



State of California
Office of the Attorney General

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ATTORNEY GENERAL

September 23, 2019

Via electronic submission to www.regulations.gov

ATTN: Docket ID No. DHS-2019-0036

The Honorable Kevin K. McAleenan
Acting Secretary of Homeland Security
Washington, D.C. 20528

RE: Comments from State Attorneys General Regarding the Department of Homeland Security's
Notice Designating Aliens for Expedited Removal (Docket No. DHS-2019-0036)

Dear Acting Secretary McAleenan:

This letter is submitted on behalf of the States of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Vermont, and Washington, and the District of Columbia (collectively, the States) to highlight serious concerns regarding the Department of Homeland Security's (DHS) notice Designating Aliens for Expedited Removal (Docket No. DHS-2019-0036) (the New Rule), which dramatically expands the expedited removal process to permit summary deportation of hundreds of thousands of additional immigrants. Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019). The New Rule's major expansion of expedited removal ensures that people, including legal permanent residents and United States citizens, will be erroneously deported because the expedited removal process provides individuals virtually no opportunity to defend themselves.

The New Rule also fails to account for the disruption caused by summarily detaining and expelling productive members of our communities. Immigrant residents of the States, including undocumented immigrants, provide care and support to children or other family members, pay taxes, provide goods and services in their communities, and otherwise contribute to society. They cannot simply be plucked from the lives they have established without causing great hardship to children, relatives, employers, and the States. Thus, the States oppose the New Rule and respectfully urge that it be rescinded.

I. THE STATES ARE HARMED BY THE FAILURE TO PROVIDE FOR ADVANCE NOTICE AND COMMENT

As a preliminary matter, the States could have, and would have, identified all of the following problems with expanding expedited removal *before* the New Rule was implemented had the federal government provided notice and an opportunity for comment. But this rule was implemented with no advance notice and no opportunity for input from affected individuals, organizations, the States, or the public in general. Public notice and comment promotes good government by ensuring the decision-maker has access to complete information about potential pitfalls and ramifications of, and alternatives to, the proposed action. Public participation ensures that agency actions are tested through exposure to diverse perspectives, that the process is fair to affected parties, particularly where “governmental authority has been delegated to unrepresentative agencies,” and that affected parties have “an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.” *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005); *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980).

DHS’s failure to provide pre-rule notice and a comment period not only deprived the States of the opportunity to participate in the rulemaking process but also deprived DHS and the public of the benefit of the States’ unique perspectives. 84 Fed. Reg. 35,409, 35,410. The opportunity to comment on proposed federal actions is vital to the States’ ability to protect their residents. As sovereigns¹ responsible for the health, safety, and welfare of millions of people within their respective borders, the States have unique interests and perspectives to contribute, particularly where, as here, federal actions will cause their residents unnecessary, substantial, and enduring harm.

Public input is most effective when it is received and considered *before* a course of action has been decided upon and the decision-maker is open to *all* available options. Nonetheless, the States urge DHS to give these comments full consideration, unconstrained by the decision already made.

¹ The District of Columbia asserts its quasi-sovereign interests and its authority to enforce its laws and uphold the public interest under its Attorney General Act. D.C. Code. § 1-301.81; *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 608 n.15 (1982) (recognizing that Puerto Rico “has a claim to represent its quasi-sovereign interests in federal court at least as strong as that of any State”).

II. EXPANSIVE USE OF EXPEDITED REMOVAL UNDERMINES THE STATES' EFFORTS TO ENSURE FAIR TREATMENT OF ALL THEIR RESIDENTS

A. Residents of the States Face Substantial Risk of Wrongful Deportation Under the New Rule

The New Rule allows line-level immigration officers to summarily deport anyone apprehended anywhere in the country who cannot satisfy the officer that he or she is lawfully in the country; has been continuously present here for at least two years; or has a credible fear of persecution if deported. This truncated removal process has previously been applied only to immigrants arriving by sea or who were apprehended within 100 miles of a land border within 14 days of entering the country. Even then it was fraught with problems and led to numerous erroneous deportations. Extending its use to hundreds of thousands more individuals will only magnify the potential for these errors and the harm that this process can cause to immigrants, families, communities and the States.

During the expedited removal process, subject to certain exceptions for individuals claiming a credible fear of persecution, individuals can be abruptly removed without a regular immigration court hearing before a judge, access to counsel, or the opportunity to apply for most forms of relief from removal. 8 U.S.C. § 1225(b)(1)(A)(i).² Instead, both the fact-finding and adjudication functions are given to a DHS line-level immigration enforcement officer whose decision to deport someone via expedited removal is generally final, subject only to approval by a supervisor. 8 U.S.C. § 1225(b)(1)(A)(i).³ Despite the significant penalties that result from a removal order, including a ban on readmission ranging from five years to life, 8 U.S.C. § 1182(a)(9)(A)(i), and potential criminal penalties for reentry, 8 U.S.C. § 1326, such orders generally are not subject to either judicial review or appeal, 8 U.S.C. § 1225(b)(1)(C).

DHS reports that in fiscal year 2018, the time from initial detention to deportation averaged 11.4 days for individuals in expedited removal, compared to 51.5 days for persons “placed into full removal proceedings.”⁴ Generally, the entire expedited removal process consists of an interview with an immigration officer who fills out a standardized form, and may

² In the process, individuals may be detained until removed. 8 U.S.C. § 1225(b)(2)(A); *see also* 8 C.F.R. §§ 212.5(b), 235.3(b) (discussing parole of noncitizens in expedited removal); *Flores v. Barr*, No. 17-56297, slip. op. at 15-18 (9th Cir. Aug. 15, 2019) (same).

³ In limited circumstances, additional review is provided. For example, any person who claims under oath to have been lawfully admitted for permanent residence, to have been admitted as a refugee, or to have been granted asylum is entitled to prompt review of an expedited removal order. 8 U.S.C. § 1225(b)(1)(C).

⁴ 84 Fed. Reg. 35,409, 35,411.

even be in a remote location.⁵ Fewer than 20 percent of the people ordered removed through expedited removal (and reinstatement of removal)⁶ ever see an immigration judge.⁷

Even before the New Rule's broad expansion of expedited removal, the process has been prone to errors. Since its inception, reports have documented numerous problems, including significant numbers of people being: (1) forced by officers to sign documents they cannot read or understand; (2) misinformed about or denied their right to apply for asylum; and (3) denied the ability to collect documentary or other information to support a valid defense against expedited removal.⁸ The process has been misapplied to deport legitimate asylum seekers, longtime residents with family who are U.S. citizens, children, individuals with valid work and tourist visas, "and others with significant ties or legal claims to be in the United States."⁹

Given the speed at which the expedited removal process takes place, there is rarely an opportunity to consult with an attorney, obtain witnesses, or collect documents, such as a birth certificate, lease, or employment form, that might prevent immediate deportation. In addition, the short timelines make it even more difficult for people already traumatized by the harm they fled or the shock of being uprooted from family and friends to clearly articulate their basis for immigration relief.¹⁰ Quick decisions made by line-level immigration officers with broad

⁵ Stephen Manning & Kari Hong, *Getting It Righted: Access to Counsel in Rapid Removals*, 101 Marq. L. Rev. 673, 682-83, 690 (2018).

⁶ "Reinstatement of removal" refers to the summary removal, without a hearing before an immigration judge, of a person previously deported who unlawfully reenters the country. Office of Immigration Stat., U.S. Dep't of Homeland Sec., *Immigration Enforcement Actions: 2017* at 4 (Mar. 2019), <https://tinyurl.com/ImmEnf2017>.

⁷ Am. Immigration Lawyers Ass'n, *Due Process Denied: Central Americans Seeking Asylum and Legal Protection in the United States* 17 (June 15, 2016), <https://tinyurl.com/AILA-DueProcess>.

⁸ See, e.g., U.S. Comm'n on Int'l Religious Freedom, *Report on Asylum Seekers in Expedited Removal: Volume I: Findings & Recommendations* 51 (Feb. 8, 2005), <https://tinyurl.com/USCIRF-ExpeditedRemoval>; Elizabeth Cassidy & Tiffany Lynch, U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection, The Treatment of Asylum Seekers in Expedited Removal* 21-22 (2016), <https://tinyurl.com/USCIRF-Barriers>; Am. Immigration Council, *A Primer on Expedited Removal* 1 (July 2019), <https://tinyurl.com/AmIC-Perils>; see also Borderland Immigration Council, *Discretion to Deny: Family Separation, Prolonged Detention, and Deterrence of Asylum Seekers at the Hands of Immigration Authorities Along the U.S.-Mexico Border* 12-13 (Feb. 2017), <https://bit.ly/2ZxInuV>.

⁹ ACLU Found., *American Exile: Rapid Deportations that Bypass the Courtroom* 4 (Dec. 2014), <https://tinyurl.com/ACLU-AmExile>.

¹⁰ Kathryn Shepherd & Royce Bernstein Murray, Am. Immigration Council, *The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers* 9-16 (May 2017), <https://tinyurl.com/AIC-Perils> (finding that many in expedited removal who are seeking asylum

discretion and little to no judicial review compound the errors.¹¹ The failure to provide access to counsel only increases the probability of mistakes. A national study of 1.2 million immigration cases found that detained immigrants with counsel were ten times more likely to seek relief than those without counsel and more than twice as likely to obtain relief from removal.¹²

Moreover, under the New Rule, expedited removal is allowed if the person apprehended does not “establish[] to the satisfaction of the immigration officer” that he or she has been physically present in the United States continuously for the past two years. 8 C.F.R. § 235.3(b)(1)(ii). Neither the New Rule nor the expedited removal regulations inform immigrants or immigration officers how continuous presence in the United States may be established or what standard of proof is to be applied. 8 C.F.R. § 235.3. Instead, expedited removal is allowed if the person does not “establish[] to the satisfaction of the immigration officer” that he or she has been physically present in the United States continuously for the past two years. 8 C.F.R. § 235.3(b)(1)(ii). Without a clear legal standard, immigration officers may apply an inconsistent or unfairly high burden of proof, which is especially problematic in this context, where people must prove a negative—that they have not left the country during the past two years.¹³

The summary process also effectively limits the types of claims or defenses that can be raised and may unjustly deprive individuals of any opportunity to pursue relief for which they may be eligible. For example, individuals who are profiled on the basis of national origin or race or arrested in violation of their Fourth Amendment rights will be effectively prevented from raising those violations in the expedited removal process by the lack of a neutral adjudicator or any procedure for deciding such issues. This is especially troubling where, as here, concerns about racial profiling are particularly acute. To date, expedited removal has almost exclusively been applied to persons who are from Mexico and three Central American countries, Guatemala,

are suffering from significant trauma, including the emotional impact of family separation, which may have an effect on their ability to tell their story).

¹¹ Ebba Gebisa, *Constitutional Concerns with the Enforcement and Expansion of Expedited Removal*, 2007 U. Chi. Legal F. 565, 580-83 (2007).

¹² Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 51 fig.15 (2015); see also U.S. Gov’t Accountability Office, *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges* 30 (Sept. 2008), <https://tinyurl.com/GAO-Asylum> (after controlling for other factors, finding that having an attorney more than doubled an asylum seeker’s chance of being granted asylum).

¹³ Am. Immigration Council, *supra* note 8; Cassidy & Lynch, *supra* note 8, at 35.

Honduras, and El Salvador.¹⁴ And roughly 90 percent of all immigrants removed in 2017 were from those four countries.¹⁵

As noted above, substantial errors occurred even with the more limited application of expedited removal; it is inevitable that expanding the scope of the system, as the New Rule does, will only multiply the mistakes. And these errors represent more than an administrative failure. Multiple reports have documented the grave consequences of wrongful deportation for the people involved. For example, a 2014 report described Maria, a U.S. citizen against whom an expedited removal order was issued by an officer who did not believe a U.S. citizen would speak only Spanish. She spent years in Mexico before she found an attorney and then months in litigation before she could return.¹⁶

The systemic problems inherent in the expedited removal process are exacerbated by DHS's immediate expansion of the practice without providing training to immigration officers. DHS's notice of the New Rule states that Immigration and Customs Enforcement (ICE) intends to, at some unspecified time in the future, develop and deploy updated expedited removal training for its officers, including proper referral for credible fear (asylum) screening. 84 Fed. Reg. 35,409. In the meantime, numerous individuals will be subjected to a process without meaningful review, lacking clear standards, and conducted by immigration officers without appropriate training.

B. The Expedited Removal Process Increases the Risk of Erroneous Deportation for Asylum Seekers

Under federal law, individuals, even those in the country without proper documentation, are exempt from expedited removal if they can establish a credible fear of persecution if returned to their country of origin. 8 U.S.C. § 1225(b)(1)(B)(v). However, in the expedited removal process, immigration officers retain virtually unchecked authority to determine whether to refer the individual for a credible fear interview in the first instance, subject only to review by a supervisor. Multiple reports have found that not all persons in the expedited removal process

¹⁴ Office of Immigration Stat., U.S. Dep't of Homeland Sec., *Immigration Enforcement Actions: 2013* at 6 (Sept. 2014), <https://tinyurl.com/ImmEnf2013>; Office of Immigration Stat., U.S. Dep't of Homeland Sec., *Immigration Enforcement Actions: 2012* at 5 (Dec. 2013), <https://tinyurl.com/ImmEnf2012>; Office of Immigration Stat., U.S. Dep't of Homeland Sec., *Immigration Enforcement Actions: 2011* at 5 (Sept. 2012), <https://tinyurl.com/ImmEnf2011>; Office of Immigration Stat., U.S. Dep't of Homeland Sec., *Immigration Enforcement Actions: 2010* at 4 (June 2011), <https://tinyurl.com/ImmEnf2010>.

¹⁵ Office of Immigration Stat., U.S. Dep't of Homeland Sec., *Immigration Enforcement Actions: 2017* at 9, 13 tbl. 7 (March 2019), <https://tinyurl.com/DHS-ImmEnf-2017>.

¹⁶ ACLU Found., *supra* note 9, at 4-5.

who express a fear of persecution if deported are provided a credible fear screening interview.¹⁷ In some cases, immigration officers pressured individuals expressing fear into withdrawing their application for admission, and thus their request for asylum, despite DHS policies forbidding the practice.¹⁸ In other cases, officers failed to ask if the arriving individual feared return.¹⁹ Even where the individuals expressed such fear, officers failed to document it, resulting in denial of a credible fear screening.²⁰ In still other cases, individuals were denied a credible fear interview because officers interviewed them in a language they could not understand.²¹ The United States Commission on International Religious Freedom found that the federal government lacked sufficient quality assurance mechanisms to ensure that asylum seekers were not improperly returned to their home countries.²²

Thus, the increased use of the summary expedited removal process heightens the risk that an individual will not know to assert, or immigration officers will not recognize, a valid claim for refuge from abuse, violence, or persecution in the person's country of origin.²³ As a result, the new rule jeopardizes the interests of the States and the public in ensuring that persons eligible for refuge in this country are not "deliver[ed] . . . into the hands of their persecutors." *Leiva-Perez v. Holder*, 640 F.3d 962, 971 (9th Cir. 2011) (per curiam).

The consequences for those who are returned to their home countries can be deadly. For example, a 2014 Report described the story of Braulia A. and Hermalinda L. who were gang-raped and shot after being deported to Guatemala; Braulia's son, who joined her in Guatemala

¹⁷ Michele R. Pistone & John J. Hoeffner, *Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 Geo. Immigr. L.J. 167, 175-93 (2006) (describing failure of federal government to adhere to statutes and regulations governing expedited removal); *see also* Cassidy & Lynch, *supra* note 8, at 21-22.

¹⁸ E.g., U.S. Comm'n on Int'l Religious Freedom, *supra* note 8, at 5-6; *see also* Cassidy & Lynch, *supra* note 8, at 23.

¹⁹ *Id.*

²⁰ U.S. Comm'n on Int'l Religious Freedom, *supra* note 8, at 53, 54-55 & 57; Cassidy & Lynch, *supra* note 8, at 21; *see also* Letter from Nat'l Immigrant Justice Ctr. et al. to U.S. Dep't of Homeland Sec. Office of Civil Rights & Civil Liberties & Office of the Inspector Gen., at 12-22 (Nov. 13, 2014), <https://tinyurl.com/NIJctoCRCL> (explaining that "[w]hen applicants express fears, CBP officials fail to capture those statements in the required documentation or include mistaken information"); John Washington, *Bad Information: Border Patrol Arrest Reports Are Full of Lies That Can Sabotage Asylum Claims*, Intercept (Aug. 11, 2019), <https://tinyurl.com/Washington-BadInfo>.

²¹ Cassidy & Lynch, *supra* note 8, at 27-28.

²² U.S. Comm'n on Int'l Religious Freedom, *supra* note 8, at 51.

²³ The cumulative effects of the New Rule and the federal government's new restrictions on asylum eligibility will only make the asylum process even more treacherous for asylum seekers. *See* 84 Fed. Reg. 33,829 (July 16, 2019) (to be codified at 8 C.F.R. pts. 208, 1003 & 1208).

after her deportation, was murdered by the same gang.²⁴ Nydia R., a transgender woman who had been granted asylum status, was deported through expedited removal, even though she told Customs and Border Patrol officers of being raped by a gang in Mexico that tried to cut out her breast implants; at the time, her wounds were still fresh. After being deported, Nydia managed to return, but DHS reinstated the removal order despite having records of her asylum status. Upon being returned to Mexico, she was raped, kidnapped, and repeatedly attacked because of her transgender status.²⁵ Laura S. told border officials that she was afraid of her abusive ex-partner; her pleas ignored, she was deported and murdered by him within days of her return to Mexico.²⁶

There is a need to be especially vigilant against erroneous removals because many recent arrivals requesting asylum are from the Northern Triangle of Central America (El Salvador, Honduras, and Guatemala), one of the most violent regions in the world, “akin to the conditions found in the deadliest armed conflicts in the world today.”²⁷ Instead of minimizing the potential for error, however, expedited removal significantly increases the risk of wrongful deportations, with life-or-death consequences.

Finally, asylum seekers placed in the expedited removal process can be detained in conditions that add to the trauma they have already suffered and create or worsen emotional and physical health problems. Those who are detained are often housed in units designed like criminal, not civil, detention facilities, with little or no privacy or freedom of movement. These facilities are often already overwhelmed and filled to capacity, and fail to provide even the most basic services and care.²⁸ “[P]enal detention conditions risk re-traumatizing asylum seekers who experienced or fear persecution or torture,” and prolonged detention can cause severe chronic emotional distress, including chronic anxiety, physically damaging stress levels, depression and suicide, and post-traumatic stress disorder.²⁹

²⁴ ACLU Found., *supra* note 9, at 4.

²⁵ *Id.* at 37.

²⁶ Sarah Stillman, *When Deportation is a Death Sentence*, *New Yorker* (Jan. 8, 2018), <https://tinyurl.com/Stillman-Deportation>.

²⁷ Medecins Sans Frontieres, *Forced to Flee Central America’s Northern Triangle: A Neglected Humanitarian Crisis* 4 (May 2017), <https://tinyurl.com/MSF-ForcedFlee>; see also U.N. High Comm’r for Refugees, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* 4 (Oct. 2015), <https://tinyurl.com/UNHCR-WomenRun> (“[T]he increasing violence from criminal armed groups occurred alongside repeated physical and sexual violence at home.”).

²⁸ Cassidy & Lynch, *supra* note 8, at 40-42; Office of Inspector Gen., U.S. Dep’t of Homeland Sec., *Management Alert – DHS Needs to Address Dangerous Overcrowding Among Single Adults at El Paso Del Norte Processing Center* (May 30, 2019), <https://tinyurl.com/DHSOIG-MA>.

²⁹ Cassidy & Lynch, *supra* note 8, at 9, 43-44.

III. THE NEW RULE HARMS THE STATES

A. The New Rule Will Cause the States to Divert Resources to Protect Their Residents

The States are home to hundreds of thousands of people who have come to this country because they fear persecution, torture, or violence in their countries of origin or to seek a better life for their families. For example, in 2015 almost 3.3 million immigrants with lawful permanent residence and more than 2.8 million undocumented immigrants resided in California; each group represents almost a quarter of the respective immigrant population in the U.S. Office of Immigration Stat., Dep't of Homeland Sec., *Population Estimates: Lawful Permanent Resident Population in the United States: January 2015* at 2, 5 (May 2019), <https://tinyurl.com/OffImmStatsPerm> (estimating size of lawful permanent resident population as of January 2015); Office of Immigration Stat., Dep't of Homeland Sec., *Population Estimates: Illegal Alien Population Residing in the United States: January 2015* at 2, 5 (Dec. 2018), <https://tinyurl.com/OffImmStatsUndoc> (estimating size of undocumented population as of January 2015). New Jersey was home to 600,000 lawful permanent residents and 440,000 individuals without documentation, the majority of whom are long-term residents. *Id.* An estimated 530,000 lawful permanent residents and 450,000 undocumented immigrants resided in Illinois. *Id.* These individuals face severe consequences if placed in expedited removal. For some, the stakes are “life or death, since [they] face torture or worse upon returning to their home countries.”³⁰ Even for those who do not face persecution, a removal order may result in permanent separation from their spouses and children and the lives they have built in the United States.

The States have a strong interest in ensuring that all people residing within their borders—with or without authorization—are treated fairly, especially when facing the severe consequences awaiting many if they are returned to their countries of origin. For that reason, many of the States invest significant resources to help fund legal and other services to their immigrant residents, including those who have been granted or are seeking asylum. This funding is generally intended to increase access to legal services and information about constitutional rights to better enable immigrants to protect themselves and their families.³¹ California, for example, provided more than \$43 million in funding for this purpose in the past fiscal year,³²

³⁰ Bruce J. Einhorn, *Op-Ed: L.A. needs to provide attorneys to immigrants facing deportation*, L.A. Times (Mar. 27, 2017), <https://tinyurl.com/Einhorn-LATimes>.

³¹ Ready Cal., *One California: Immigration Services Funding* (July 28, 2017), <https://tinyurl.com/OneCal-funding>; Ready Cal., *Ready California Overview* (Aug. 2018), <https://tinyurl.com/ReadyCal>.

³² Cal. Dep't of Soc. Servs., *Immigration Branch: Immigration Services Funding: Tentative Award Announcement* (Jan. 3, 2019), <https://tinyurl.com/CDSS-ImmServs2019>; *Immigration Services Contractors*, Cal. Dep't of Soc. Servs., <https://tinyurl.com/Cal-DSS-ISC>

and since fiscal year 2015-16, has allocated \$147 million to nonprofit legal service organizations for immigration-related programs.³³ Illinois funds more than five dozen community organizations providing citizenship and others services to immigrants.³⁴ New Jersey provides \$2.1 million in state funds to provide legal services to individuals facing detention or deportation due to their immigration status.³⁵ The State of Washington allocated \$1 million for fiscal year 2019 to contract with organizations and attorneys providing legal representation to asylum seekers and other immigrant populations in the state.³⁶ In calendar year 2018, the State of Connecticut's Judicial Branch provided \$13,886,873 through the Connecticut Bar Foundation to nonprofit civil legal services providers in the state.³⁷ All of those nonprofits provide legal services to immigrants, including those granted asylum, asylum seekers, and refugees.³⁸ Under a 2019 Oregon law, the nonprofit Innovation Law Lab will receive \$2 million in state funding to represent Oregonians in removal proceedings.³⁹ New York's Fiscal Year 2020 Enacted Budget includes \$10 million to support the expansion of the Liberty Defense Project, the first-in-the-nation, state-led public-private project administered by New York's Office for New Americans to assist immigrants, regardless of status, in obtaining access to legal services and process.⁴⁰ Community Legal Aid Society, Inc. of Delaware (Delaware Legal Aid) receives federal and state funding for the legal services it provides to immigrants. State funding for 2018-2021 amounted to approximately \$1.5 million, which included funding to provide victim-based services to non-citizens.

(last visited Aug. 8, 2019); Cal. Dep't. of Soc. Servs., *Immigration Services Program Update* 17 (Mar. 2019).

³³ Cal. Dep't of Soc. Servs., *Immigration Services Program Update* 1 (Mar. 2019).

³⁴ *List of Community Service Agencies Serving Immigrants*, Ill. Dep't Hum. Servs., <https://tinyurl.com/Ill-Imm-Servs> (last visited Aug. 16, 2019).

³⁵ N.J. Office of Mgmt. & Budget, *The Governor's FY2020 Budget – Detailed Budget* 495 (Mar. 2019), <https://tinyurl.com/NJ-Budget-2020>.

³⁶ 2018 Wash. Sess. Laws 2152, <https://tinyurl.com/WA-SessLaw>.

³⁷ I.R.S. Form 990 (2018), Conn. Bar Found., Inc. (Aug. 14, 2019), <https://tinyurl.com/CBF-990>.

³⁸ See, e.g., Beth Fertig, *Two Immigrant Children In Connecticut Get Temporary Legal Status After Separation From Parents*, WSHU Conn. (August 31, 2018), <https://tinyurl.com/WSHU-Fertig> (describing immigration advocacy efforts of state-funded Connecticut Legal Services lawyers).

³⁹ H.B. 5050, 80th Legis. Assemb., 2019 Reg. Sess. (Or. 2019), <https://tinyurl.com/Or-HB5050>; *About Equity Corps*, Equity Corps Or., <https://tinyurl.com/EquityCorpsOr> (last visited Sept. 20, 2019).

⁴⁰ Press Release, Office of the Governor, Governor Cuomo and Legislative Leaders Announces 2020 Enacted Budget Includes \$10 Million to Support Expansion of the Liberty Defense Project (Apr. 5, 2019), <https://tinyurl.com/NYGOV-PR>.

Since 1990, an average of more than 22,000 individuals have been granted asylum annually.⁴¹ California welcomes by far the largest number, with almost 44 percent of the total in fiscal year 2016.⁴² As home to more than 72 percent of the applicants granted asylum in 2016,⁴³ the States also have a significant interest in protecting the rights of asylees.⁴⁴

The New Rule magnifies the potential for harms to asylum seekers and those who have been granted asylum. Because of the expansion of expedited removal, it is likely that more people who express a credible fear of persecution will be detained by the federal government under conditions that will cause them additional trauma.⁴⁵ When non-citizens ultimately granted asylum return to their communities, the States, their local jurisdictions, and non-governmental organizations funded by the States will be called upon to provide additional mental health and other services to counter the effects of detention.

Many of the States have invested in specialized services to meet the needs of residents granted asylum. In California, for example, the Immigration Branch of the California Department of Social Services has various forms of assistance for certain eligible asylees and refugees including programs that provide cash assistance and employment services.⁴⁶ The State of Washington allocated approximately \$2.4 million for fiscal year 2018 to provide employment services for organizations serving asylum seekers and other immigrant populations in the state.⁴⁷ For fiscal year 2020, the District of Columbia allocated \$2.5 million to programs that provide services and resources to its immigrant population.⁴⁸ The New York State Office of Temporary and Disability Assistance provides various forms of financial and social services assistance to eligible asylees and refugees through its Refugee Resettlement Program, appropriating \$26 million in state fiscal year 2019-2020.⁴⁹ For state fiscal year 2019-2020, New York has also appropriated \$2,397,000 for the Response to Human Trafficking Program, a state-funded

⁴¹ Office of Immigration Stat., U.S. Dep't of Homeland Sec. (DHS), *2016 Yearbook of Immigration Statistics* 43 tbl.16 (Nov. 2017), <https://tinyurl.com/2016YBImmStats>.

⁴² Nadwa Mossad & Ryan Baugh, Office of Immigration Stat., U.S. Dep't of Homeland Sec., *Refugees and Asylees: 2016* at 8 (Jan. 2018), <https://tinyurl.com/Mossad-Baugh-DHS>.

⁴³ *Id.* at 10 fig.7.

⁴⁴ For purposes of this brief, the term asylee includes those who are seeking asylum and those who have been granted asylum.

⁴⁵ Cassidy & Lynch, *supra* note 8, at 14 (noting that “[a]s Expedited Removals have increased, so too have claims of fear by non-citizens in that process”).

⁴⁶ *See Services for Refugees, Asylees, and Trafficking Victims*, Cal. Dep't of Soc. Servs., <https://tinyurl.com/Services-CDSS> (last visited Sept. 20, 2019).

⁴⁷ 2018 Wash. Sess. Laws 2220, <https://tinyurl.com/WA-SessLaw>.

⁴⁸ Press Release, Office of the Mayor, *Mayor Bowser Announces \$2.5 Million Available for FY 2020 Immigrant Justice Legal Services Grant Program* (July 12, 2019), <https://tinyurl.com/DC-Grant>.

⁴⁹ Aid to Localities Budget, 2019 N.Y. Sess. Laws ch. 53 (McKinney).

program to assist human trafficking victims not otherwise eligible for services due to their immigration status.⁵⁰ In Vermont, the state Department of Health works with asylees from the moment they arrive through a community-based system of care. It collaborates with local health care partners to provide health screenings and integrate asylees into the health care system. It also provides translated information on public health and wellness for these new Vermonters.⁵¹

The New Rule undermines these efforts. While the States invest in programs to help their new or temporary residents navigate the complex immigration system, the expedited removal process effectively prevents those subjected to it from accessing that assistance. The New Rule, by extending expedited removal to substantially more people, will add significantly to erroneous deportations, including deportations of those who may face genuine threats of violence if returned to their countries of origin and who may be eligible for asylum. The New Rule likely will also increase the demand for state resources to provide immigrant assistance and may require the States to divert funds from other purposes to meet the needs of residents subjected to the expedited removal process.

B. The New Rule Will Hurt the States' Economies

Under the New Rule, anyone who has been in the country for up to two years without proper authorization is subject to summary deportation. But people who have lived in this country that long have begun to build lives here. They contribute to the economies and civic life of the States in countless ways. For instance, immigrants make up more than a third of California's workforce and undocumented immigrants in California each year contribute an estimated \$3 billion in state and local taxes.⁵² In 2015, immigrant workers comprised 10 percent of the labor force in Minnesota.⁵³ Immigrant-led households in Minnesota paid \$1.1 billion in state and local taxes in 2014.⁵⁴ Eight percent of all self-employed Minnesota residents in 2015 were immigrant business owners, who generated \$489.1 million in business income.⁵⁵ In 2015 in Connecticut, one of every six workers was an immigrant, comprising 17.6 percent of the labor

⁵⁰ N.Y. Soc. Serv. Law § 483-bb; Aid to Localities Budget, 2019 N.Y. Sess. Laws ch. 53 (McKinney).

⁵¹ See *Refugee Health Program*, Vt. Dept. of Health (VTDOH), <https://tinyurl.com/VTDOH-RHP> (last visited Sept. 20, 2019).

⁵² Am. Immigration Council, *Immigrants in California 2* (Oct. 4, 2017), <https://tinyurl.com/AmIC-CA>; Inst. on Tax'n & Econ. Policy, *State and Local Tax Contributions of Undocumented Californians 1* (Apr. 2017), <https://tinyurl.com/ITEP-Taxes>.

⁵³ See Am. Immigration Council, *Immigrants in Minnesota 2* (Oct. 13, 2017), <https://tinyurl.com/AmIC-MN>.

⁵⁴ See *id.* at 4.

⁵⁵ *Id.*

force.⁵⁶ As of 2017, Connecticut had 525,813 immigrant residents, about 14.7 percent of the state population, who generated \$14.5 billion in spending power and paid almost \$6 billion in taxes annually.⁵⁷ The 37,285 immigrant entrepreneurs in Connecticut produced total sales of \$15.6 billion and employed 95,177 people.⁵⁸ Immigrant households in Vermont contributed nearly \$135 million in federal taxes and nearly \$58 million in state and local taxes in 2014.⁵⁹ In Massachusetts, one in five workers is an immigrant and undocumented immigrants pay an estimated \$185 million in taxes each year.⁶⁰ Undocumented immigrants in New Jersey paid an estimated \$587.4 million in state and local taxes in 2014.⁶¹ Approximately 4.5 million immigrants live in New York State.⁶² Some 2.8 million immigrant workers comprise roughly 27.8 percent of the state's labor force.⁶³ In 2014, New York State immigrant-led households paid \$26.5 billion in federal taxes and \$15.9 billion in state and local taxes, and had \$103.3 billion in after-tax income spending power.⁶⁴

The New Rule will cause substantially more people to be targeted for summary removal and susceptible to erroneous deportation, including asylum seekers and others. Deporting hard-working and tax-paying members of our communities will hurt the States' economies.

C. The New Rule Will Increase the Demand for State Services for Affected Families

Millions of children born to undocumented immigrants are U.S. citizens because they were born in the United States. Millions of people live in "mixed-status" households, where one or both parents may be undocumented, while some or all of the children (and, sometimes, a

⁵⁶ Am. Immigration Council, *Immigrants in Connecticut 2* (Oct. 13, 2017), <https://tinyurl.com/AmImC-CT>.

⁵⁷ New Am. Economy, *Immigrants and the Economy in Connecticut*, <https://tinyurl.com/NewAE-CT> (last visited Sept. 20, 2019).

⁵⁸ *Id.*

⁵⁹ New Am. Economy, *Contributions of New Americans in Vermont 5* (Aug. 2016), <https://tinyurl.com/NAE-VT-Report>.

⁶⁰ Am. Immigration Council, *Immigrants in Massachusetts 3, 5* (Oct. 5, 2017), <https://tinyurl.com/AmIC-MA>.

⁶¹ Am. Immigration Council, *Immigrants in New Jersey 4* (Oct. 13, 2017), <https://tinyurl.com/AmIC-NJ>.

⁶² New Am. Economy, *Contributions of New Americans in New York 4* (Aug. 2016), <https://tinyurl.com/NewAm-NY>.

⁶³ *Id.* at 10.

⁶⁴ *Id.* at 7.

spouse) are U.S. citizens.⁶⁵ The New Rule means that these “mixed-status” families face separation with little or no time to prepare.

Studies show that children faced with the likelihood of a family members’ deportation can experience serious mental health problems, including depression, anxiety, self-harm, and regression.⁶⁶ Studies also show that children’s concerns about their parents’ immigration status can impair their socio-emotional and cognitive development.⁶⁷ And children whose immigrant mothers are subject to deportation have a higher incidence of adjustment and anxiety disorders.⁶⁸

Of course, these ills only worsen when fears of forcible separation are realized. In one study, children with deported parents refused to eat, pulled out their hair, had persistent stomachaches and headaches, engaged in substance abuse, lost interest in daily activities, and had trouble maintaining positive relationships with non-deported parents.⁶⁹ These traumatic childhood experiences can also inflict lasting harm, including severe impairment of a child’s sense of self-worth and ability to form close relationships later in life, increased anxiety, and depression.⁷⁰

The States and their local governments will need to address the trauma caused by the New Rule. As children fear or experience family separation, they will likely need additional educational and mental health services with associated costs borne by the States and their local governments. In education, the States may have to invest additional resources to address the

⁶⁵ Randy Capps, et al., Urb. Inst., *Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families: A Review of the Literature* 8-12 (Sept. 2015), <https://tinyurl.com/CappsMPI> (discussing 2015 study estimating that 5.3 million children, 85 percent of whom were U.S. born, living with undocumented immigrant parents).

⁶⁶ Wendy Cervantes, et al., Ctr. for Law & Soc. Policy, *Our Children’s Fear: Immigration Policy’s Effects on Young Children* 2-3, 10-12 (Mar. 2018), <https://tinyurl.com/ChildFears>.

⁶⁷ Hirokazu Yoshikawa, *Immigrants Raising Citizens: Undocumented Parents and Their Young Children* 120-136 (2011); Capps, *supra* note 65, at 8-9.

⁶⁸ Jens Hainmueller, et al., *Protecting Unauthorized Immigrant Mothers Improves Their Children’s Mental Health*, 357 *Science* 1041, 1041 (2017).

⁶⁹ Heather Koball, et al., Urb. Inst., *Health and Social Services Needs of US-Citizen Children with Detained or Deported Immigrant Parents* 5 (Sept. 2015), <https://tinyurl.com/MIRFinal>; see also Mary Papenfuss, *Weeping Girl Left Abandoned by ICE Pleads with ‘Government’ to ‘Let My Parent Be Free’*, *Huffington Post* (Aug. 8, 2019), <https://tinyurl.com/Papenfuss-HuffPost> (reporting scores of children left abandoned after largest ICE raid in a decade and 200 children failing to show up for schools in the area the following day).

⁷⁰ Kristen Lee Gray, Cal. Polytechnic St. Univ., San Luis Obispo, *Effects of Parent-Child Attachment on Social Adjustment and Friendship in Young Adulthood* 14-15, 19 (June 2011), <https://tinyurl.com/j3lgrno>.

social-emotional and special education needs of students who have been traumatized by actual or potential family separation.⁷¹ The States' health insurance and public health systems will face additional costs due to increased needs for mental health services for affected children and adults.⁷²

In addition to threatening children's health, deporting a family's financial breadwinner can lead to economic hardship and loss of housing for remaining family members, and can put children, seniors, and disabled family members at serious risk.⁷³ As a result, many families would be forced to seek increased social services,⁷⁴ stretching the resources of the States. For example, as of 2011, more than 5,000 children nationally were estimated to be living in foster care due to their parents' detention or deportation.⁷⁵ With long-term foster care estimated to cost about \$25,000 per child per year,⁷⁶ these immigration enforcement actions cost states and local governments \$125 million dollars annually. Such costs could substantially increase with the expansion of expedited removal and the separation of families.⁷⁷

Harms are suffered not only by children, but also extend to other residents of the States who suffer the daily uncertainty of not knowing whether their relatives will be placed (erroneously or not) in expedited removal on the way to the grocery store, to work, or even to their children's schools.⁷⁸ Many individuals who seek asylum have relatives in the States across the country and those relatives are harmed by the federal government's actions.

⁷¹ The Massachusetts Constitution, for example, imposes an enforceable duty on the State to provide all Massachusetts students with a quality education. *See McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993). Massachusetts provides significant funding to meet this requirement through a complex formula that includes the provision of specific funding to address students' special education needs, including those caused by trauma. Mass. Gen. Laws ch. 70, §§ 2, 3.

⁷² Massachusetts, for example, provides health insurance for children up to age 18, including those not otherwise eligible for Medicaid. Mass. Gen. Laws ch. 118E, § 10F. This coverage includes medically-necessary mental health services. 130 Mass. Code Regs. 522.004(G)(9).

⁷³ Capps, *supra* note 65, at 9-14, 17-23.

⁷⁴ *Id.*

⁷⁵ Seth Freed Wessler, Applied Res. Ctr., *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System* 6 (Nov. 2011), <https://tinyurl.com/ARCFam>.

⁷⁶ Nicholas Zill, Nat'l Council for Adoption, *Better Prospects, Lower Cost: The Case for Increasing Foster Care Adoption* 3 (May 2011), <https://tinyurl.com/Zill-Adoption>.

⁷⁷ Papenfuss, *supra* note 69; Immigrant Legal Res. Ctr., *Immigration Enforcement & the Child Welfare System* 2 (Dec. 11, 2017), <https://tinyurl.com/ImmChildWelfare>.

⁷⁸ Kelly Heyboer, *ICE Arrests Surging in N.J. Under Trump. Here's Why.*, N.J. On-Line (Feb. 2018), <https://tinyurl.com/Heyboer-ICEArrests> (ICE has increased arrests and detentions of

Finally, the New Rule is inhumane, as it has no provisions to allow long-term residents time to take care of even the most basic human needs before being forced from the country, such as obtaining or completing life-saving medical care, arranging care for children or other dependents, or even notifying loved ones that they are being deported. 84 Fed. Reg. 35,409, 35,412.

D. The New Rule Will Harm the States' Public Safety and Public Health

The risks undocumented immigrants face make them some of the most vulnerable people residing in the States. The New Rule's dramatic expansion of expedited removal only exposes these residents to even more abuse. Inevitably, they will be even less likely to report crime or exploitation or to seek needed medical care, which obstructs the efforts of the States to protect the public.

The States are dedicated to ensuring that police and prosecutors are able to do their jobs to protect public safety. *See, e.g., Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) (discussing states' sovereign interests in enforcing criminal code). But by subjecting hundreds of thousands of additional immigrants to unexpected and hasty deportation, the New Rule makes all undocumented immigrants and their households less likely to report crimes to law enforcement, even if they are victims.⁷⁹ When law enforcement is unable to obtain evidence of crimes, public safety suffers. For example, Delaware Legal Aid reports that among immigrants there is now rampant fear of contacting law enforcement for help or to report a crime. The organization says its clients and their communities do not distinguish between federal immigration enforcement or prosecutors and state social services agencies or Family Court, but view them all as "the government." As a result, Delaware Legal Services reports that more of its clients and their children are staying in unsafe or abusive situations. This not only

immigrants in New Jersey by 42 percent; many have been arrested at courthouses, children's schools, and at their work places).

⁷⁹ *E.g., James Queally, Fearing Deportation, Many Domestic Violence Victims Are Steering Clear of Police and Courts*, L.A. Times (Oct. 9, 2017), <https://tinyurl.com/Queally> (Los Angeles law enforcement officials reporting precipitous drop in domestic violence reports in Latino community, which they attributed to victims' fear of deportation); Make the Road N.J., *ICE in the New Jersey Courts: The Impact of Immigration Enforcement on Access to Justice in the Garden State* 2-3 (Dec. 2017), <https://tinyurl.com/MTRNJ-ICE> (Seventy-two percent of legal services providers surveyed in New Jersey reported clients who feared attending court proceedings because abusive partners threatened that ICE would be there; 60 percent reported clients who had withdrawn or failed to pursue orders of protection due to fear of ICE.); Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, Ctr. for Am. Progress (Jan. 26, 2017), <https://tinyurl.com/Wong-CAP-Crime> (concluding that when immigrant populations have an increased fear of deportation from law enforcement, it chills reporting of crimes and results in communities that are less safe).

endangers those families, but also damages Delaware's ability to investigate and prosecute crimes, which renders all Delawareans less safe.

Also, when fear of immigration enforcement is high, immigrants are more vulnerable to unlawful wage theft and health and safety workplace violations. Unscrupulous employers can take advantage of their fear of deportation to keep them from reporting violations, making it more difficult for the States to enforce their labor laws.⁸⁰ The States have an interest in ensuring enforcement of wage and hour and employment safety laws that protect not only the specific workers but also ensure economic fairness and a safe workplace for all of the States' residents. *See, e.g., Metro. Life Ins. Co v. Massachusetts*, 471 U.S. 724, 756 (1985) ("The States traditionally have had great latitude under their police powers to legislate as 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.'") (citation omitted). That interest is undermined by the increased fear the New Rule will create.

Further, the States have a substantial interest in ensuring that their residents access medical treatment and preventative care. The States who fund and provide health care services to immigrants can reduce future medical costs when they prevent health problems from becoming more extreme and expensive. Unfortunately, immigration enforcement fears, which will only increase under the New Rule, cause immigrant families to forego preventative medical care. In recent studies, health care providers are finding that immigrant families are increasingly skipping health care appointments and abstaining from scheduling routine prevention or primary care appointments for their children.⁸¹ Clinics across the country have noticed a significant decline in clinic visits due to this Administration's harsh immigration enforcement policies.⁸² The New Rule will further dissuade immigrants from seeking cost-effective preventive care that saves lives and reduces costs in the States.

⁸⁰ Rebecca Smith, Ana Avendaño & Julie Martínez Ortega, AFL-CIO, *Iced Out: How Immigration Enforcement Has Interfered with Workers' Rights* 5-6 (2009), <https://tinyurl.com/Smith-IcedOut>.

⁸¹ The Children's P'ship, *Healthy Mind, Healthy Future: Promoting the Mental Health and Wellbeing of Children in Immigrant Families in California* 25 (Sept. 22, 2018), <https://tinyurl.com/ChildrensPship-Healthy>.

⁸² Ctr. for Health Progress, *Immigration Policy Is Health Policy: Executive Order 13768 & The Impact of Anti-Immigrant Policy on Health* 3 (Mar. 20, 2018), <https://tinyurl.com/CHP-Health>; see also Anna North, *Immigrants Are Skipping Reproductive Health Care Because They're Afraid of Being Deported*, Vox (July 22, 2019), <https://tinyurl.com/North-Vox>.

IV. CONCLUSION

As detailed above, the New Rule will have damaging and irreparable impacts on the States' current and prospective residents and their families, and on the States themselves, which must address the damage caused by this policy. For all these reasons, the States strongly oppose the New Rule and respectfully urge that it be rescinded.

Sincerely,



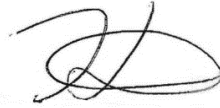
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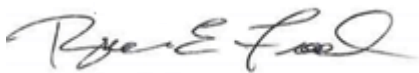
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