

Appeal No. 18-17274 & 18-17436

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

East Bay Sanctuary Covenant, et al.,

Plaintiffs-Appellees,

v.

Donald J. Trump, President 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. 3:18-CV-06810-JST

**BRIEF OF AMICI CURIAE 21 COUNTIES, CITIES, AND LOCAL OFFICIALS 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 or local officials for whom no corporate disclosure is required.

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INTEREST OF AMICI CURIAE¹

U.S. law has long provided that an individual 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 may request asylum within our borders, whether or not they entered at a designated port of arrival.

8 U.S.C §§ 1101(a)(42), 1158(a)(1). Nevertheless, Defendants-Appellants (“Defendants”) made immediately effective an Interim Final Rule that strips eligibility for asylum from asylum seekers who cross the southern border between ports of entry. Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55934 (Nov. 9, 2018) (the “Interim Rule”). Defendants promulgated the Interim Rule without the notice and comment that the Administrative Procedure Act (“APA”) requires, and without regard for the grave public health and safety consequences for communities like Amici.

Amici are 21 counties, cities, and local officials, located in 14 states across the country, that are home to vibrant immigrant communities that attract asylum

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.

seekers fleeing persecution. Amici have an interest in this proceeding because the Interim Rule will irreparably harm Amici and the public health, safety, and well-being of their residents and communities.

The Interim Rule will damage the public health of Amici's communities by driving more immigrants underground, making them less likely to access healthcare services that benefit everyone. It will also expose asylum seekers to more trauma, which will needlessly burden local government mental health and healthcare systems that care for them when they arrive in communities like Amici's.

The Interim Rule will also make Amici's communities less safe. Studies show that policies like the Interim Rule erode trust in law enforcement and deter immigrant communities from cooperating with law enforcement, to the detriment of everyone.

Finally, the Interim Rule will restrict Amici's ability to provide essential legal services to asylum seekers. Several Amici have allocated funds for legal representation for asylum seekers in their communities. The Interim Rule will dramatically reduce the reach of these investments.

The District Court below granted Plaintiffs-Appellees' ("Plaintiffs") preliminary injunction because the Interim Rule is unlawful, will cause irreparable harm, and is not in the public interest. Appellants' Excerpts of Record ("ER") 2.

Amici respectfully request the Court affirm the District Court's order preliminarily enjoining Defendants' unlawful Interim Rule.²

ARGUMENT

The Interim Rule unlawfully penalizes asylum seekers and harms Amici and their residents. This Court should affirm the District Court's order, which recognized that the Defendants' rush to judgment was illegal and unwise. The severe harm to Amici, their residents, and others demonstrates the necessity of genuine notice-and-comment rulemaking. That process would have revealed multiple harms to asylum seekers, asylees, and states and municipalities and their residents, which in turn would have revealed the severe error in enacting the Interim Rule. These harms are so severe that the Interim Rule, and any rule like it, should never be pursued after proper notice-and-comment rulemaking.

First, the Interim Rule will have a grave impact on the public health of Amici's communities and the health of asylees and asylum seekers who settle within Amici's borders. Amici already devote substantial resources to the mental and physical health of immigrants, including would-be and eventual asylees. They do so for the benefit of all their residents. The Interim Rule discourages immigrants in Amici's communities from accessing healthcare, including

² Amici do not address the precedential effect of this Court's prior decision on the issues in this case. *See* Pltf's Br. at 15–20.

immunizations, preventative health services, and mental health services, to the detriment of the entire community. The Interim Rule also works further trauma on asylum seekers who eventually settle in Amici's communities. The journey to the United States' southern border is already dangerous and traumatizing for asylum seekers. The Interim Rule forces asylum seekers, if they are to preserve their eligibility for asylum, to remain in truly horrific circumstances—an acknowledged humanitarian crisis just south of the border. It will lead to profound demands on the services Amici provide to remediate this crisis.

Second, the Interim Rule threatens the public safety of all Amici's residents. By eliminating a primary path to legal status for those who continue to cross between points of entry, and by contributing to a hostile immigration climate, the Interim Rule will erode trust between immigrants and local law enforcement. In doing so, the Interim Rule will chill both documented and undocumented immigrants from engaging with law enforcement, undermining the safety of all Amici's residents.

Finally, the Interim 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.

Aside from the substantial harms caused by the Interim Rule, Defendants also violated the procedural requirements of the APA when enacting the Interim

Rule. They bypassed the statute's required notice-and-comment and 30-day waiting period and instead gave the Interim Rule immediate effect. Defendants' decision was unlawful and shut out important evidence regarding the Interim Rule's harm. In a meaningful notice-and-comment process Amici, and those similarly situated, would have supplied critical evidence demonstrating the folly of the Interim Rule.

I. THE INTERIM RULE WILL NEGATIVELY IMPACT THE HEALTH OF AMICI'S RESIDENTS

The Interim Rule will have a widespread health impact that Amici must counteract. First, it will increase asylum seekers' fear of interacting with healthcare institutions and jeopardize Amici's ability to provide for the health and welfare of all residents. Second, it will exacerbate the health and mental health conditions of asylum seekers and asylees, placing additional burdens on Amici's healthcare systems.

A. The Interim Rule Will Undermine Public Health by Discouraging Immigrants from Seeking Health Services that Benefit the Entire Community

Because the Interim Rule will cause asylum seekers who enter between ports of entry to fear or avoid interactions with healthcare providers, the Interim Rule will impede Amici's ability to promote public health within their borders and will undermine the health of all Amici's residents.

The Interim Rule eliminates a primary pathway to legal status for many

immigrants, who will likely continue to cross the southern border between ports of entry.³ Because the Interim Rule eliminates their eligibility for asylum, these immigrants are more likely to remain undocumented and to fear deportation.⁴

Fear of deportation creates immense mental and emotional stress that prevents undocumented immigrants and their family members (many of whom may have legal status) from accessing health services. A 2018 survey revealed that 66 percent of Hispanic immigrants in the United States worry “a lot” or “some” that they, a family member, or a close friend could be deported.⁵ The percentage increases to over 75 percent for “likely unauthorized” Hispanic immigrants.⁶

When encumbered by the constant fear of deportation, individuals are less

³ See, e.g., Alyssa Isidoridy, *FAQ: Why Do Asylum Seekers Cross the U.S. Border Between Ports of Entry?*, *Human Rights First* (Nov. 27, 2018), <https://www.humanrightsfirst.org/blog/faq-why-do-asylum-seekers-cross-us-border-between-ports-entry>.

⁴ Although the Interim 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).

⁵ Mark Hugo Lopez et al., Pew Research Ctr., *More Latinos Have Serious Concerns About their Place in America Under Trump* 30–31 (Oct. 25, 2018), http://www.pewhispanic.org/wp-content/uploads/sites/5/2018/10/Pew-Research-Center_Latinos-have-Serious-Concerns-About-Their-Place-in-America_2018-10-25.pdf.

⁶ *Id.* at 31.

likely to interact with health institutions or to seek out the psychological or medical services they need.⁷ They miss doctor's visits and avoid filling their prescriptions.⁸ At the same time, deportation fears exacerbate health conditions like high blood pressure, anxiety, and depression.⁹ Fear of deportation can also dissuade undocumented immigrants from accessing health services for vulnerable family members, like young children.¹⁰ The effects of policies like the Interim Rule extend beyond those who themselves fear deportation. Such policies also

⁷ 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).

⁸ 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>.

⁹ See Hacker, *supra* n.7 at 592.

¹⁰ 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.").

impact the well-being of the families of undocumented immigrants, which may include U.S. citizens and those with legal immigration status.¹¹

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 through the Affordable Care Act marketplace.¹² Consequently, undocumented immigrants experience higher rates of uninsurance, and uninsured individuals are more likely to suffer from poor health and medical debt than insured individuals.¹³ Uninsured

¹¹ Kathleen M. Roche et al., *Impacts of Immigration Actions and News and the Psychological Distress of U.S. Latino Parents Raising Adolescents*, 62 J. Adolescent Health 525, 530 (2018), [https://www.jahonline.org/article/S1054-139X\(18\)30054-5/pdf](https://www.jahonline.org/article/S1054-139X(18)30054-5/pdf) (surveying the psychological effects of immigration policy on Latino parents and noting their U.S. citizen children also face risks to their well-being).

¹² 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., *Health Coverage of Immigrants*, Disparities Policy (Feb. 15, 2019), <https://www.kff.org/disparities-policy/fact-sheet/health-coverage-of-immigrants/>. Undocumented immigrants are eligible for emergency Medicaid. See Marrow, *supra* n.12 at 73.

¹³ See Kaiser Family Found., *supra* n.12; Kaiser Family Found., *Key Facts about the Uninsured Population*, Uninsured (Dec. 7, 2018) (“Key Facts”), <https://www.kff.org/uninsured/fact-sheet/key-facts-about-the-uninsured-population/>.

individuals also have limited access to healthcare and are less likely to receive preventative care or treatment for chronic diseases.¹⁴

By making it less likely that immigrants will seek health care, the Interim Rule jeopardizes the health of entire communities. Public health strategies are successful only when they are able to 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.”¹⁵ Immigrants who avoid the healthcare system struggle longer with virulent illnesses.¹⁶ If they have communicable diseases, it is more likely those diseases will spread to others.¹⁷ For example, when studying why tuberculosis patients delay in getting treatment, researchers found that a fear of immigration authorities was one of the variables most closely related to delaying care, which in turn increases the risk that disease will spread.¹⁸ For all of these reasons, Amici’s

¹⁴ See *Key Facts*, *supra* n.13.

¹⁵ See Hacker, *supra* n.7 at 592.

¹⁶ See Hoffman, *supra* n.8 (quoting Dr. Kathleen Page, co-director of the Centro SOL health center at Johns Hopkins).

¹⁷ *Id.*

¹⁸ Steven Asch et al., *Does Fear of Immigration Authorities Deter Tuberculosis Patients from Seeking Care?*, 161 WJM 373, 376 (1994).

public health efforts are directly threatened by policies like the Interim Rule that make immigrants and their families less likely to access critical health services.

B. The Interim Rule Will Harm the Health of Asylum Seekers and Asylees and Unnecessarily Burden the Communities that Care for Them

The Interim Rule also increases the health and mental-health trauma for asylum seekers who cross at points of entry by exacerbating the humanitarian crisis at the southern border. The Interim Rule will leave asylum seekers in horrific conditions for months as they await entry. The trauma associated with entering the U.S. will compound the physical and mental trauma asylees carry with them from the countries they are fleeing and from their journey to the U.S. border. Local governments in destination communities like Amici’s will be left to treat the unnecessary trauma inflicted by the Interim Rule.

1. The Interim Rule compounds the trauma and persecution that asylum seekers and asylees already face

The practices and policies of the U.S. government have led to this crisis at the southern border, which the Interim Rule will only exacerbate. U.S. Customs and Border Protection is currently engaged in “metering”—limiting the number of people who may assert their asylum claims each day and stationing officials on bridges leading to ports of entry to turn asylum seekers away.¹⁹ These practices

¹⁹ Amnesty Int’l, *Amnesty International Statement for March 6 Hearing on “The*

slow the rate that asylum applications are processed, result in longer wait times, and leave more people in crisis-level conditions at the border.²⁰ The Interim Rule aims to force vulnerable asylum seekers to these overcrowded and increasingly unsafe ports of entry, which will only worsen these conditions and leave asylum seekers waiting there for weeks or months to preserve their asylum claims.

The result will be more unnecessary trauma inflicted on already-traumatized asylum seekers. Asylum seekers face high levels of trauma because of the persecution they have experienced and are escaping, and the uncertainty of their status in the country to which they are fleeing.²¹ Many who enter at the southern

Way Forward on Border Security” 4 (Mar. 5, 2019), <https://www.amnestyusa.org/wp-content/uploads/2019/03/2019.03.06-Statement-for-House-Homeland-Security-Hearing-on-Border-Security-for-record-submission.pdf>; Robert Strauss Ctr. for Int’l Security and Law et al., *Asylum Processing And Waitlists at the U.S.-Mexico Border* 3–4 (Dec. 2018), https://www.strausscenter.org/images/MSI/AsylumReport_MSI.pdf.

²⁰ Amnesty Int’l, *USA: ‘You Don’t Have Any Rights Here’* 5, 19 (Oct. 2018), <https://www.amnesty.org/download/Documents/AMR5191012018ENGLISH.PDF>; ER.98 (citing advocacy organization declarations and finding “an established policy of limiting the number of people who may present asylum claims at ports of entry . . . currently results in lengthy delays, some eclipsing six weeks”).

²¹ See Piyal Sen, *The mental health needs of asylum seekers and refugees – challenges and solutions*, 13 *BJPsych Int.* 30, 31 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5619616/> (“One of the greatest challenges for asylum seekers is coping with the uncertain nature of their immigration status and, in particular, the difficulties negotiating the process of seeking asylum . . .”).

border come from the Northern Triangle of Central America and are fleeing extreme violence and persecution in their home countries. *See* ER.25 (citing administrative record evidence that “[t]he violence experienced by the population of the [Northern Triangle of Central America] is not unlike that of individuals living through war”). Asylum seekers and asylees arrive traumatized and susceptible to significant mental and physical health conditions, including post-traumatic stress disorder, depression, and anxiety.²² One Doctors Without Borders study found that of 1,817 refugees and migrants surveyed, 92.2 percent reported living through traumatic events that threaten their mental health and well-being.²³

The violence and persecution continue after asylum seekers escape their home countries. They face perilous journeys to the southern border that often include physical and sexual abuse at the hands of gangs and other persecutors.²⁴

²² *See, e.g.,* Sen, *supra* n.21 at 31; *see also* Rocío Naranjo Sandalio, *Life After Trauma: The Mental-Health Needs of Asylum Seekers in Europe*, Migration Policy Institute (Jan. 30, 2018), <https://www.migrationpolicy.org/article/life-after-trauma-mental-health-needs-asylum-seekers-europe> (explaining that many asylum seekers in Europe “suffer from conditions such as depression and post-traumatic stress disorder (PTSD), having lived through traumatic events before they set off on their journey, along the way, or both”).

²³ Medecins Sans Frontieres, *Forced to Flee Central America’s Northern Triangle: A Neglected Humanitarian Crisis* 15 (May 2017), https://www.doctorswithoutborders.org/sites/default/files/2018-06/msf_forced-to-flee-central-americas-northern-triangle.pdf.

²⁴ *Id.* at 4.

The same Doctors Without Borders study found that 68.3 percent of migrants and refugees that passed through Mexico to the United States are victims of violence during their journey.²⁵

The current conditions at the southern border exacerbate these traumas. In recent months, waitlists at certain ports of entry have skyrocketed, including for asylum seekers.²⁶ In December 2018, the estimated average wait time to cross the southern border was up to eight weeks at the Tamaulipas Gateway International Bridge port of entry, and a staggering twelve weeks in Tijuana.²⁷

Many asylum seekers undergo these lengthy waits in cities plagued by violence. In 2018, thousands of migrants waited to cross into the United States in Tijuana, the city with the highest murder rate in Mexico and one of the most dangerous cities in the world.²⁸ Another Mexican border state, Tamaulipas, also

²⁵ *Id.* at 5.

²⁶ *See* Strauss Ctr., *supra* n.19 at 5–6.

²⁷ *See id.* at 6–7.

²⁸ *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.”); Strauss Ctr., *supra* n.19 at 11; 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*

has such high levels of violence that the State Department classifies it as “Level 4: Do Not Travel.”²⁹ Migrants who are victims of crimes in these 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.³⁰

Asylum seekers who wait at the southern border are also forced to endure troublingly unsanitary living conditions. Before it was closed by local government officials in Tijuana, a shelter in the Benito Juarez Sports Complex housed thousands of migrants at a time, was prone to flooding, and routinely lacked enough essential resources such as food, water, and health services to meet

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>.

²⁹ 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>.

³⁰ 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.

migrants' basic needs.³¹ Lice and respiratory infections were rampant.³²

Ultimately, the government closed the shelter in December 2018 due to the unsanitary conditions.³³ In conditions like these, the most vulnerable populations—like young children—suffer the most severe health effects.³⁴

2. The Interim Rule will harm the health and well-being of Amici's communities, which Amici will struggle to remedy

Because the Interim Rule inflicts these types of additional trauma, asylees and asylum seekers will require more care when they arrive in Amici's communities.

Several Amici provide health services to all their residents, regardless of

³¹ Amnesty Int'l, *Americas: US government endangers asylum seekers with unlawful policies* (Nov. 26, 2018), <https://www.amnesty.org/en/latest/news/2018/11/americas-us-government-endangers-asylum-seekers-with-unlawful-policies/>.

³² Associated Press, *Tijuana Shuts Down Migrant Shelter In Sports Complex*, KPBS (Dec. 3, 2018), <https://www.kpbs.org/news/2018/dec/03/tijuana-shuts-down-migrant-shelter-benito-juarez/>.

³³ *Id.*

³⁴ Last year UNICEF issued a statement calling on governments in the region to protect migrant children at the border, explaining, “[t]hese children have limited access to many of the essential services they need for their wellbeing, including nutrition, education, psychosocial support and healthcare. They are also at risk of exploitation, abuse and trafficking while on the road or amidst the crowded camps and respite centres at the border.” *UNICEF statement on situation of migrant children at Mexico-U.S. border* (Nov. 28, 2018), <https://www.unicef.org/press-releases/unicef-statement-situation-migrant-children-mexico-us-border>.

immigration status, at great cost to Amici. For example:

- The Los Angeles County Department of Health Services (“LADHS”) is the second largest municipal health system in the United States.³⁵ The Los Angeles County Department of Mental Health (“LADMH”) is the largest county-operated mental health department in the United States.³⁶ LADHS and LADMH, along with the Los Angeles County Department of Public Health, and the Los Angeles County Department of Public Social Services, provide critical public health and social services to all County residents. LADHS and LADMH operate the My Health LA program that provides health care services to individuals and families that are ineligible for public health insurance, including undocumented immigrants.³⁷

³⁵ *About DHS*, L.A. Cty. Health Servs., <http://dhs.lacounty.gov/wps/portal/dhs/moredhs/aboutus/> (last visited May 15, 2019).

³⁶ *About*, L.A. Cty. Dep’t of Mental Health, <https://dmh.lacounty.gov/about/> (last visited May 15, 2019).

³⁷ My Health LA, *Annual Report to the Los Angeles County Board of Supervisors Fiscal Year 2017–18* 3, http://file.lacounty.gov/SDSInter/dhs/1049638_2017-18MHLAAnnualReportFINAL.pdf (last visited May 15, 2019); Shannon McConville et al., Pub. Policy Inst. of Cal., *Health Coverage and Care for Undocumented Immigrants* 5 (Nov. 2015), https://www.ppic.org/content/pubs/report/R_1115SMR.pdf.

- New York City offers mental health clinics, hotlines, and health services for all residents, regardless of immigration status.³⁸ In January 2019, New York City Mayor Bill de Blasio announced that the City will launch a \$100 million health insurance initiative called NYC Care, which will provide access to health services to an estimated 300,000 residents who are uninsured and either ineligible for public health insurance programs due to their lack of immigration status or unable to afford health insurance premiums. NYC Care aims to help uninsured New Yorkers better manage their health and avoid reliance on emergency room visits.³⁹
- The City of Chicago provides all residents with city services, which include mental health care and well-being services.⁴⁰

³⁸ N.Y.C. Mayor's Office of Immigrant Affairs, *Services for Recently Arrived Immigrants Resource and Referral Guide* 29 (Apr. 2017), https://www1.nyc.gov/assets/immigrants/downloads/pdf/english_immigration%20guide.pdf.

³⁹ Jillian Jorgensen, *NYC to provide a \$100M 'public option' for health care to city's 600,00 uninsured, de Blasio says*, N.Y. Daily News (Jan. 8, 2019), <https://www.nydailynews.com/news/politics/ny-pol-deblasio-public-option-nyc-care-health-insurance-undocumented-20190108-story.html>.

⁴⁰ The City of Chi. Mayor's Office of New Americans, *Resources for Chicago Immigrants and Refugees*, https://www.chicago.gov/content/dam/city/depts/mayor/Office%20of%20New%20Americans/PDFs/Resources_Flyers/Resources_Flyer_English_Color.pdf (last

- In the City of Oakland, the Highland Hospital’s Human Rights Clinic, operated by the Alameda Health System,⁴¹ provides asylum seekers with medical assessments that are used for treatment and also provide essential evidence to support their asylum applications.⁴² If the asylum seeker cannot cover the cost of their treatment, Alameda County provides the necessary funding.⁴³

When asylum seekers and asylees settle in the United States, they depend on local governments like Amici, for vital health services, including physical exams, mental health evaluations and referrals, and treatment for undiagnosed illnesses like tuberculosis and HIV.⁴⁴

visited May 15, 2019).

⁴¹ A Board of Trustees appointed by the Alameda County Board of Supervisors runs the Alameda Health System. *Our Leadership: Board of Trustees*, Alameda Health Sys., <http://www.alamedahealthsystem.org/about-us/> (last visited May 15, 2019).

⁴² Lisa Fernandez & Candice Nguyen, *Oakland human rights clinic provides rare, forensic medical evidence for tortured asylum seekers*, KTVU (Oct. 11, 2018), <http://www.ktvu.com/news/oakland-human-rights-clinic-provides-rare-forensic-medical-evidence-for-tortured-asylum-seekers>; Anna Gorman, *Medical Clinics That Treat Refugees Help Determine The Case For Asylum*, NPR (July 10, 2018), <https://www.npr.org/sections/health-shots/2018/07/10/625504295/medical-clinics-that-treat-refugees-help-determine-the-case-for-asylum>.

⁴³ See Gorman, *supra* n.42.

⁴⁴ See e.g., *id.*

Amici provide these services because they understand that providing health care for all residents benefits the entire community. An analysis of three county-level programs that expanded primary care services to undocumented immigrants associated the programs with a reduction in avoidable emergency room visits, which is cost-effective and improves patient outcomes.⁴⁵ Another study examining Internal Revenue Service data found that Medicaid expansion was associated with higher cumulative earnings, higher tax payments, and lower mortality rates.⁴⁶ Yet the Interim Rule will increase health care needs and the demands on Amici's public health programs. These programs already face extreme demands. For example, in October 2018, the Highland Hospital's Human Rights Clinic in Oakland had a three-month long waiting list.⁴⁷

In short, the Interim Rule undermines Amici's public health initiatives while also increasing the trauma that those public health initiatives must address.

⁴⁵ Denisse Rojas & Miranda Dietz, *Providing Health Care to Undocumented Residents: Program details and lessons learned from three California county health programs* 18 (Oct. 4, 2016), <http://laborcenter.berkeley.edu/pdf/2016/Providing-Health-Care-to-Undocumented-Residents.pdf>.

⁴⁶ David W. Brown et al., *Medicaid As An Investment In Children: What Is The Long-Term Impact On Tax Receipts?* 31–32 (Cowles Found., Discussion Paper No. 1979, 2015), <https://cowles.yale.edu/sites/default/files/files/pub/d19/d1979.pdf>.

⁴⁷ See Fernandez & Nguyen, *supra* n.42.

II. THE INTERIM RULE WILL UNDERMINE PUBLIC SAFETY FOR ALL OF AMICI'S RESIDENTS

The Interim Rule will also undermine public safety in communities like Amici's. For the same reasons that it discourages immigrants and their families from accessing health care, eliminating a path to legal status for those who continue to cross between ports of entry and thereby increasing fear of deportation⁴⁸ also undermines public safety because it will make immigrants and their families less likely to report crimes and seek assistance from law enforcement.

Law enforcement 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.⁴⁹ Policies like the Interim Rule alienate

⁴⁸ The Interim Rule operates alongside other recently adopted policies that restrict lawful immigration and against the backdrop of heightened anti-immigrant sentiment, all of which will compound the likelihood that the Interim Rule will increase fears of detention and removal. For immigrants who enter the U.S. with the hope of gaining asylum, removal may mean returning to the persecution from which they fled, and separation from family members who remain in the United States.

⁴⁹ 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->

immigrants, undermine trust in police and other government institutions, and frustrate the ability of law enforcement to protect the entire community.

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, and *even when an individual is a 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 to the police.⁵⁰ Among survey respondents, fear of deportation was also associated with fear of police using excessive force and low confidence that police would treat Latinos fairly, which in turn was associated with a reduced likelihood of reports by victims of violent crime.⁵¹ Other studies show that undocumented victims of domestic violence, most of whom are women, are

09/CommunityPoliceRelationsSummitReport_web.pdf (explaining that communication, partnership, and trust form the basis of strong community-police relationships).

⁵⁰ 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).

⁵¹ *Id.* at 332–35.

less likely to report abuse to authorities than documented or non-immigrant women because of fear of immigration consequences, among other reasons.⁵² 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.⁵³

The inverse has also proven true: when there is less general fear of deportation, immigrants are more likely to engage with police and report crime. A recent study by Princeton University analyzed crime reporting rates in Dallas, Texas between 2013 and 2016 and found that crime reporting by Hispanic individuals increased by 10 percent after the U.S. Department of Homeland

⁵² 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 (2012).

⁵³ 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-field/legacy_downloads/engaging-police-in-immigrant-communities.pdf; see also Hannah Rappleye et al., *Immigration Crackdown Makes Women Afraid to Testify Against Abusers, Experts Warn*, NBC News (Sept. 22, 2018), <https://www.nbcnews.com/politics/immigration/immigration-crackdown-makes-women-afraid-testify-against-abusers-experts-warn-n908271> (“Since President Trump’s inauguration, [Denver City Attorney Kristin Bronson] said she’s had to drop 30 cases of domestic violence because the victims were too afraid of deportation to cooperate and appear in court.”).

Security limited its immigration enforcement priorities.⁵⁴ These results suggest that when communities ameliorate fears of immigration enforcement, trust between immigrants and law enforcement increases, with concrete outcomes on crime reporting.⁵⁵

Policies like the Interim 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 immigrant populations in the mid-Atlantic 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.⁵⁶

For these reasons, law enforcement agencies warn that policies that alienate immigrants places communities at risk.⁵⁷ In response to a 2017 nationwide survey

⁵⁴ 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, 2018), <http://arks.princeton.edu/ark:/88435/dsp018p58pg70r>.

⁵⁵ *Id.* at 24.

⁵⁶ *See Roche, supra* n.11 at 528–29.

⁵⁷ *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

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.⁵⁸ Crimes involving immigrant and LEP victims, most notably domestic violence, human trafficking, sexual assault, and child abuse, were becoming harder to investigate due to lack of cooperation from victims, driven largely by fears of deportation and hostile federal immigration policies.⁵⁹ Officials also reported that when immigrant victims do not cooperate with law enforcement, it negatively affects officer safety, community safety, victim safety, and the ability to hold violent perpetrators accountable.⁶⁰ 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

step forward because they trust their local police, communities are safer.”).

⁵⁸ 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 (2018).

⁵⁹ *Id.* at 39, 48–49, 50–51.

⁶⁰ *Id.* at 103–04.

detriment of public safety.⁶¹ As DOJ explained, “[p]olice 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.”⁶² By creating an entirely new category of immigrants who are ineligible for asylum, the Interim Rule increases fear and hostility and undermines public safety in Amici’s communities.

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

The Interim Rule also negatively impacts the efforts of several Amici to provide counsel and other support services to asylum seekers in their communities. Because many would-be asylum seekers will unlawfully be rendered ineligible under the Interim Rule based solely on how they entered the United States, their legal claims in immigration court will be more restricted, more difficult, and costlier to make, even though they have valid claims of fear of persecution in their home countries. The legal services funding that Amici provide therefore will not help as many as efficiently as before. The result will be less legal representation for immigrants fleeing persecution and less benefit to Amici who support legal

⁶¹ *When Police Engage Immigrant Communities: Promising Practices from the Field*, Community Policing Dispatch (Office of Cmty. Oriented Policing Servs., Washington, D.C.), Feb. 2013, <https://goo.gl/RfdtXC>.

⁶² *Id.*

services funds and programs for immigrants fleeing persecution. And a decline in representation will mean more asylum seekers are left unable to navigate the complex immigration process and persuasively present meritorious claims.

Several Amici devote significant resources to increase asylum seekers' access to legal services. In Fiscal Year 2019, Amici New York City ("NYC") invested more than \$40 million dollars in legal services for immigrant residents.⁶³ New York State's immigrants have the highest rate of asylum approval in the United States, in part because of the funding provided by NYC.⁶⁴ In 2017, the City of Chicago approved a Legal Defense Fund of \$1.3 million to pay for legal services for immigrants.⁶⁵ After the Fund was instituted, representation in Chicago immigrants' deportation proceedings increased from 30 percent to 57 percent

⁶³ N.Y.C. Mayor's Office of Immigrant Affairs, *Public Comment Re: EOIR Docket No. 18-0501, Interim Final Rule: "Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims"* 4 (Jan. 8, 2019).

⁶⁴ *Id.*

⁶⁵ Vikki Ortiz, *Spike in Legal Representation for immigrants in Chicago is attributed to \$1 million city fund*, Chicago Trib. (Nov. 4, 2017), <http://www.chicagotribune.com/news/immigration/ct-met-immigrants-represented-in-court-20171031-story.html>; see also Nat'l Immigrant Justice Ctr., *Second Annual Report of the Chicago Legal Protection Fund* 1 (Oct. 2018), https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-10/LPF-annual-report_Final_3Oct2018.pdf.

between May and August 2017.⁶⁶ The County and City of Los Angeles also strive to increase immigrants' access to legal services through the L.A. Justice Fund. The L.A. Justice Fund provides representation for Los Angeles County residents at imminent risk of removal and who earn 200 percent or less of the Federal Poverty guidelines.⁶⁷

Amici do so for good reason. 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 attorney.⁶⁸ 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.⁶⁹ Legal services programs for asylum seekers make it more likely that our immigration system “gets it right,” and avoid the human and moral cost of sending refugees back to danger, persecution, torture, or

⁶⁶ See Ortiz, *supra* n.65.

⁶⁷ L.A. Cty. Office of Immigrant Affairs, L.A. Justice Fund FAQs (Jan. 17, 2019), <http://oia.lacounty.gov/aboutlajf/>.

⁶⁸ See TRAC Immigration, *Continued Rise in Asylum Denial Rates: Impact of Representation and Nationality* (Dec. 13, 2016), <https://trac.syr.edu/immigration/reports/448/> (affiliated with Syracuse University).

⁶⁹ Medecins Sans Frontieres, *supra* n.23 at 23 (explaining that some migrants deported from the United States to the Northern Triangle have been killed by gangs after their return).

death. ER.88 (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))).

The Interim Rule threatens the reach of Amici’s investments in legal services by restricting asylum eligibility and forcing many would-be asylum seekers to instead pursue more difficult forms of relief (*i.e.*, withholding of removal or Convention Against Torture (“CAT”) claims). Legal service providers will need to shift strategy when representing clients who would have otherwise qualified for asylum. Litigating these more complex and difficult claims will place time and financial strains on providers. And the much higher burden of proof for both withholding of removal and CAT claims will increase the time and money needed for lawyers to marshal additional evidence to meet the higher burdens.

By unlawfully restricting asylum eligibility based solely on manner of entry, the Interim Rule undermines Amici’s investments in legal services programs that assist those fleeing persecution.

IV. DEFENDANTS FAILED TO COMPLY WITH THE APA’S NOTICE-AND-COMMENT REQUIREMENTS AND THUS FAILED TO PROPERLY WEIGH THE RULE’S HARMFUL IMPACTS AND CONFLICT WITH THE INA

Defendants did not pause to consider any of these harmful effects of the Interim Rule because Defendants disregarded the notice-and-comment

requirements of the APA and made the Interim Rule immediately effective. This is a clear violation of basic rulemaking procedures, which requires an agency to consider the negative impacts of a Rule, and provide an opportunity for all stakeholders to comment, *before* the agency adopts the rule. Defendants must start the rulemaking process over and comply with the APA's requirements, including a full consideration of the grave harms that will flow from the Interim Rule to communities like Amici's.

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\(d\)](#).⁷⁰ The notice-and-comment period is not "an empty formality" and the agencies "must consider and respond to significant comments" before implementation. ER.111 (quoting *Perez v. Mortg. Bankers Ass'n*, [135 S. Ct. 1199, 1203](#) (2015)); *see Paulsen v. Daniels*, [413 F.3d 999, 1005](#) (9th Cir. 2005) ("It is antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later."); *see also United States v. Dean*, [604 F.3d](#)

⁷⁰ Plaintiffs' brief thoroughly explains why Defendants' claimed exemptions for foreign affairs and good cause are inapplicable and do not justify Defendants' departure from the APA's unambiguous requirements. *See* Pltf.'s Br. at 41–48.

1275, 1280 (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.’” ER.177 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001)). The APA’s “procedural safeguards that assure the public access to the decisionmaker should be vigorously enforced.” *W. Oil & Gas Ass’n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980).

These procedures exist for good reason: if Defendants had followed notice-and-comment procedures, they would have been unable to ignore the clear harms that the Interim Rule works on Amici and their residents, causing irreparable damage in the name of speculative, if any, gain. Faced with this evidence, Defendants could not justify their decision to implement the Interim 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)).

Defendants' proffered explanation for the Interim Rule is wholly inadequate and irrational. Defendants ignore many of the Interim Rule's most devastating effects. The Interim Rule breezes over its impact on asylum seekers and the unsafe conditions at the southern border. It devotes only four paragraphs to the Interim Rule's impact on asylum seekers, despite a blatant admission that the Interim Rule would have the "most direct effect" on them. *See* ER.211. Although the Interim Rule speculates that meritorious claims *might* be adjudicated more swiftly if "the number of non-meritorious cases decline[s]," *id.*, it essentially fails to consider the impact of foreclosing asylum eligibility for those who have meritorious claims under decades of federal policy. *Cf. Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, [407 F.3d 1250, 1259](#) (D.C. Cir. 2005) ("Notice requirements are designed . . . to give affected parties an opportunity to develop evidence in the record to support their objections to the rule . . .").

Defendants also accord cursory treatment to how the Interim Rule will affect the situation at the southern border, noting only that there will be longer wait times at ports of entry and "more time in Mexico." ER.211. The Interim Rule's failure to address the growing humanitarian crisis on the southern border and recognize its role in compounding that crisis is astounding. *See* Part I.B.1. *supra*. Defendants should be held to account for this failure by responding to comments from gravely concerned stakeholders like Amici, as the APA unambiguously requires. *Cf. St.*

James Hosp. v. Heckler, 760 F.2d 1460, 1469 (7th Cir. 1985) (explaining that an agency must identify “what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.” (quotations omitted)).

In the context of a lawful notice-and-comment process, Amici would also have voiced their opposition to a rule that violates the plain text of the Immigration and Nationality Act (“INA”). The Interim Rule is contrary to Congress’s clear mandate that anyone “physically present in the United States . . . (whether or not at a designated port of arrival . . .)” may apply for asylum. 8 U.S.C. § 1158(a)(1). This conflict between the Interim Rule and the INA presents a “straightforward question of statutory interpretation.” ER.105 (applying the *Chevron* framework); *see also Sung Kil Jang v. Lynch*, 812 F.3d 1187, 1190 (9th Cir. 2015). That conflict must be resolved as follows. The Interim Rule contradicts, and is superseded by, the INA. *See Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014) (It is a “core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.”).

Defendants failed to follow notice-and-comment procedures. They prevented Amici and others from presenting compelling evidence that the Interim Rule is unlawful and would cause irreparable harm *before* it went into effect. The Interim Rule should therefore be enjoined, and this Court should affirm the

preliminary injunction order of the District Court. *Paulsen*, 413 F.3d at 1008 (“Ordinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid.” (quotations omitted)).

CONCLUSION

For the reasons stated above, Amici respectfully request the Court affirm the District Court’s order preliminarily enjoining Defendants’ unlawful Interim Rule.

Dated: May 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 6,990 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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