC.gov (July 12, 2019), https://tinyurl.com/DC-Grant.
[82] *See* N.J. Office of Mgmt. & Budget, *The Governor's FY2020 Budget- Detailed Budget* 419 (Mar. 2019), https://tinyurl.com/NJ2020Budget.
[83] H.B. 5050, 80th Or. Legis. Assemb., 2019 Reg. Sess. (Or. 2019), https://tinyurl.com/Or-HB5050.
[84] Cal. Dep't of Soc. Serv. (CDSS), *Immigration Services Program Update* 1 (Mar. 2019).
[85] *Id.*
[86] *Immigration Services Contractors*, CDSS, https://tinyurl.com/Cal-DSS-ISC (last visited July 26, 2018). For fiscal year 2018-19, CDSS provided close to $44 million, including $602,920 to EBSC, $239,320 to Al Otro Lado, and $2,503,200 to CARECEN-LA. CDSS, *Immigration Branch Immigration Services Funding Tentative Award Announcement* (Jan. 3, 2019), https://tinyurl.com/CDSS-ImmigrationFunding.

providers use a combination of funds from California and private donors to ensure their cases are filed properly and adjudicated fairly.[87] *See EBSC* Compl. ¶ 111, Doc. 1.

The Rule will reduce the number of immigrants who are eligible for asylum and force them to pursue more difficult forms of relief. *See supra*, Part I (c). These changes will seriously frustrate the missions of legal services organizations in the States and require the allocation of additional time and resources for each case. *See EBSC* Compl. ¶¶ 115-16, 119, 121-22, 133. The Rule will also cause these organizations to divert considerable resources to re-strategizing their approaches to representation of clients and eligibility issues, revising their training, and re-allocating staff time. *See id.* ¶¶ 116-17, 121, 123, 133, 135. As a result, the number of cases these organizations can undertake will decrease. Because their funding is based, in part, on the number of cases handled per year, and the number of clients they anticipate serving, *see id*. ¶¶ 114, 132, the Rule will imperil their funding streams. *See id.* ¶¶ 115-16, 119, 121-22. Harms to these organizations redound to their funders, including the States, whose priorities and funding decisions will also feel the impact of the Rule.

In addition to investing in legal services, the States also fund services to meet the mental health needs of asylees and asylum seekers. Due to the extended time asylum seekers will be forced to spend in Mexico or Guatemala before seeking asylum in the United States, they will be more likely to endure abuse and trauma. Consequently, the States and local jurisdictions will need to allocate additional resources to identify, assess, and treat asylees and asylum seekers.[88] For example, every year, the Highland Human Rights Clinic in Oakland, California (operated by Alameda County) conducts approximately 80 to 120 health assessments of asylees, the vast majority needing mental health referrals, due to abuse and trauma. New York provides inpatient psychiatric services to youth.[89] With potentially hundreds or thousands of minor asylum seekers experiencing even further trauma as result of the Rule, many more youth may be in need of New York State's inpatient services.[90] This increased demand for resources will also affect public schools in the States, which will need to offer increased mental health and early intervention services to students who have been traumatized and needlessly missed schooling while languishing in Mexico or Guatemala. *See* 20 U.S.C. § 1411 (requiring States to provide special

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[87] Indeed, 97% of the almost 5,000 affirmative asylum petitions filed by plaintiff East Bay Sanctuary Covenant have been granted. *See* Compl. ¶ 111, Doc. 1.
[88] Anna Gorman, *Medical Clinics that Treat Refugees Help Determine the Case for Asylum*, NPR (July 10, 2018), https://tinyurl.com/Gorman-NPR.
[89] *See generally* Decl. of Donna M. Bradbury at 362-68 (Exhibit 60), Washington v. Trump, No. 2:18-cv-00939-MJP (W.D. Wash. July 17, 2018), ECF No. 31.
[90] *Id.*

education services to students with learning or emotional disabilities). These additional educational costs will be borne by the States.[91]

Health programs in the States will also see increased demand because the Rule will likely result in decreased physical health for asylum seekers. California, New York, the District of Columbia, Illinois, Oregon, Massachusetts, and Washington all provide full scope health benefits to low-income children regardless of immigration status.[92] Starting January 2020, California will expand these benefits to those 25 and younger.[93] In Illinois, asylum seekers can access state medical coverage and services by state-funded community agencies.[94] In Minnesota, immigrants residing there can access health care through Minnesota's Emergency Medical Assistance program, regardless of legal status.[95]

The added trauma that asylum seekers will suffer, due to their extended stay in Mexico or Guatemala's precarious conditions while seeking asylum there, will likely cause long-term negative health impacts. Studies have shown that long-term stress can contribute to serious physical health problems including heart disease, diabetes, and severe viral infections.[96] Moreover, asylum seekers' health will likely suffer as they will lack access to preventative care, vaccinations, and necessary medical care in Mexico and Guatemala. Once these individuals reach the United States, the States will have to address these increased needs.

The States have also allocated funds for specialized programs to integrate asylees. In California, for example, the Immigration and Refugee Programs Branch of the Department of Social Services (CDSS) provides assistance for immigrants, through programs like the California Newcomer Education and Well-Being program (CalNEW), the Cash Assistance Program for Immigrants (CAPI), and the Trafficking and Crime Victims Assistance Program (TCVAP). CAPI provides cash assistance to certain aged, blind, and disabled noncitizens including asylees;

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[91] *See, e.g.*, Patrick Murphy & Jennifer Paluch, *Financing California's Public Schools*, Pub. Pol'y Inst. of Cal. (Nov. 2018), https://tinyurl.com/PPIC-CA-Schools (noting 90% of funding for California public schools came from state and local sources in 2018-19).
[92] *Immigrant Eligibility for Health Care Programs in the United States*, Nat'l Conf. St. Legis. (Oct. 19, 2017), http://www.ncsl.org/research/immigration/immigrant-eligibility-for-health-care-programs-in-the-united-states.aspx.
[93] Bobby Allyn, *California is 1st State to Offer Health Benefits to Adult Undocumented Immigrants*, NPR (July 10, 2019), https://tinyurl.com/Allyn-NPR.
[94] *See PM 06-21-00: Medical Benefits for Asylum Applicants and Torture Victims*, Ill. Dep't of Hum. Servs., https://tinyurl.com/Ill-Med (last visited July 25, 2019). The list of organizations can be found here: http://www.dhs.state.il.us/page.aspx?item=117419.
[95] *Health care coverage for people who are noncitizens*, Minn. Dep't Hum. Servs., https://mn.gov/dhs/people-we-serve/adults/health-care/health-care-programs/programs-and-services/noncitizens.jsp (last visited Aug. 7, 2019).
[96] *See Stress Fact Sheet*, Nat'l Inst. Mental Health (Dec. 2016), https://tinyurl.com/NIMH-Stress.

TCVAP provides cash assistance, food benefits, employment and social services to victims of human trafficking, domestic violence and other serious crimes; and CalNEW provides funding to certain school districts to improve the well-being, English-language proficiency, and academic performance of their students. [97] The New York Office for New Americans has established neighborhood-based Opportunity Centers throughout the state to provide, among other things, English language courses and business development skills for immigrants.[98] One of Washington State's social service programs partners with local governments, community and technical colleges, ethnic community-based organizations, and other service provider agencies to deliver educational services, job training skills, assistance establishing housing and transportation, language classes, and other comprehensive support services.[99] All of these state-provided resources will be further impacted because of the increased harms that the Rule will cause to individuals who seek to obtain asylum in Mexico or Guatemala.

c. The Rule Will Harm the States' Family Unity Values

The Rule will cause unnecessary family separation. Many immigrants fleeing from persecution choose to seek refuge in the States—often to reunite with relatives who already reside within our borders. Their inability to reunite with their relatives will harm the States, which benefit from family units that provide stability and support for their members as well as irreplaceable care and nurturing of children. *See, e.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) ("It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.")

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[97] *Cash Assistance Program for Immigrants (CAPI)*, Cal. Dep't of Soc. Servs., http://www.cdss.ca.gov/CAPI (last visited Aug. 5, 2019); *Trafficking and Crime Victims Assistance Program*, Cal. Dep't of Soc. Servs., https://www.cdss.ca.gov/inforesources/TCVAP (last visited Aug. 5, 2019); *California Newcomer Education and Well-Being*, Cal. Dep't of Soc. Servs., http://www.cdss.ca.gov/inforesources/Refugees/Programs-and-Info/Youth-Initiatives/CalNEW (last visited Aug. 5, 2019).

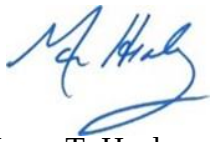
[98] *See Our Mission*, N.Y. St. Off. New Ams., https://tinyurl.com/y5wb8dws (last visited Aug. 5, 2019); *see also* N.Y. St. Off. for New Americans, *Request for Applications, RFA #18-ONA-32*, https://tinyurl.com/y3oqjul6 (last visited Aug. 5, 2019); N.Y. St., Pressroom, *Governor Cuomo Announces Expansion of Services for Immigrant Community Through Office for New Americans*, https://tinyurl.com/y3yd54sb (last visited Aug. 5, 2019).

[99] *See* Off. of Refugee & Immig. Assistance, Econ. Servs. Admin., Wash. Dep't of Soc. & Health Servs., *Briefing Book for State Fiscal Year 2018*, https://tinyurl.com/y528prka (last visited Aug. 5, 2019).

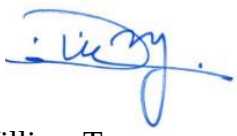
The Departments have now been informed by a federal court that this Rule is likely illegal. The Rule will have damaging and irreparable impact on the States' current and prospective residents, their families, and on the States themselves that must address the damage caused by this policy. For the reasons set forth above, the States strongly oppose the Rule and urge that it be withdrawn.

Sincerely,

Xavier Becerra
California Attorney General

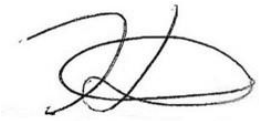


Maura T. Healey
Massachusetts Attorney General



William Tong
Connecticut Attorney General

Kathleen Jennings
Delaware Attorney General



Karl A. Racine
District of Columbia Attorney General

Clare E. Connors
Hawaii Attorney General

Kwame Raoul
Illinois Attorney General

Tom Miller
Iowa Attorney General

Aaron Frey
Maine Attorney General

Brian E. Frosh
Maryland Attorney General

Dana Nessel
Michigan Attorney General

Keith Ellison
Minnesota Attorney General

Aaron D. Ford
Nevada Attorney General

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