

Appeal Nos. 19-16487 & 19-16773

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

East Bay Sanctuary Covenant, et al.,

Plaintiffs-Appellees,

v.

William P. Barr, Attorney General of the United States, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
THE HONORABLE JON S. TIGAR, JUDGE
CASE No. 3:19-CV-04073-JST

**BRIEF OF AMICI CURIAE 24 COUNTIES AND CITIES IN SUPPORT OF
PLAINTIFFS-APPELLEES AND FOR AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* all are political subdivisions for whom no corporate disclosure is required.

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INTEREST OF AMICI CURIAE¹

U.S. law has long offered the possibility of asylum to any individual on U.S. soil who faces a well-founded fear of persecution in his or her country of origin due to race, religion, nationality, membership in a particular social group, or political opinion, whether or not they passed through other countries without seeking asylum during their journey to the United States. 8 U.S.C §§ 1101(a)(42), 1158(a)(1). Nevertheless, Defendants-Appellants (“Defendants”) made immediately effective an interim final rule that requires immigrants who cross at the southern border to apply for and be denied asylum in any country they pass through before applying for protection in the United States. Interim Final Rule: “Asylum Eligibility and Procedural Modifications,” 84 Fed. Reg. 33,829-01 (July 16, 2019), EOIR Docket No. 19-0504 (the “Rule”). As a practical matter, the Rule strips asylum eligibility from everyone other than Mexican nationals, including the thousands of Hondurans, Guatemalans, and Salvadorans escaping the violence gripping the Northern Triangle of Central America, unless they first seek and are

¹ All parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the undersigned counsel certifies that this brief was authored in full by Amici and their counsel, no party or counsel for a party authored or contributed monetarily to this brief in any respect, and no other person or entity—other than Amici and their counsel—contributed monetarily to this brief’s preparation or submission.

denied asylum in countries that may be no safer for them than the countries they are fleeing.² The District Court below granted Plaintiffs-Appellees' ("Plaintiffs") preliminary injunction because the Rule is unlawful and is not in the public interest. 2d ER104–06. It is in Amici's interest that the injunction be affirmed.

Amici are 24 counties and cities, located in 13 states across the country that are home to vibrant immigrant communities that attract and welcome asylum seekers fleeing persecution. Asylum seekers and asylees live and work in Amici's neighborhoods, making up integral parts of local economies. Amici have an interest in this proceeding because the Rule will irreparably harm Amici and the public health, safety, and wellbeing of their residents and communities.

By closing the door on asylum seekers unless they first seek relief in countries that may be no safer for them than their own, the Rule will drive migrants away from legal ports of entry and into the shadows, harming Amici's interests. First, asylum seekers will be less likely to seek medical attention and access healthcare services because the Rule will increase their fears of deportation and cause them to be denied crucial federal health benefits. This will compromise the wellness of immigrants and of the community at large. Second, asylum seekers

² Although the Rule allows for relief through withholding of removal or Convention Against Torture claims, these forms of relief entail a higher standard of proof than required for asylum relief. *See, e.g., Ling Huang v. Holder*, 744 F.3d 1149, 1152 (9th Cir. 2014); *Zheng v. Holder*, 644 F.3d 829, 835 (9th Cir. 2011).

will be less likely to report crimes, as both victims and witnesses. Studies show that policies like the Rule erode trust in law enforcement and deter immigrant communities from cooperating with law enforcement, to the detriment of everyone. Third, the Rule will restrict Amici's ability to provide essential legal services to asylum seekers. Several Amici have allocated funds to help asylum seekers in their jurisdictions navigate the complexities of the legal system, both to help their residents obtain relief and to ensure that they have a fair pathway to permanently join and contribute to their local communities. The Rule will dramatically reduce the reach of these investments and place members of Amici's communities at a greater risk for removal to countries where they may face persecution and physical harm. Fourth, Amici also have an interest in ensuring that the federal government follows proper rulemaking procedures. Defendants' failure to comply with those requirements not only violates the Administrative Procedure Act ("APA"), but also irreparably harms Amici.

Finally, Amici have a significant interest in nationwide relief. The Rule's harms are not limited to the parties or to a geographic region. Absent a nationwide injunction, Plaintiffs, Amici, and the public at large will suffer irreparable harm as a result of the fear and uncertainty that the Rule will stoke. It is in Amici's interest that the nationwide injunction in this case be affirmed.

ARGUMENT

The Rule is both unwise and unlawful. It irreparably harms asylum seekers, Amici, and Amici's residents. By effectively barring asylum for immigrants who travel through Guatemala or Mexico but do not apply for asylum there, the Rule will heighten the fear of deportation in Amici's communities and inhibit more immigrants from interacting with the government. This will make them less likely to participate in public health programs that benefit the wellbeing of all Amici's residents. Asylum seekers subject to the Rule will also be reluctant to participate in public health programs because the Rule renders them ineligible for federal health benefits, requiring additional services and outreach on behalf of Amici. Deportation concerns will also lead immigrants to avoid contact with law enforcement, to the detriment of Amici's public safety initiatives. The Rule's overhaul of the asylum system will further strain limited funding that Amici have already earmarked to provide immigrants, including asylum seekers, with legal services. Because this Rule was enacted without the requisite notice-and-comment rulemaking, Amici and other stakeholders were denied the opportunity early in the rulemaking process to explain these harms and assert the significant interests that the Rule will undermine.

The Rule also violates the APA and the Immigration and Nationality Act ("INA"). Defendants' decision to unlawfully bypass the APA's notice-and-

comment requirements deprived Amici and the public of the opportunity to raise the Rule's fatal defects early in the rulemaking process. The Rule is also arbitrary and capricious because Defendants failed to consider its extensive harm to asylum seekers, Amici, and the public. And as Plaintiffs explain more fully in their brief, the Rule is contrary to the INA, which sets out only limited circumstances for when a third country may play a role in an individual's eligibility for asylum.³

In light of these defects and harms, the Rule should be enjoined nationwide. Nationwide relief is necessary to prevent harm to Amici and the public, to provide uniformity and security for asylum seekers attempting to comply with the applicable immigration rules, and to vindicate the requirements of the APA.

I. THE RULE WILL IRREPARABLY HARM AMICI AND THE PUBLIC INTEREST

A. THE RULE WILL NEGATIVELY IMPACT THE HEALTH OF ALL AMICI'S RESIDENTS

By closing the door on asylum seekers with valid claims of persecution, the Rule will impede Amici's ability to promote public health within their borders and to ensure the health of all Amici's residents.

Although the Rule eliminates a primary pathway to legal status for many immigrants, it is unlikely to deter them from seeking refuge in the United States.

³ Amici join in Plaintiffs' arguments at Plfts. Br. 14–30 but do not restate them here.

Those targeted by the Rule are fleeing extreme violence and persecution in their home countries.⁴ It is not realistic for them to apply for asylum in countries like Mexico and Guatemala, where asylum seekers continue to face the risk of violence and persecution.⁵ The impulse to escape such violence and persecution outweighs the deterrent effect of harsh U.S. immigration policies, concluded one report on the Administration’s “zero tolerance policy,” which sought to prosecute everyone who unlawfully crossed the border.⁶ This report determined that such a blanket crackdown had little to no deterrent effect on unlawful border crossings.⁷ People desperate to avoid death in their home countries will continue to enter the United States, even if it means subjecting themselves to a more perilous route across the

⁴ Medecins Sans Frontieres, *Forced to Flee Central America’s Northern Triangle: A Neglected Humanitarian Crisis* 8–9 (May 2017), https://doctorswithoutborders.org/sites/default/files/2018-08/msf_forced-to-flee-central-americas-northern-triangle_E.pdf (comparing the violence experienced by residents of the Northern Triangle of Central America to that of “individuals living through war”).

⁵ Human Rights First, *Is Guatemala Safe for Refugees and Asylum Seekers?* (June 2019), https://www.humanrightsfirst.org/sites/default/files/GUATEMALA_SAFE_THIRD.pdf; Ximena Suárez et al., *Access to Justice for Migrants in Mexico: A Right that Exists Only on the Books* 4 (July 2017), https://www.wola.org/wp-content/uploads/2017/07/Access-to-Justice-for-Migrants_July-2017.pdf.

⁶ Adam Isacson, et al., WOLA, *The Zero Tolerance Policy* 8 (July 2018), <https://www.wola.org/analysis/wola-report-zero-tolerance-policy/>.

⁷ *Id.* at 5–7.

border.⁸ Because the Rule eliminates their eligibility for asylum, immigrants targeted by the Rule are more likely to remain undocumented and to fear deportation.

An increased fear of deportation will push Amici's immigrant residents into society's margins and away from public health services. They will be less likely to interact with health institutions or to seek out medical services they need from the government, and they will remain ineligible for many federal health benefits.⁹ One study found that 80 percent of those who feared deportation for themselves, a friend, or a family member believed that the risk of deportation increased with

⁸ See, e.g., Caitlin Dickerson, *Desperate Migrants on the Border: 'I Should Just Swim Across,'* N.Y. Times (Sept. 29, 2019), <https://www.nytimes.com/2019/09/29/us/asylum-migrants-mexican-border.html> (noting that the Border Patrol reports a 40 percent increase this year in the number of immigrants apprehended at the border in tractor-trailers, sometimes in dangerously hot conditions).

⁹ See Karen Hacker et al., *The impact of Immigration and Customs Enforcement on immigrant health: Perceptions of immigrants in Everett, Massachusetts, USA*, 73 Soc. Sci. & Med. 586, 589 (2011) (analyzing focus group discussions and finding that immigrants' deportation fears led to avoidance of care); Patricia A. Cavazos-Rehg et al., *Legal Status, Emotional Well-Being and Subjective Health Status of Latino Immigrants*, 99 J. Nat'l Med. Ass'n 1126, 1130 (2007) (surveying 143 Latino immigrants and finding 39 percent indicated they avoided social services for fear of deportation); Kaiser Family Found., *Health Coverage of Immigrants*, Disparities Policy (Feb. 15, 2019), <https://www.kff.org/disparities-policy/fact-sheet/health-coverage-of-immigrants/>.

enrollment in any kind of governmental health program.¹⁰ The fear of deportation also makes it more likely that individuals will miss doctor's visits and avoid filling their prescriptions.¹¹ The result will be worse health outcomes for immigrants and the community at large.

Healthcare workers serving immigrant populations have observed this trend firsthand. In a survey of 66 community health workers in Texas, one of the most consistent findings "was the pervasive way that fear is limiting access to needed health care and social services for mixed status families under the Trump administration."¹² The workers reported that fear of immigration enforcement permeates immigrants' day-to-day lives, even deterring them from seeking help in

¹⁰ George Foulsham, *Deportation, Loss of Health Care Raise Concerns in L.A. County, According to UCLA Survey*, UCLA Newsroom (Apr. 4, 2017), <http://newsroom.ucla.edu/releases/deportation-loss-of-health-care-raise-concerns-in-l-a-county-according-to-ucla-survey>.

¹¹ See Jan Hoffman, *Sick and Afraid, Some Immigrants Forgo Medical Care*, N.Y. Times (June 26, 2017), <https://www.nytimes.com/2017/06/26/health/undocumented-immigrants-health-care.html>; Brianna Ehley et al., *Fearing Deportation, Immigrants Forgo Medical Care*, Politico (July 17, 2017), <https://www.politico.com/story/2017/07/17/deportation-fears-under-trump-have-immigrants-forgoing-medical-care-240635>.

¹² Timothy Callaghan et al., *Immigrant Health Access in Texas: policy, rhetoric, and fear in the Trump era*, BMC Health Services Research 3 (2019).

life-threatening emergencies.¹³ For example, during the severe flooding that followed Hurricane Harvey in 2017, some immigrants avoided rescue services because Customs and Border Patrol boats were used in relief efforts.¹⁴

The effects of policies like the Rule extend beyond those who themselves fear deportation. Fear of deportation can also dissuade undocumented immigrants from accessing health services for vulnerable family members, like young children.¹⁵ These family members include U.S. citizens and those with legal immigration status.¹⁶

These immigrants and their families will also be less likely to seek health care because they are more likely to be uninsured. Unlike asylees, undocumented immigrants are not eligible for most federally-funded public health insurance such as Medicaid, the State Children’s Health Insurance Program or insurance

¹³ *Id.*

¹⁴ *Id.*; see also Jeffrey Thomas DeSocio, *US Border Patrol Dispatches boats, 450 rescues reported*, Fox 26 (Aug. 31, 2017), <http://www.fox26houston.com/news/us-border-patrol-dispatches-boats-450-rescues-reported>.

¹⁵ See Tara Watson, *Inside the Refrigerator: Immigration Enforcement and Chilling Effects in Medicaid Participation*, 6 Am. Econ. J.: Econ. Pol’y 313, 316 (2014) (“Enforcement could impact the willingness of undocumented parents to interact with public agencies even though their children are eligible for benefits.”).

¹⁶ *Id.*

through the Affordable Care Act marketplace.¹⁷ This leaves localities, like Amici, responsible for providing additional healthcare resources and undertaking additional outreach to ensure that immigrants targeted by the Rule can live healthy and productive lives as members of Amici's communities.

By making it more costly and difficult for Amici to ensure that immigrants obtain the health care they need, the Rule jeopardizes the health of entire communities. Public health strategies are successful only when they address the needs of *all* residents. As one researcher observed: "When [immigrant groups] avoid health care for communicable diseases, it becomes difficult to maintain the public's health."¹⁸ Immigrants who avoid the healthcare system struggle longer with virulent illnesses.¹⁹ If they have communicable diseases, those diseases are more likely to spread.²⁰ For example, when studying why tuberculosis patients delay getting treatment, researchers found that a fear of immigration authorities

¹⁷ See Helen B. Marrow, *The power of local autonomy: expanding health care to unauthorized immigrants in San Francisco*, 35 *Ethnic & Racial Stud.* 72, 72 (2012); Kaiser Family Found., *supra* n.9. Undocumented immigrants are eligible for emergency Medicaid. See Marrow, *supra* n.17 at 73.

¹⁸ See Hacker, *supra* n.9 at 592.

¹⁹ See Hoffman, *supra* n.11 (quoting Dr. Kathleen Page, co-director of the Centro SOL health center at Johns Hopkins).

²⁰ *Id.*

was a closely-associated factor, which in turn complicates efforts to eradicate the disease.²¹

For all these reasons, policies like the Rule that make immigrants and their families less likely to access critical health services directly threaten Amici's public health efforts.

B. THE RULE WILL UNDERMINE PUBLIC SAFETY FOR ALL AMICI'S RESIDENTS

The Rule will also undermine public safety in Amici's communities. Law enforcement agencies rely on all residents, regardless of immigration status, to help keep communities safe, whether by reporting crimes and suspicious or dangerous activity, assisting in investigations, providing evidence, or testifying in court. Building public trust encourages such cooperation and is a foundational principle of community policing.²² Policies like the Rule, however, alienate immigrants, undermine trust in police and other government institutions, and frustrate the ability of law enforcement to protect the entire community.

²¹ Steven Asch et al., *Does Fear of Immigration Authorities Deter Tuberculosis Patients from Seeking Care?*, 161 WJM 373, 376 (Oct. 1994).

²² See, e.g., Int'l Ass'n of Chiefs of Police, IACP National Policy Summit on Community-Police Relations 15–16 (Jan. 2015), https://www.theiacp.org/sites/default/files/2018-09/CommunityPoliceRelationsSummitReport_web.pdf (explaining that communication, partnership, and trust form the basis of strong community-police relationships).

Immigrants who fear removal for themselves or members of their communities are less likely to cooperate with local law enforcement, report crimes, or participate in court proceedings. This is true for both documented and undocumented residents—even when that individual is the victim of a crime. For example, an analysis of a 2008 nationwide survey of Latinas found that, regardless of immigration status, respondents who reported a greater fear of deportation for themselves, a family member, or a close friend were less likely to report being a victim of a violent crime.²³ Other studies show that undocumented victims of domestic violence, most of whom are women, are less likely to report abuse to authorities than documented or non-immigrant women for fear of immigration consequences, among other reasons.²⁴ Law enforcement agencies also report that fear of deportation interfered with victim cooperation in prosecutions, even when the victim had the courage to report a crime.²⁵

²³ Jill Theresa Messing et al., *Latinas' Perceptions of Law Enforcement: Fear of Deportation, Crime Reporting, and Trust in the System*, 30 *Affilia: J. Women & Soc. Work* 328, 334 (2015).

²⁴ Radha Vishnuvajjala, *Insecure Communities: How an Immigration Enforcement Program Encourages Battered Women to Stay Silent*, 32 *B.C. J. L. & Soc. Just.* 185, 189–90 (Jan. 2012).

²⁵ See Pradine Saint-Fort et al., Office of Cmty. Oriented Policing Servs. & Vera Inst. of Justice, *Engaging Police in Immigrant Communities* 40 (2012), <https://storage.googleapis.com/vera-web-assets/downloads/Publications/engaging-police-in-immigrant-communities-promising-practices-from-the->

The inverse has also proved true: when general fear of deportation subsides, immigrants are more likely to engage with police and report crime. A recent Princeton University study, which analyzed crime-reporting rates in Dallas between 2013 and 2016, found that crime reporting by Latinos increased 10 percent after the U.S. Department of Homeland Security limited its immigration enforcement priorities.²⁶ These results suggest that when communities ameliorate fears of immigration enforcement, trust between immigrants and law enforcement increases, with concrete benefits for crime reporting.²⁷ A 2018 survey of undocumented individuals in San Diego also demonstrates the profound impact that entanglement with federal immigration enforcement can have on the relationship between local law enforcement and immigrants. The survey found that 44.6 percent of respondents trust “a great deal” or “a lot” that local law enforcement would keep them and their families safe when told that local law enforcement officials *are not* working together with U.S. Immigration and

field/legacy_downloads/engaging-police-in-immigrant-communities.pdf.

²⁶ Elisa Jácome, *The Effect of Immigration Enforcement on Crime Reporting: Evidence from the Priority Enforcement Program* 13, Princeton Univ. Indus. Relations Section, Working Paper No. 624 (Oct. 2018), <http://arks.princeton.edu/ark:/88435/dsp018p58pg70r>.

²⁷ *Id.* at 24.

Customs Enforcement (“ICE”).²⁸ By contrast, only 9.8 percent of respondents had these same levels of trust when told that local law enforcement officials *are* working together with ICE.²⁹ Similarly, when told that local law enforcement officials *are* working together with ICE, just 8.9 percent of respondents trust “a great deal” or “a lot” that local law enforcement would protect the confidentiality of witnesses to crimes, compared to 38.2 percent of respondents when told that local law enforcement officials *are not* working with ICE.³⁰

Policies like the Rule also contribute to a generally hostile immigration climate that deters broader communities of immigrants from cooperating with law enforcement. A 2017 survey of Latino immigrants in the mid-Atlantic region found that because of the hostile immigration climate in 2017, almost 30 percent of participants “very often” or “always” avoided contact with police; 39.4 percent avoided medical care, police, and services; and 47.6 percent warned their children to stay away from authorities.³¹

²⁸ Tom K. Wong et al., *How Interior Immigration Enforcement Affects Trust In Law Enforcement* 9, UC San Diego Working Paper No. 2 (Apr. 2019), <https://usipc.ucsd.edu/publications/usipc-working-paper-2.pdf>.

²⁹ *Id.*

³⁰ *Id.* at 9–10.

³¹ See Kathleen M. Roche et al., *Impacts of Immigration Actions and News and the Psychological Distress of U.S. Latino Parents Raising Adolescents*, 62 J.

For these reasons, law enforcement agencies warn that policies that alienate immigrants place entire communities at risk.³² In response to a 2017 nationwide survey conducted by the National Immigrant Women’s Advocacy Project, 42 percent of the 219 responding law enforcement officials reported that federal immigration enforcement practices were negatively affecting police-community relationships with foreign-born and Limited English Proficient (“LEP”) communities.³³ Crimes involving immigrant and LEP victims, most notably domestic violence, human trafficking, sexual assault, and child abuse, were becoming harder to investigate, largely due to the victims’ fears of deportation and hostile federal immigration policies.³⁴ Officials also reported that when immigrant victims do not cooperate with law enforcement, it jeopardizes officer safety, community safety, victim safety, and the ability to hold violent perpetrators

Adolescent Health 525, 528–29 (2018).

³² See, e.g., Chuck Wexler, *Police Chiefs Across the Country Support Sanctuary Cities Because They Keep Crime Down*, L.A. Times (Mar. 6, 2017), <https://goo.gl/Fut52T> (“[Cities and police departments] know that when people step forward because they trust their local police, communities are safer.”).

³³ Rafaela Rodrigues et al., Nat’l Immigrant Women’s Advocacy Project, *Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims in an Age of Increased Immigration Enforcement: Initial Report from a 2017 National Survey* 50–51 (May 3, 2018), <http://library.niwap.org/wp-content/uploads/Immigrant-Access-to-Justice-National-Report.pdf>.

³⁴ *Id.* at 39, 48–49, 50–51.

accountable.³⁵ Even federal agencies have agreed. The Community Oriented Policing Services unit of the Department of Justice (“DOJ”) acknowledged that immigrants’ fear of deportation or detention “challenge[s] police-immigrant relations” to the detriment of public safety.³⁶ As DOJ explained, “Police need to be able to collaborate effectively with all of the people they serve so that they can detect crime, offer protection, gather evidence, and keep the public safe.”³⁷ By creating an entirely new category of immigrants who are ineligible for asylum, the Rule increases fear and hostility, and undermines public safety in Amici’s communities.

C. THE RULE WILL IMPEDE AMICI’S ABILITY TO PROVIDE CRITICAL LEGAL SERVICES TO THOSE FLEEING PERSECUTION

The Rule also negatively impacts the efforts of several Amici to provide counsel and other support services to asylum seekers in their communities.

Several Amici devote significant resources to increase asylum seekers’ access to legal services. For example, the County and City of Los Angeles strive

³⁵ *Id.* at 103–04.

³⁶ *When Police Engage Immigrant Communities: Promising Practices from the Field*, Community Policing Dispatch (Office of Cmty. Oriented Policing Servs., Wash., D.C.) (Feb. 2013), <https://goo.gl/RfdtXC>.

³⁷ *Id.*

to increase immigrants' access to legal services through the L.A. Justice Fund, which provides representation for residents at imminent risk of removal and who earn 200 percent or less of the Federal Poverty guidelines.³⁸ The City of Dallas provides funds for civil legal immigration services to low income Dallas residents in removal proceedings. The City of Minneapolis contracts with organizations to provide immigration-related legal assistance to its residents. The City of New York is now investing nearly \$50 million annually in free legal services for immigrant New Yorkers,³⁹ which have helped ensure that the vast majority of asylum seekers in a critical immigration court in Manhattan have legal representation.⁴⁰

Amici do so for good reason. It is well-established that the impact of representation in asylum proceedings is overwhelming: represented asylum seekers are five times more likely to be successful in their claims than those without an

³⁸ L.A. Cty. Office of Immigrant Affairs, L.A. Justice Fund FAQs (Jan. 17, 2019), <http://oia.lacounty.gov/aboutlajf/>.

³⁹ N.Y. City Office of Civil Justice, 2018 Annual Report 33 (Mar. 2019), https://www1.nyc.gov/assets/hra/downloads/pdf/final_2018_ojc_report_march_19_2019.pdf.

⁴⁰ TRAC Immigration, *Asylum Decisions, Data from Federal Fiscal Year 2001 through August 2019*, <https://trac.syr.edu/phptools/immigration/asylum/> (last visited Oct. 15, 2019) (affiliated with Syracuse University).

attorney.⁴¹ Having legal representation means that valid claims of persecution are properly heard and adjudicated, which means that fewer people are returned to countries where they face real risk of torture and death.⁴² Legal services programs for asylum seekers make it more likely that an overburdened immigration system “gets it right,” and that our country avoids the human and moral cost of sending refugees back to danger, persecution, torture, or death. *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 843 (N.D. Cal. 2018), *appeal filed*, No. 18-17274 (9th Cir. Nov. 7, 2018) (describing “one of the oldest and most important themes in our Nation’s history” as “welcoming homeless refugees to our shores” and “our national commitment to human rights and humanitarian concerns” (citing 125 Cong. Rec. 23231-32 (Sept. 6, 1979))).

Amici also have an economic interest in making sure that the immigration system gets it right. Research proves that refugees contribute billions of dollars to the U.S. economy as taxpayers and consumers each year.⁴³ While asylees are

⁴¹ See TRAC Immigration, *Continued Rise in Asylum Denial Rates: Impact of Representation and Nationality* (Dec. 13, 2016), <https://trac.syr.edu/immigration/reports/448/>.

⁴² Medecins Sans Frontieres, *supra* n.4 at 23 (explaining that some migrants deported from the United States to the Northern Triangle have been killed by gangs after their return).

⁴³ See generally New American Economy, *From Struggle to Resilience: The Economic Impact of Refugees in America 2* (June 2017),

frequently eligible for modest government assistance on first arrival, this benefit period is relatively short.⁴⁴ In fact, a U.S. Department of Health and Humans Services report, leaked in September 2017, found that refugees contributed almost \$22 billion in *net* fiscal benefits to state and local governments.⁴⁵

The Rule threatens the reach of Amici's investments in legal services. It unlawfully restricts asylum eligibility and will force many would-be asylum seekers to pursue more difficult forms of relief (*i.e.*, withholding of removal or Convention Against Torture claims). In response, legal service providers will need to shift strategy when representing clients who would have otherwise qualified for asylum. Litigating these more complex claims will steal time from and place financial strains on the counsel who take such cases. The funding Amici provide will therefore not help as many as efficiently before. The result will be less legal representation for immigrants fleeing persecution and less benefit to Amici who support these legal service programs. And a decline in representation will mean more asylum seekers are left unable to navigate the complex immigration process

https://research.newamericaneconomy.org/wp-content/uploads/sites/2/2017/11/NAE_Refugees_V6.pdf.

⁴⁴ *Id.* at 24.

⁴⁵ See National Immigration Forum, *Immigrants as Economic Contributors: Refugees Are a Fiscal Success Story for America* (June 14, 2018), <https://immigrationforum.org/article/immigrants-as-economic-contributors-refugees-are-a-fiscal-success-story-for-america/>.

and persuasively present meritorious claims.

By unlawfully restricting asylum eligibility based solely on an immigrant's past asylum applications, the Rule undermines Amici's investments in legal services programs that assist those fleeing persecution.

D. DEFENDANTS' BLATANT DISREGARD FOR PROPER RULEMAKING PROCEDURES FURTHER HARMS AMICI

Defendants did not pause to consider any of the Rule's harmful effects. Instead, Defendants disregarded the APA's notice-and-comment requirements and made the Rule immediately effective. This violation of the APA harmed Amici and countless other interested parties by excluding the concerns of local governments, organizations, and U.S. residents. Because Defendants did not comply with the APA's requirements, Amici could not express their reasoned and unique points of view or make Defendants aware of how the Rule affects their residents. If Defendants had followed the APA's procedures, they would have been forced to grapple with overwhelming evidence that the Rule is unlawful, contrary to the public interest, and harmful to Amici and their residents. Faced with this evidence, Defendants would be unable to justify their decision to implement the Rule, and their actions would not survive this Court's review. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that the APA requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action including a

rational connection between the facts found and the choice made” (quotations omitted)).

This loss of the opportunity to comment on the Rule at an early stage, given the Rule’s grave impact on the public health, safety, and wellbeing of Amici’s residents, irreparably harms Amici.

II. THE RULE VIOLATES THE APA

A. THE RULE VIOLATES THE APA’S NOTICE-AND-COMMENT REQUIREMENTS

Defendants also violated the APA’s procedural requirements when they bypassed the notice-and-comment and 30-day waiting periods and instead gave the Rule immediate effect. The plain text of the APA requires that Defendants provide Amici and other interested parties an “opportunity to participate in the rule making” through submission of comments. *See* 5 U.S.C. § 553(c). The statute also requires that a substantive rule shall be published “not less than 30 days before its effective date.” 5 U.S.C. § 553(d). The notice-and-comment period is not “an empty formality”; agencies “must consider and respond to significant comments” before implementation. *See E. Bay Sanctuary Covenant*, 349 F. Supp. 3d at 860 (quoting *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1203 (2015)).

Defendants’ decision to accept comments now—after the Rule is already in effect—cannot cure the harm from bypassing the comment period before the Rule was issued. *See United States v. Dean*, 604 F.3d 1275, 1280–81 (11th Cir. 2010)

(“[S]ection 553 is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas.” (quotations omitted)). The APA’s procedures “are ‘designed to assure due deliberation’ of agency regulations and ‘foster the fairness and deliberation that should underlie a pronouncement of such force.’” *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 775 (9th Cir. 2018) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001)); *see also W. Oil & Gas Ass’n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) (the APA’s “procedural safeguards that assure the public access to the decisionmaker should be vigorously enforced”).

Defendants’ justifications for bypassing these important procedural requirements were limited and inadequate. First, Defendants relied on a “good cause” exception without meeting its high bar. *See* 84 Fed. Reg. at 33,840–41. This limited exception to the notice-and-comment requirement is available only when the “notice and public procedure[s] . . . are impracticable, unnecessary or contrary to the public interest.” 5 U.S.C. § 553(b)(3)(B). The exception is applied narrowly and requires the invoking agency to satisfy a high bar. *See United States v. Valverde*, 628 F.3d 1159, 1164 (9th Cir. 2010). Defendants claimed the Rule was “essential to avoid a surge of aliens who would have strong incentives to seek to cross the border during pre-promulgation notice-and-comment or during the 30-

day delay,” 84 Fed. Reg. at 33,841, but cited no evidence to support their prediction. Speculation alone cannot satisfy the requirements of the good-cause exception. *See Valverde*, 628 F.3d at 1167 (finding agency’s recitation of “conclusory speculative harms” did not meet requirements of good cause exception (quotations omitted)).

Second, Defendants’ reliance on the “foreign affairs” exception, *see* 84 Fed. Reg. at 33,841–42, is unpersuasive because they do not and cannot show that the comment period itself would provoke undesirable foreign affairs consequences. The foreign affairs “exception requires the Government to do more than merely recite that the rule ‘implicates’ foreign affairs.” *E. Bay Sanctuary Covenant*, 932 F.3d at 775; *City of N.Y. v. Permanent Mission of India to United Nations*, 618 F.3d 172, 202 (2d Cir. 2010) (a narrow reading of the foreign affairs exception “accords with Congress’s admonition in the legislative history of the APA not to interpret the phrase ‘foreign affairs function’ loosely to mean any function extending beyond the borders of the United States”) (alterations and quotation marks omitted) (quoting S. Rep. No. 79–752, at 13 (1945)). Rather, the comment period must “provoke definitely undesirable international consequences.” *E. Bay Sanctuary Covenant*, 932 F.3d at 775–76 (quotations omitted). This essential limitation ensures that the exception does not subsume the statutory notice-and-

comment requirement in any area that arguably touches on foreign affairs. *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980).

Although Defendants acknowledge the applicable standard, they identify no plausible “definitely undesirable international consequences.” *See* 84 Fed. Reg. at 33,841. Defendants state, with no evidence, that observing the customary notice-and-comment period would risk “provoking a disturbance in domestic politics in Mexico and the Northern Triangle countries, and eroding the sovereign authority of the United States. . . .” *Id.* at 33,842. These purely speculative statements do not explain how adhering to the APA’s requirements would either derail domestic politics in Central America or erode the sovereignty of the United States.

Defendants’ failure to comply with notice-and-comment and the waiting period violates the APA’s established procedures. Defendants must consider the reasoned comments of interested parties and observe the 30-day waiting period.

B. DEFENDANTS’ DECISION WAS ARBITRARY AND CAPRICIOUS BECAUSE IT DID NOT ADEQUATELY CONSIDER THE HARMS THAT THE RULE WILL CAUSE

Defendants’ decision-making was also arbitrary and capricious. It failed to address the significant harms that flow from the Rule and the way it was enacted, or the Rule’s significant departure from prior practice. Defendants instead seek to justify the Rule only on conclusory assertions of efficiency, deterrence of meritless asylum claims, and a “crisis” at the southern border.

Administrative action violates the APA when it “entirely fail[s] to consider an important aspect of the problem” that the agency action purports to address. *State Farm*, 463 U.S. at 43. When instituting a policy, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *Altera Corp. & Subsidiaries v. Comm’r of Internal Revenue*, 926 F.3d 1061, 1080 (9th Cir. 2019) (“[T]he touchstone of ‘arbitrary and capricious’ review under the APA is ‘reasoned decisionmaking.’”) (quoting *State Farm*, 463 U.S. at 52). An agency’s decision to depart from its prior practice “can serve as a basis for finding an agency’s interpretation to be arbitrary and capricious, so long as the change in policy constitutes an ‘unexplained inconsistency.’” *City of Phila. v. Sessions*, 309 F. Supp. 3d 289, 322 (E.D. Pa. 2018), *aff’d in part and vacated in part on other grounds*, 916 F.3d 276 (3d Cir. 2019) (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

Defendants did not meet the APA’s requirements for reasoned decision-making. Defendants’ proffered explanation for the Rule ignores many of the Rule’s most devastating effects, especially its impact on asylum seekers. The Rule claims, with no support, that those who do not apply for asylum in a third country lack meritorious claims. 84 Fed. Reg. at 33,839. The Rule also touts Mexico’s

“robust protection regime.” *Id.* at 33,835. Yet the Rule fails to consider the danger and persecution migrants face in Mexico, and the corresponding risks of a prolonged stay in Mexico while applying for asylum, especially at cities along the southern border. In 2018, thousands of migrants waited to cross into the United States from Tijuana, the city with the highest murder rate in Mexico and one of the most dangerous cities in the world.⁴⁶ Farther east, in the Mexican border state of Tamaulipas, violence has soared to the point that the State Department has issued a “Level 4: Do Not Travel” warning.⁴⁷ Migrants who are victims of crimes in these

⁴⁶ See Human Rights First, *Refugee Blockade: The Trump Administration’s Obstruction Of Asylum Claims At The Border* 11 (Dec. 2018), https://www.humanrightsfirst.org/sites/default/files/December_Border_Report.pdf (“As of December 3, 2018, over five thousand people were on the informal ‘list’ of asylum seekers waiting to be processed through the U.S. port of entry at San Ysidro, California.”); Robert Strauss Ctr. for Int’l Security and Law et al., *Asylum Processing And Waitlists at the U.S.-Mexico Border* 11 (Dec. 2018), https://www.strausscenter.org/images/MSI/AsylumReport_MSI.pdf; Ed Vulliamy, *Migrants flee violence only to find more in Tijuana – Mexico’s murder capital*, *The Guardian* (Jan. 26, 2019), <https://www.theguardian.com/world/2019/jan/26/migrants-violence-tijuana-murder-capital>; Christopher Woody, *These were the 50 most violent cities in the world in 2018*, *Business Insider* (Mar. 12, 2019), <https://www.businessinsider.com/most-violent-cities-in-the-world-in-2018-2019-3>.

⁴⁷ See Human Rights First, *A Sordid Scheme: The Trump Administration’s Illegal Return of Asylum Seekers to Mexico* 14 (Mar. 2019), https://www.humanrightsfirst.org/sites/default/files/A_Sordid_Scheme.pdf; U.S. Dep’t of State, *Mexico Travel Advisory* (Apr. 9, 2019), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html>.

dangerous areas are particularly vulnerable due to indifference from the local authorities. One study estimates that less than 1 percent of crimes against migrants in Mexico resulted in a criminal conviction.⁴⁸ The Rule failed to consider this evidence.

Nor does the Rule include any discussion of the fear it will rouse within communities like Amici's, or how increased fear will erode public health, public safety, and access to legal services. Nor did Defendants consider the harm to Amici and the public from enacting the Rule without notice-and-comment procedures, which deprived Amici of the opportunity to marshal evidence and argument at an early stage of the rulemaking process to meaningfully influence it. *See Dean*, 604 F.3d at 1280–81. Defendants should be held to account for this failure by responding to comments from directly impacted stakeholders like Amici, as the APA unambiguously requires.⁴⁹ *Cf. St. James Hosp. v. Heckler*, 760 F.2d 1460, 1469 (7th Cir. 1985) (explaining that an agency must identify “what major

⁴⁸ Ximena Suárez et al., *supra* n.5 at 4.

⁴⁹ In the context of a lawful notice-and-comment process, Amici would also have voiced their opposition to a rule that violates the INA, as Plaintiffs have urged. *See* Plfts. Br. at 14–30. The Rule is contrary to the INA and its properly passed regulations' clear requirements because it does not require an adjudication that the immigrant can be removed safely to a third country or was firmly resettled in a third country; it categorically bars applicants from obtaining asylum if they passed through other countries without seeking asylum. Because the Rule contradicts the INA, it must be set aside.

issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did” (quotations omitted)).

Defendants failed to follow the APA’s requirements. Because Defendants did not appropriately consider any of these harms in enacting the Rule, their decision-making was arbitrary and capricious. The Rule should therefore be enjoined, and this Court should affirm the preliminary injunction order of the District Court. *See Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) (“Ordinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid.” (quotations omitted)).

III. NATIONWIDE RELIEF IS NECESSARY TO REMEDY THE RULE’S SIGNIFICANT HARMS

The District Court’s nationwide injunction should be upheld. A nationwide injunction of the Rule is in the public interest and necessary to prevent irreparable harm to Amici’s communities. Nationwide relief is also appropriate to ensure uniformity in the administration of immigration laws and because the Rule violates the APA.

The District Court’s order is entitled to deference and is reviewed only for abuse of discretion. The District Court has “considerable discretion in ordering an appropriate equitable remedy,” and “crafting a preliminary injunction” is “often dependent as much on the equities of a given case as the substance of the legal issues it presents.” *City & Cty. of S.F. v. Trump*, 897 F.3d 1225, 1245 (9th Cir.

2018) (quotations omitted). This Court will “reverse the grant of a preliminary injunction only when the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact.” *Sony Computer Entm’t, Inc. v. Connectix Corp.*, 203 F.3d 596, 602 (9th Cir. 2000) (quotations omitted). This Court also reviews “the scope of injunctive relief for an abuse of discretion.” *Id.*

Here, the District Court determined that a nationwide injunction was appropriate because it was necessary to afford complete relief to Plaintiffs. The District Court also found that several other factors supported a nationwide injunction, including a need to ensure uniformity in immigration laws, to prevent major administrability issues, and to remedy Defendants’ violation of the APA. 2d ER8, 12–14. This was an appropriate exercise of the District Court’s discretion.

First, the Rule’s negative effects on asylum seekers, Amici, and Amici’s residents extend nationwide. Such widespread harm to the public interest must be considered when ordering preliminary injunctive relief. *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). “Courts of equity may, and frequently do, go much farther to give relief in furtherance of the public interests than they are accustomed to go when only private interests are involved.” *Kansas v. Nebraska*, 135 S. Ct. 1042, 1053 (2015) (quotations omitted). Here, the Rule’s irreparable harm to the

public interest, including the interests of Amici and their residents, undoubtedly weighs in favor of nationwide relief. Absent a nationwide injunction, the climate of fear fanned by the Rule will remain, and the harm to the public safety and health of all Amici's residents will persist.

Second, the Rule is a nationwide immigration policy on eligibility for asylum in the United States, and it applies nationwide. For other nationwide immigration policies, courts have determined that nationwide injunctions are appropriate. *See Saget v. Trump*, 375 F. Supp. 3d 280, 378–79 (E.D.N.Y. 2019) (finding nationwide injunction appropriate because the challenged action—the termination of TPS for Haitians—did not involve case-by-case enforcement of a particular policy, but instead concerned a nationwide policy with a nationwide effect); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 437–38 (E.D.N.Y. 2018) (“Because the decision to rescind the DACA program had a ‘systemwide impact,’ the court will preliminarily impose a ‘systemwide remedy.’”). Courts have recognized the need for uniformity in the application of federal immigration law. *See id.* at 438; *Doe v. Trump*, 288 F. Supp. 3d 1045, 1086 (W.D. Wash. 2017) (“[P]artial implementation of the challenged provisions . . . would undermine uniform enforcement of the nation’s immigration laws.”); *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015) (finding the district court did not err when it imposed a nationwide injunction on a deferred action policy because partial

implementation of the policy would run against Congress’s intent that “the immigration laws of the United States . . . be enforced vigorously and *uniformly*”).

Third, nationwide relief is appropriate because the Rule violates the APA. Nationwide relief “is commonplace in APA cases.” *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 512 (9th Cir. 2018). “[W]hen a reviewing court determines that agency regulations are unlawful [in violation of the APA], the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.” *Id.* at 511 (quoting *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)).

This “ordinary result” makes sense. *See Regents of the Univ. of Cal.*, 908 F.3d at 511. When a Rule is found to violate the APA, either because it is contrary to law or arbitrary and capricious, *see* 5 U.S.C. §706(2)(A), that illegality does not depend on the party bringing the lawsuit or the jurisdiction in which it is applied. A partial injunction as to only Plaintiffs would flout the purpose of the APA: “[T]o provide the relief that any APA plaintiff is entitled to receive for establishing that an agency’s rule is procedurally invalid, the rule must be invalidated, so as to give interested parties (the plaintiff, the agency, and the public) a meaningful opportunity to try again.” *Make the Road N.Y. v. McAleenan*, No. 19-cv-2369(KBJ), 2019 WL 4738070, at *49 (D.D.C. Sept. 27, 2019).

CONCLUSION

For the reasons stated above, Amici respectfully request that the Court affirm the District Court's orders preliminarily enjoining Defendants' unlawful Rule nationwide.

Dated: October 15, 2019

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 29(a)(5) & 32(a)(7)(B) and Circuit Rule 32-1 because it contains 6,964 words, exclusive of the portions of the brief that are exempted by Federal Rule of Appellate Procedure 32(f). I certify that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

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