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Via Federal eRulemaking Portal
Kevin McAleenan, Acting Secretary
Department of Homeland Security
Kenneth T. Cuccinelli, Acting Director
U.S. Citizenship and Immigration Services
Samantha Deshommes, Chief
Regulatory Coordination Division, Office of Policy and Strategy
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, NW
Washington, D.C. 20529-2140

RE: Comments on *Removal of 30-Day Processing Provision for Asylum Applicant Related Form I-765 Employment Authorization Applications*, 84 Fed. Reg. 47,148 (Sept. 9, 2019), RIN 1615-AC19

Dear Acting Secretary McAleenan, Acting Director Cuccinelli, and Chief Deshommes:

We, the undersigned Attorneys General of New Jersey, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New York, Oregon, Vermont, Virginia, and Washington. ("The States"), write to oppose the U.S. Department of Homeland Security's ("the Department") proposal to eliminate the 30 day processing deadline for asylum related Employment Authorization Documents ("EAD" or "work permits"). *Removal of 30-Day Processing Provision for Asylum Applicant Related Form I-765 Employment Authorization Applications*, 84 Fed. Reg. 47,148, (Sept. 9, 2019); RIN 1615-AC19 ("Proposed Rule").

This Proposed Rule would eliminate the 30 day deadline by which work authorization applications for asylum seekers must be adjudicated. Currently, asylum seekers must wait until 150 days after their asylum applications are submitted to seek a work permit. Once they submit such a request, however, the Department must grant or deny the work permit within 30 days. 8

C.F.R. § 208.7. This rule would eliminate that deadline and grant the Department an indefinite amount of time to adjudicate a simple work permit application.

The Proposed Rule will seriously harm asylum seekers by making them unable to work legally for an indefinite time period, and in harming this population, the Proposed Rule will also harm the States. Every year, the States welcome thousands of asylum seekers, who contribute greatly to the States' communities and economies.¹ Indeed, in 2015-2017, the most recent years for which this data is available, the States signatory to this letter constituted six of the top ten states of residence for individuals whose affirmative asylum applications were granted.² Combined, these six States were home to 68 percent of the individuals granted affirmative asylum applications in the United States.³ By making it harder for asylum seekers to work, the Proposed Rule will lower tax revenue for the States, harm the States' industries, increase reliance on State-funded programs, and make it harder for the States to enforce their labor and civil rights laws.

Not only is the Proposed Rule bad policy, but it also would violate the law if enacted. This Proposed Rule, if finalized, would be arbitrary and capricious in violation of the Administrative Procedure Act (APA) because the Department did not provide the reasoned justification required for a significant policy change. Likewise, the Department did not conduct the regulatory analysis required under federal law and executive orders because the Department did not consider the fiscal costs of the Proposed Rule or whether it was the least burdensome alternative.

I. The Proposed Rule Will Harm Asylum Seekers

Asylum seekers leave everything behind—their homes, jobs, and sometimes families—to escape persecution and find a better life. Many arrive after having exhausted all of their resources to get to the United States. The Department estimates that migrants, including asylum seekers, may pay up to \$9,200 to arrive in the United States.⁴

These individuals face prolonged unemployment once they reach the United States. Asylum seekers must wait 150 days after the submission of their asylum applications before they can apply for a work permit, and during this time, it is common for them to face severe housing and financial insecurity.⁵

But, under the current regulations, that waiting period must have a certain end. Under 8 CFR § 208.7(a)(1), U.S. Citizenship and Immigration Services (USCIS) must process EAD

¹ Dep't of Homeland Sec., *2017 Yearbook of Immigration Statistics* 43 tbl.16 (Apr. 1, 2019), <https://tinyurl.com/y2tzh7ry>; Nadwa Mossad, Office of Immigration Statistics, Dep't of Homeland Sec., *Annual Flow Report: Refugees and Asylees: 2017* (Mar. 2019) <https://tinyurl.com/y4kfuclj>.

² Mossad, *supra* note 1, at tbl. 13.

³ *Id.*

⁴ Dept. of Homeland Security, *Efforts by DHS to Estimate Southwest Border Security Between Points of Entry* (Sept. 2017) at 13-14, available at <https://tinyurl.com/y9gbn5js>.

⁵ Human Rights First, *Callous and Calculated: Longer Work Authorization Bar Endangers Lives of Asylum Seekers and Their Families* (April 29, 2019) <https://tinyurl.com/HRFworkpermit>.

applications within 30 days of their submission, allowing applicants to receive EADs within six months of filing their asylum application so that they can begin to work and find the stability that comes with a steady paycheck. In the past, the Department regularly failed to comply with this requirement. This failure resulted in the 2017 court order in *Rosario v. USCIS*, 365 F. Supp. 3d 1156, 1162 (W.D. Wash. 2018), which enforces the 30 day deadline.

In eliminating the regulatory timeframe entirely, the Department anticipates that EAD applications will be delayed to the 2017 levels that existed before the order in *Rosario*, 365 F. Supp. 3d at 1162. 84 Fed. Reg. at 47,149. Troublingly, with no alternative deadline in the Proposed Rule, the Department's estimate is just speculation. Indeed, under the Proposed Rule, applicants could wait an indefinite time period. And even assuming that the Department's estimate is correct, it was USCIS's delay in processing EAD applications in 2017 that caused the *Rosario* court serious concern. At the time of that order, only 52 percent of EAD applications were processed within 30 days, 82.8 percent within 60 days, and thousands were delayed for over three months. *Rosario*, 2:15-cv-00813, (W.D. Wash.), ECF No. 146-1 (Aug. 6, 2019). The court explained, "in 2017, 10,103 applications took over 121 days to adjudicate, on top of the 150 days those applicants already had to wait, unable to work, after filing their asylum application." *Rosario*, 365 F. Supp. 3d, at 1162. According to the court, this delay caused a "negative impact on human welfare." *Id.*

The delayed EAD processing times that will result from the Proposed Rule will have the same negative impacts on human welfare that concerned the *Rosario* court. If EADs are delayed, asylum seekers will be unable to support themselves or their loved ones. This will reverberate in nearly every aspect of their lives—from their health to their ability to successfully claim asylum. Furthermore, without the ability to earn a living legally, many will have no choice but to work without authorization, making them vulnerable to exploitation and dangerous conditions.

a. The Proposed Rule puts asylum seekers' well-being at risk

Prolonged unemployment and resulting poverty will harm asylum seekers' well-being in numerous ways, impacting their physical health, mental health, and ability to find stable housing, as well as their asylum cases.

First, the delay of EADs will have negative physical health consequences. Without employment and employer-sponsored healthcare, asylum seekers will be unable to afford health insurance, which directly correlates with health outcomes.⁶ Stress and environmental factors stemming from poverty have a negative impact on health as well.⁷ For these reasons, low-income adults in the United States have higher rates of physical limitations, heart disease, diabetes,

⁶ Steffie Woolhandler, MD et al, *The Relationship of Health Insurance and Mortality: Is Lack of Insurance Deadly?*, ANNALS OF INTERNAL MEDICINE (Sept. 19, 2017), <https://tinyurl.com/Woolhandler>; Institute of Medicine Committee on the Consequences of Uninsurance, *Care Without Coverage: Too Little, Too Late, Effects of Health Insurance on Health*, National Academies Press (2002), available at: <https://www.ncbi.nlm.nih.gov/books/NBK220636/>.

⁷ Dheuv Khullar & Dave A. Chokshi, *Health, Income, & Poverty: Where We Are & What Could Help*, HEALTH AFFAIRS (October 4, 2018), <https://tinyurl.com/KhullarChokshi>.

stroke, and other chronic conditions, compared to higher-income Americans.⁸ Poor adults are five times as likely as those with incomes above 400 percent of the federal poverty level to report being in poor or fair health.⁹ These poor health outcomes for adults likewise hurt children, who recently have become a common population seeking asylum with their families.¹⁰ Children in poor families are seven times more likely to have poor or fair health than children in affluent families.¹¹ The health consequences of childhood poverty can last throughout a lifetime.¹²

Second, prolonged financial instability from unemployment will exacerbate the trauma and mental anguish from which many asylum seekers already suffer. Asylum seekers often face multiple layers of traumatic experiences before seeking asylum in the United States. Indeed, to even be eligible for this type of relief, an individual must have suffered extreme harm that rises to the level of persecution in their home country, or live under the threat of such persecution in the future. *See* 8 U.S.C. § 1158. The Center for Victims of Torture estimates that 44 percent of asylum seekers, asylees, and refugees in the United States are survivors of torture.¹³ Studies show that “asylum seekers are at particular risk of developing mental illness, including post-traumatic stress disorder (PTSD), depression and anxiety.”¹⁴ Such asylum seekers already face an uncertain future given the long delays in the adjudication of their claims—indeed, some immigration courts are setting asylum hearings as far out as 2024, meaning that asylum seekers sometimes will wait five years to know their fate.¹⁵ Per Human Rights First: “[s]everal studies have shown that extended delays in adjudicating claims—and the resulting uncertainty in asylum seekers’ futures—are associated with psychological distress ‘above and beyond the impact of traumatic events.’”¹⁶

The Proposed Rule will make these issues even worse because financial stability and employment are intrinsically related to mental health. The inability to work can take a “physical and emotional toll” on a person.¹⁷ Studies show that the “long-term unemployed have at least a

⁸ *Id.*

⁹ *Id.*

¹⁰ Adolfo Flores, *Here's Why A Record Number Of Families Are Actually Showing Up At The Border*, BUZZFEED NEWS (May 8, 2019), <https://tinyurl.com/FloresBuzzfeed>.

¹¹ Robert Wood Johnson Foundation, *Overcoming Obstacles to Health*, 11 (Feb. 2008) <https://tinyurl.com/ObstacletoHealthReport>.

¹² *Id.* at 9.

¹³ Craig Higson-Smith, *Updating the Estimate of Refugees Resettled in the United States Who Have Suffered Torture*, CENTER FOR VICTIMS OF TORTURE, available at <https://tinyurl.com/y358lp3k>; Dep’t of Human Services, Office of Refugee Resettlement, *Services for Survivors of Torture*, <https://tinyurl.com/yyjvt4u3>.

¹⁴ Piyal Sen, *The mental health needs of asylum seekers and refugees – challenges and solutions*, BJPSYCH INTL. (May 1, 2016), available at <https://tinyurl.com/yyqd79xt>.

¹⁵ TRAC Immigration, *Immigration Court's Active Backlog Surpasses One Million* (June 2019) <https://trac.syr.edu/immigration/reports/574/>; Diane Solis, *Judges, lawyers say video justice is just adding to the mess within U.S. immigration courts*, DALLAS MORNING NEWS (Sept. 28, 2019) <https://tinyurl.com/SolisDallasMorningNews>.

¹⁶ Human Rights First, *In the Balance Backlogs Delay Protection in the U.S. Asylum and Immigration Court Systems*, 13 (April 2016) <https://tinyurl.com/yyr82bem>.

¹⁷ Human Rights Watch, *“At Least Let Them Work” The Denial of Work Authorization and Assistance for Asylum Seekers in the United States* (Nov. 12, 2013) <https://tinyurl.com/yx9vp5wf>.

twofold risk of mental illness, particularly depression and anxiety disorders, compared to employed persons.”¹⁸ Financial stress is the second most common cause of suicide.¹⁹ People in debt are three times as likely to have a mental health issue, especially depression, anxiety, and psychotic disorders.²⁰ And in a survey of nearly 5,500 people who experience mental health problems, 86 percent of respondents said that their financial situation had made their mental health problems worse.²¹ Conversely, one study found that for asylum seekers especially, employment can “ameliorate[] psychiatric symptoms,” serve a protective function, reduce stress and anxiety, and “increase a sense of self-agency.”²²

Third, many asylum seekers, and particularly those who cannot lean on the support of family or friends in a new country, could become homeless without work authorization.²³ The perils of homelessness are well known, and they are intensified for asylum seekers who may not speak English or may have already been victimized.²⁴ Homelessness “is closely connected to declines in physical and mental health; homeless persons experience high rates of health problems such as HIV infection, alcohol and drug abuse, mental illness, tuberculosis, and other conditions.”²⁵ Asylum seekers can have a difficult time adjusting to homeless shelters due to linguistic and other barriers.²⁶

Finally, the Proposed Rule will result in more asylum seekers having to navigate the complex and evolving immigration bureaucracy without legal counsel, because they will not have the means to afford attorneys.²⁷ Asylum seekers with counsel fare far better than those without counsel. In 2017, 90 percent of those without legal representation were denied asylum in immigration court while only 54 percent of those with legal representation were denied.²⁸ Unrepresented individuals are more likely to be affected by appeals, delays in their claims, and

¹⁸ Olivera Batic-Mujanovic et al, *Influence of Unemployment on Mental Health of the Working Age Population*, MATER SOCIOMED, U.S. National Library of Medicine, National Institutes of Health (June 29, 2017), <https://tinyurl.com/ncbiUnemployment>.

¹⁹ Brett Whysel, *3 Vicious Cycles: Links Among Financial, Physical And Mental Health*, FORBES (June 27, 2018), <https://tinyurl.com/WhyselForbes>.

²⁰ *Id.*

²¹ Money and Mental Health Policy Institute, *The Facts*, <https://tinyurl.com/MoneyandMentalHealth>.

²² Debbie C. Hocking, Psych, Gerard A. Kennedy, PhD, and Suresh Sundram, *Mental Disorders in Asylum Seekers The Role of the Refugee Determination Process and Employment*, THE JOURNAL OF NERVOUS AND MENTAL DISEASE, Vol. 203, No. 1 (Jan. 2015).

²³ Human Rights First, *Callous and Calculated*, *supra* note 5.

²⁴ National Coalition on Homelessness, *Vulnerable to Hate: A Survey of Bias-Motivated Violence Against People Experiencing Homelessness in 2016-2017* 9 (Dec. 2018), <https://tinyurl.com/HomelessViolence>.

²⁵ The Centers for Disease Control and Prevention, *Homelessness as a Public Health Law Issue: Selected Resources*, <https://tinyurl.com/CDCHomelessness>.

²⁶ Ted Hesson, *Why So Many Asylum Seekers Come to America and Wind Up Homeless*, VICE (May 11, 2016), <https://tinyurl.com/HessonHomelessness>.

²⁷ Philip Bump, *Most migration to the U.S. costs money. There's a reason asylum doesn't.*, WASH. POST (April 30, 2019) <https://tinyurl.com/BumpWashPost> (describing the challenge and complexity of asylum cases).

²⁸ *Id.*

more unreliable adjudications.²⁹ Despite the drastic gap in success rates between the represented and the unrepresented, counsel is not guaranteed in immigration court. *C.J.L.G. v. Barr*, 923 F.3d 622, 629, n. 7 (9th Cir. 2019). Pro bono providers' resources are already stretched thin, and they can take only a limited number of cases.³⁰ Thus, retaining a private attorney is necessary for many to have a chance at receiving asylum. Without the ability to work, many will be unable to afford counsel and more meritorious cases will be denied.

b. In light of the Proposed Rule, many asylum seekers will enter into dangerous and exploitative work situations

In the face of poverty and the negative consequences that flow from it, many asylum seekers will end up working without authorization in the underground economy. The shift to underground work will put asylum seekers in exploitative and dangerous employment situations.

Multiple studies have shown that unauthorized employees are more likely to endure labor abuses, as well as violence.³¹ In a landmark study on labor abuses, 84.9 percent of unauthorized immigrant workers reported not being paid time-and-a-half for their overtime hours, and 37.1 percent of unauthorized immigrant workers had been victims of minimum wage violations in the week prior to their being surveyed.³² By comparison, 24 percent of immigrant workers with work authorization surveyed reported being victims of wage theft.³³ These abuses have been documented in several localities within the States. For example, in Chicago, 38 percent of undocumented workers reported their employers did not pay them minimum wages, and 66.2 percent of undocumented workers reported their employers did not pay them overtime wages.³⁴ A recent study of low-wage employees working without authorization in San Diego County found that 64 percent of the janitors surveyed had not been paid what they were owed or suffered some other labor violation.³⁵ Worse yet, nearly one-third said they had been forced to work against their will, and 17 percent of that group said they had experienced some kind of physical threat, including sexual violence, at work.³⁶ Women without legal authorization face particularly dangerous work-place situations—in a study of 150 female farmworkers in California, 40

²⁹ Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, UNIV. OF PENN. LAW REV. Vol. 164, 1, 47-75 (Dec. 2015) available at <https://tinyurl.com/y5j9bd3p>.

³⁰ Sabrineh Ardalán, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J. L. REFORM 1001, 1016 (2015), available at <https://tinyurl.com/ArdalanUMich>.

³¹ Daniel Costa, *California leads the way*, Economic Policy Institute (March 22, 2018) <https://tinyurl.com/CostaEPI>.

³² *Id.*

³³ Leo Gertner, Fact Sheet: *Billions are lost to wage theft every year—New Jersey must act to protect workers' paychecks and level playing field for employers*, Economic Policy Institute (Mar. 18, 2019) <https://tinyurl.com/y2qeayp7>.

³⁴ Douglas D. Heckathorn, et al., *Unregulated work in Chicago: The Breakdown of Workplace Protections In the Low-Wage Labor Market*, Center for Urban Economic Development, University of Illinois at Chicago, 33-34 (2010) available at <https://tinyurl.com/y5bqd55k>.

³⁵ Bernice Yeung, *Under cover of darkness, female janitors face rape and assault*, REVEAL FROM THE CENTER FOR INVESTIGATIVE REPORTING (June 23, 2015) <https://tinyurl.com/YeungReveal>.

³⁶ *Id.*

percent had suffered sexual harassment.³⁷ Asylum seekers often arrive after having suffered sexual and physical abuse, and placing them in exploitative working environments will potentially subject them to further trauma.

Moreover, employers in the shadow economy often do not carry workers' compensation insurance, leaving workers to pay for treatment of their workplace injuries out of their own pockets. For example, 41 percent of undocumented workers in Illinois paid the cost of their workplace injuries.³⁸ Even when employers carry coverage, insurance companies often deny unauthorized workers' claims.³⁹ In some cases, insurance companies even report unauthorized workers to immigration enforcement or for prosecution under state laws that prevent immigrants from making workers' compensation claims with false social security numbers.⁴⁰

In sum, the consequences of the Proposed Rule are vast. Without the ability to legally work, asylum seekers will be forced into precarious conditions impacting their health, safety, and legal status. To survive, many will work without authorization in exploitative jobs.

II. The Proposed Rule Harms the States

In 2017, the States hosted over 10,000 affirmative asylees grantees, more than 68 percent of the total nationwide.⁴¹ By precluding asylum seekers from legally working for a prolonged period, the States will face a number of harms, including: (1) a decrease in tax revenue and in the spending power of asylum seekers, who are vital to the States' economies; (2) increased health care costs because fewer people will be on employer sponsored health insurance; (3) increased burdens on nonprofits and providers funded by the States; and (4) greater challenges in enforcing the States' laws.

a. The Proposed Rule will harm the States' economies

The States—indeed all states—benefit immensely when asylum seekers and other immigrants reside in their communities. The Proposed Rule would limit the financial boon the States experience from the legal entry of asylum seekers into the workforce, decrease tax revenue, and harm the States' labor force.

To begin, the lost wages that will result from this Proposed Rule will lower the spending power and economic contributions of asylum seekers in the States. Immigrants, including asylum seekers, exercise an enormous amount of purchasing power that contributes to the States' economies. For example, in 2017 in New Jersey, immigrants accounted for over \$60.9 billion in spending power.⁴² Likewise, California's immigrant population contributes greatly to its

³⁷ Bernice Yeung and Andrés Cediél, *Rape in the Fields*, Center for Latin American Studies at University of California Berkley (Fall 2013), <https://tinyurl.com/y23wgaxm>.

³⁸ Heckathorn, *supra* note 34 at 18.

³⁹ Michael Grabell & Howard Berks, *They Got Hurt At Work — Then They Got Deported*, NPR (Aug. 16, 2017), <https://tinyurl.com/GrabellNPR>.

⁴⁰ *Id.*

⁴¹ Mossad, *supra* note 1.

⁴² New Am. Econ., *Immigrants and the economy in New Jersey*, <https://tinyurl.com/y5n669em>.

economy, exercising more than \$282 billion in spending power that same year.⁴³ There is similar data for many of the States: In Michigan, immigrants contributed \$6.7 billion in spending power;⁴⁴ in Illinois, immigrants contributed \$46.6 billion in spending power;⁴⁵ in Hawaii immigrants contributed \$5.8 billion in spending power;⁴⁶ in New York, immigrants contributed \$117.8 billion in spending power;⁴⁷ in Connecticut, immigrants contributed \$14.5 billion in total spending power;⁴⁸ and in the District of Columbia, immigrants contributed \$3.3 billion in spending power.⁴⁹ Extended delays in obtaining work permits will doubtless reduce the spending power of asylum seekers. The Department itself references the huge amount of lost wages—estimating an annual loss of approximately \$255,877,138 to \$774,764,960 in wages resulting from over two million lost working days while awaiting work authorization. 84 Fed. Reg. at 47,167. This is money that will not be flowing into the States' businesses and economies.

Furthermore, the States will lose tax revenue as a result of the Proposed Rule. Asylum seekers whose work authorization is delayed will not be paying payroll taxes from the lawful employment they otherwise would have obtained. The Department recognizes the loss in tax revenue that will result to the Federal Government, but it does not estimate the costs to the States. From the States' perspective, however, the losses could be substantial. Studies estimate that, while unauthorized workers and residents pay taxes, tax contributions increase when more people can legally work. For example, in New Jersey, it is estimated that undocumented immigrants currently pay around \$587 million in state and local taxes annually, which would increase by over \$73 million per year if they were granted legal status.⁵⁰ Undocumented immigrants in California pay nearly \$3.2 billion in state and local taxes each year. If given full legal status, that amount would increase to over \$3.6 billion.⁵¹ In Massachusetts, undocumented immigrants pay an average of \$184.6 million in state and local taxes every year, an amount that would increase to \$240.8 million if they had legal status and work authorization.⁵² Similarly, undocumented immigrants in New Mexico would have paid in excess of \$8 million more in taxes in 2017 if they had been granted full legal status.⁵³ Undocumented immigrants in Hawaii paid an estimated \$32.3 million in state and local taxes in 2014.⁵⁴ Their contribution would rise to \$42.8 million if they could receive legal status.⁵⁵ Undocumented immigrants residing in New York paid an estimated \$1.1 billion in state and local taxes, which would increase to \$1.3 billion with the availability of work-authorized status.⁵⁶ While asylum seekers are not undocumented,

⁴³ New Am. Econ., *Immigrants and the economy in California*, <https://tinyurl.com/yxc7gumu>.

⁴⁴ New Am. Econ., *Immigrants and the economy in Michigan*, <https://tinyurl.com/y6bj3m4o>.

⁴⁵ New Am. Econ., *Immigrants and the economy in Illinois*, <https://tinyurl.com/yy2ykqr8>.

⁴⁶ New Am. Econ., *Immigrants and the economy in Hawaii*, <https://tinyurl.com/y2vjamyw>.

⁴⁷ New Am. Econ., *Immigrants and the economy in New York*, <https://tinyurl.com/y57fcw2c>.

⁴⁸ New Am. Econ., *Immigrants and the economy in Connecticut*, <https://tinyurl.com/y51uhhbK>.

⁴⁹ New Am. Econ., *Immigrants and the economy in District of Columbia*, <https://tinyurl.com/y497lu3b>.

⁵⁰ Inst. on Taxation and Econ. Policy, *Undocumented Immigrants' State & Local Tax Contributions 3* (Mar. 2017), <https://tinyurl.com/ITEP-UndocTaxes>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

these studies demonstrate that tax revenue is increased when immigrants have work authorization.

Moreover, the Proposed Rule will hurt the labor market and key industries in the States. The Department references this potential harm to employers, noting that “if companies cannot find reasonable substitutes, the rule would primarily be a cost to those companies through lost productivity and profits.” 84 Fed. Reg. at 47,167. It further states that private entities “may incur a cost, as they would be losing productivity and potential profits.” 84 Fed. Reg. at 47,168. But the Department presumes that companies will “bear little or no costs” if they “are able to easily find reasonable labor substitutes.” 84 Fed. Reg. at 47,167. Without support, the Department concludes that the potentially affected population is a “very small percentage of the U.S. labor market.” 84 Fed. Reg. at 47,165.

Contrary to these assertions, there are several sectors in the States that disproportionately employ immigrants and are likely to face costs if asylum seekers are unable to work legally. In New Jersey, for example, service providers report that many asylum seekers are employed as home health aides, engineers, dental assistants, construction workers, and in farming and agriculture. Immigrants fill over two-thirds of the jobs in California’s agricultural and related sectors, almost half of those in manufacturing, 43 percent of construction workers, and 41 percent of workers in computer and sciences.⁵⁷ Likewise, approximately 43 percent of employed undocumented workers in Illinois are employed in the food services and manufacturing industries.⁵⁸ In New York, immigrants account for 71.4 percent of taxi drivers and chauffeurs; 68.3 percent of workers in private households, including maids, housekeepers, and nannies; 57.9 percent of those working as chefs and head cooks; 57.3 percent of nursing, psychiatric, and home health aides; and 44.7 percent of the state’s workers in traveler accommodation.⁵⁹ One in 6 Connecticut workers is an immigrant, or 17.6 percent of the population, and immigrants make up more than 20 percent of the workers in the construction, manufacturing, and food service industries.⁶⁰ These areas will likely see the greatest reduction in their workforce as they seek “reasonable labor substitutes,” which indeed may not even be available. 84 Fed. Reg. at 47,167.

b. The Proposed Rule will increase the States’ health care costs

For many asylum seekers, delaying the ability to work will result in delaying essential health care. Employed asylum seekers and their families may rely on employer-sponsored health insurance, but the unemployed will not have this avenue available for health coverage. Asylum seekers are also ineligible for federally-funded Medicaid. *See* 8 U.S.C. § 1641(b). Thus, many

⁵⁷ Am. Immigration Council, *Immigrants in California* 4 (Oct. 4, 2017) <https://tinyurl.com/CAP-Immigrants-in-CA>.

⁵⁸ Fred Tsao, *Illinois Undocumented Immigrant Population: a Summary of Recent Research*, Illinois Coalition for Immigrant and Refugee Rights, 11-12 (Feb. 2014) <https://tinyurl.com/y36s9le4>.

⁵⁹ New Am. Econ., *The Contributions of New Americans in New York* (New York, NY) 9-10 (Aug. 2016) <https://tinyurl.com/y5z96o5z>.

⁶⁰ Am. Immigration Council, *Immigrants in Connecticut* (Oct. 13, 2017) <https://tinyurl.com/y35tkvs5>.

asylum seekers will be without healthcare, which will increase costs to the States and cause a decline in overall public health.⁶¹

Several of the States offer State-funded healthcare programs that may experience increased need due to the Proposed Rule. For example, California, New York, the District of Columbia, Illinois, Oregon, Massachusetts, and Washington all provide full scope health benefits to low-income children regardless of immigration status.⁶² Starting January 2020, California will expand these benefits to those 25 and younger.⁶³ Connecticut offers state-funded Medicaid coverage to low-income pregnant asylum seekers and asylum seeker children under 18. In Illinois, asylum seekers can access medical coverage and services through state-funded community agencies.⁶⁴ The District of Columbia anticipates that some asylum seekers subject to the Proposed Rule, who otherwise would have received employer-sponsored health coverage, will qualify for locally-funded Medicaid or other health care coverage.⁶⁵ 29 DCMR 9503.2. Without employment and employer-sponsored health insurance, more asylum seekers and their families will need to utilize programs that are funded solely by the States.

Adult asylum seekers, who in most cases cannot qualify for State-funded health insurance plans, will likely find themselves uninsured as they await work permits. Without insurance, individuals are far more likely to skip the preventative care that keeps them healthy.⁶⁶ In the long term, they are more likely to develop more expensive medical conditions that may need to be treated in emergency care settings. These costs may be borne by the States and their public and private institutions, because public hospitals often pay for the care of uninsured patients.⁶⁷

Lack of health insurance also will worsen the general public health of the States' population. For example, the uninsured are less likely to receive vaccinations, which prevent the

⁶¹ Incidentally, the Trump Administration recently issued a proclamation denying immigrant visas to those without health insurance based on its purported concern that failing to have insurance has a negative fiscal impact. "Presidential Proclamation on the Suspension of the Entry of Immigrants Who Will Financially Burden the United States Healthcare System" (Oct. 4, 2019), available at <https://tinyurl.com/y6n3gyf5>. This alleged concern is undermined by the actions, such as this, wherein the Trump Administration makes it even harder for people to access health care.

⁶² Nat'l Conf. St. Legis., *Immigrant Eligibility for Health Care Programs in the United States*, (Oct. 19, 2017), <https://tinyurl.com/ycg4tdbu>.

⁶³ Bobby Allyn, *California is 1st State to Offer Health Benefits to Adult Undocumented Immigrants*, NPR (July 10, 2019), <https://tinyurl.com/Allyn-NPR>.

⁶⁴ See Ill. Dep't of Hum. Servs., *PM 06-21-00: Medical Benefits for Asylum Applicants and Torture Victims*, <https://tinyurl.com/III-Med>. The list of organizations can be found here: <http://www.dhs.state.il.us/page.aspx?item=117419>.

⁶⁵ Department of Healthcare Finance, *D.C. Healthcare Alliance*, <https://tinyurl.com/ybzd9v3>.

⁶⁶ Stacey McMorro et al, *Determinants of Receipt of Recommended Preventive Services: Implications for the Affordable Care Act*, AM J PUBLIC HEALTH (Dec 2014), available at: <https://tinyurl.com/McMorroPublicHealth>; Jennifer E. DeVoe et al., *Receipt of Preventive Care Among Adults: Insurance Status and Usual Source of Care*, 93 AM. J. OF PUBLIC HEALTH 5 786-791. (May 1, 2003), available at: <https://tinyurl.com/DeVoePublicHealth>.

⁶⁷ California Association of Public Hospitals and Health Systems, *About California's Public Health Care Systems*, <https://tinyurl.com/y68c6m87> (Public hospitals in California account for 40 percent of hospital care to the remaining uninsured in the communities they serve).

spread of infectious diseases throughout the community.⁶⁸ According to one study, while 44 percent of insured adults received the flu shot, only 14 percent of uninsured adults did.⁶⁹ Inoculation helps prevent the spread of the flu, which resulted in some 79,400 deaths nation-wide in 2017-2018.⁷⁰ When more people have quality health care, the entire community benefits.

State and locally funded mental health services may also face an increased need, as fewer asylum seekers will have health insurance to cover mental health care. Many localities and states fund mental health providers that assist traumatized asylum seekers. For example, every year, the Highland Human Rights Clinic in Oakland, California (operated by Alameda County) conducts approximately 80 to 120 health assessments of asylees, the vast majority of whom need mental health referrals due to abuse and trauma. New York provides inpatient psychiatric services to youth,⁷¹ and also offers undocumented state residents access to its Community or Crisis Residences regardless of their ability to pay,⁷² which may see an increased demand since fewer immigrant families will be able to afford health insurance under the Rule.

c. The Proposed Rule will increase the burden on the States' nonprofits and service providers

In order to protect the rights of asylum seeking residents and integrate them into their communities, the States fund nonprofits and service providers that serve this vulnerable population. Under the Proposed Rule, these State-funded efforts will become more difficult and more expensive.

As noted above, see *supra*, Part I. a., legal counsel is a critical factor in whether an asylum claim succeeds or fails. As a result, several of the States fund nonprofits to provide legal assistance in immigration-related matters. For example, New Jersey allocated \$3.1 million in state funds in FY 2020 for legal assistance to individuals in removal proceedings.⁷³ Similarly, since FY 2015-16, California has allocated \$147 million to non-profit legal service organizations through the Unaccompanied Undocumented Minors and Immigration Services Funding programs.⁷⁴ The State of Washington also allocated one million dollars from its general fund for FY 2019 to legal services organizations serving asylum seekers and other migrant populations in the State.⁷⁵ Among other programs, New York has allocated \$10 million in its FY 2020 enacted

⁶⁸ Peng-jun Lu et al, *Impact of health insurance status on vaccination coverage among adult populations*, 48 AM J PREV MED. 647–661 (April 15, 2015) available at <https://tinyurl.com/y5es4yt4>.

⁶⁹ *Id.*

⁷⁰ Centers for Disease Control and Prevention, *Estimated Influenza Illnesses, Medical visits, Hospitalizations, and Deaths in the United States – 2017-2018 Influenza Season*, <https://tinyurl.com/y3tf8ebl>.

⁷¹ See generally Decl. of Donna M. Bradbury at 362-68 (Exhibit 60), *Washington v. Trump*, No. 2:18-cv-00939-MJP (W.D. Wash. July 17, 2018), ECF No. 31.

⁷² *Id.*

⁷³ See N.J. Dep't of Treasury, Office of Mgmt. & Budget, *Appropriations Handbook FY2019-2020*, B-204, <https://tinyurl.com/yxw256og>.

⁷⁴ Cal. Dep't of Soc. Serv. (CDSS), *Immigration Services Program Update* 1 (Mar. 2019).

⁷⁵ See Wash. Laws of 2018, ch. 299, § 127(65) (amending Laws of 2017, 3d Spec. Sess., ch. 1, § 128) (Mar. 27, 2018) <https://tinyurl.com/yy3rduov>.

budget to fund the Liberty Defense Project, a State-led, public-private legal defense fund designed to ensure that immigrants have access to legal counsel.⁷⁶ The District of Columbia allocated \$2.5 million for FY 2020 to programs that provide services and resources to its immigrant population, including asylum seekers.⁷⁷ Under Oregon House Bill 5050, passed in 2019, the non-profit Innovation Law Lab will receive \$2 million in state funding for a two-year project for immigration defense.⁷⁸ In FY 2018, Connecticut's Judicial Branch provided \$13.8 million through the Connecticut Bar Foundation to nonprofit civil legal service providers in the State, all of which provide legal services to immigrants, including asylum seekers.⁷⁹

Even with this state and local funding, immigration nonprofits have limited resources.⁸⁰ If asylum seekers are unable to retain private attorneys because they cannot work, the already scarce resources of these organizations will be stretched even thinner, and additional resources will be necessary. Harms to these organizations redound to their funders, which include the States.

Additionally, several of the States have allocated funds for specialized programs to integrate asylees, which may be strained if applicants cannot work during much of the pendency of their claims. California, for example, provides assistance for some asylees, including cash assistance, food benefits, and funding to certain school districts to improve the well-being, English-language proficiency, and academic performance of their students.⁸¹ The New York Office for New Americans has established neighborhood-based Opportunity Centers throughout the State to provide, among other things, English language courses and business development skills for immigrants.⁸² One of Washington State's social service programs partners with local governments, community and technical colleges, ethnic community-based organizations, and other service provider agencies to deliver educational services, job training skills, assistance establishing housing and transportation, language classes, and other comprehensive support services.⁸³

⁷⁶ See N.Y. St., Div. of Budget, *Governor Cuomo Announces Highlights of the FY 2019 State Budget* (Mar. 30, 2018) <https://tinyurl.com/y6qv2jev>.

⁷⁷ *Mayor Bowser Announces \$2.5 Million Available for FY 2020 Immigrant Justice Legal Services Grant Program*, DC.gov (July 12, 2019) <https://tinyurl.com/DC-Grant>.

⁷⁸ H.B. 5050, 80th Or. Legis. Assemb., 2019 Reg. Sess. (Or. 2019) <https://tinyurl.com/Or-HB5050>.

⁷⁹ Connecticut Bar Foundation, IRS Form-990 (2018) <https://tinyurl.com/yxaf7avg>.

⁸⁰ Daniella Silva, *A scramble to help families left behind: The fallout of the Trump administration's immigration raids*, NBC NEWS (Sept. 12, 2018) <https://tinyurl.com/SilvaRaids> (“As one raid follows another, lawyers and nonprofit leaders say their resources are being stretched increasingly thin[.]”)

⁸¹ *Cash Assistance Program for Immigrants (CAPI)*, Cal. Dep't of Soc. Servs., <http://www.cdss.ca.gov/CAPI>; *Trafficking and Crime Victims Assistance Program*, Cal. Dep't of Soc. Servs., <https://www.cdss.ca.gov/inforesources/TCVAP>; *California Newcomer Education and Well-Being*, Cal. Dep't of Soc. Servs., <https://tinyurl.com/yyvf3ogn>.

⁸² See N.Y. St. Off. New Ams., *Our Mission*, <https://tinyurl.com/y5wb8dws>; see also N.Y. St. Off. for New Americans, *Request for Applications, RFA #18-ONA-32*, <https://tinyurl.com/y3oqjul6>; N.Y. St., Pressroom, *Governor Cuomo Announces Expansion of Services for Immigrant Community Through Office for New Americans*, <https://tinyurl.com/y3yd54sb>.

⁸³ See Office of Refugee & Immigration Assistance, Econ. Servs. Admin., Wash. Dep't of Soc. & Health Servs., *Briefing Book for State Fiscal Year 2018* at 28-29 (Jan. 2019), <https://tinyurl.com/y528prka>.

It will be more difficult for asylum seekers to effectively utilize these programs and integrate if they are not able to work while their cases are pending—a time during which they could be building their skills, practicing English, and learning about their communities. The U.N. High Commissioner of Refugees has explained that: “Employment is also closely related to other areas of integration, such as access to housing, family reunification, language, healthcare, a driver’s license, networks, childcare, and the asylum process itself.”⁸⁴

d. The Proposed Rule hampers the ability of the States to enforce their laws

The States have a fundamental interest in being able to enforce their own laws. *State of Alaska v. U.S. Dept. of Transp.*, 868 F.2d 441, 443 (D.C. Cir. 1989). When rulemaking impinges on that ability, the States suffer an injury. *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). Here, by forcing asylum seekers into the shadows, the Proposed Rule interferes with the ability of the States to enforce labor and civil rights protections.

Through labor and civil rights laws, the States protect their residents from wage theft, exploitation, and discrimination at work. *See generally*, N.J. Stat. Ann. § 34:11-56a to -56a38; N.J. Stat. Ann. § 10:5-1 *et seq.*; *Serrano v. Underground Utilities Corp.*, 970 A.2d 1054, 1064 (presuming that undocumented aliens may pursue relief under workers’ compensation laws and obtain retrospective compensation under New Jersey prevailing wage laws); Cal. Bus. & Prof. Code § 17200 *et seq.*; Cal. Lab. Code § 200-1200; N.Y. Labor Law Articles 5 (hours of labor), 6 (payment of wages), 19 (minimum wage standards), and 19-A (minimum wage standards for farm workers); N.Y. Workers’ Comp. Law § 17 (McKinney); D.C. Code §§ 32-1301, *et seq.* (Wage Payment and Collection Law); D.C. Code §§ 32-1001, *et seq.* (Minimum Wage Revision Act); D.C. Code §§ 32-531.01, *et seq.* (Sick and Safe Leave Act); D.C. Code §§ 32-1331.01, *et seq.* (Workplace Fraud Act), and D.C. Code §§ 2-220.01, *et seq.* (Living Wage Act). These laws are enforced without respect to immigration status, but their enforcement is premised on employees’ ability and willingness to report violations.

Despite the significant labor and discriminatory abuses that befall unauthorized workers, fear of reprisal and deportation often stops unauthorized workers from reporting such violations.⁸⁵ Asylum seekers in particular have reportedly failed to report labor violations—including working weeks without pay and physical abuse at work—because they fear immigration consequences.⁸⁶ A study in Chicago found that, of the immigrant workers who suffer a workplace injury and report it to their employer, 23 percent have reported being either immediately fired or threatened with deportation.⁸⁷

This fear of retaliation has been recognized by the courts as a common and problematic occurrence that undermines labor and civil rights protections. In *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004), the Ninth Circuit explained that the possibility of retaliatory actions

⁸⁴ U.N. High Commissioner of Refugees, *Engaging With Employers In The Hiring Of Refugees* 5 (2018) <https://www.unhcr.org/5adde9904.pdf>

⁸⁵ Human Rights Watch, “*At Least Let Them Work*” *supra* note 17; Daniel Costa, *supra* note 31.

⁸⁶ Human Rights Watch, “*At Least Let Them Work*” *supra* note 17.

⁸⁷ Heckathorn, *supra* note 34, at 18.

results in “most undocumented workers [being] reluctant to report abusive or discriminatory employment practices.” Also illustrative of this problem are the facts that led to the Ninth Circuit’s decision in *Arias v. Raimondo*, 860 F.3d 1185, 1187, 1192 (9th Cir. 2017). In that case, the court found that an employer retaliated against an employee when the employer’s attorney contacted Immigration and Customs Enforcement (ICE) to take the complainant into custody at a scheduled deposition in a labor related case.

If asylum seekers fear reporting because they do not have work authorization, it will make it harder for the States’ agencies to enforce civil rights and labor laws. Indeed, Delaware’s Office of Construction Industry Enforcement anticipates that it will likely face complications in carrying out investigations should workers reduce cooperation based on fear of being caught working without authorization. Furthermore, without work authorization, asylum seekers will not feel comfortable making claims with state agencies, meaning that they may endure exploitative and discriminatory employment practices for a longer time period. Many claims may become stale or fall outside of the statute of limitations before asylum seekers feel secure enough to make them.

Given the high rates of exploitation among asylum seekers, *supra* Part I. b., actions—such as this Proposed Rule—that discourage timely reporting of violations interfere with States’ abilities to enforce their laws and should be avoided.

III. The Proposed Rule Violates the Law

The Proposed Rule violates the APA because it is arbitrary and capricious and does not contain the regulatory analysis required under federal law and executive orders.

a. The Proposed Rule violates the APA because it is arbitrary and capricious

Under the APA, agencies must engage in “reasoned decision making.” *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Automobile Ins. Co. (State Farm)*, 463 U.S. 29, 52 (1983). When an agency changes longstanding policies, it must “show that there are good reasons for the new policy” and it must provide a “detailed justification” for adopting its proposed policy. *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009). Agencies must consider “the advantages and the disadvantages of agency decision” before taking action. *Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1046 (N.D. Cal. 2018) (quoting *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015)). If an agency fails to meet these requirements, the action can be set aside as arbitrary and capricious. *See Fox*, 556 U.S. at 537. The Department failed to engage in reasoned decision making in this case, and thus, the Proposed Rule is arbitrary and capricious.

At the outset, the Department did not adequately consider any of the harms to asylum seekers that are raised above, such as the impact on mental and physical health. The harms to the States, their labor and civil rights enforcement regimes, and their economies, likewise were not assessed or considered.

Moreover, the Department did not provide a reasoned justification for the Proposed Rule, particularly given that it is a significant policy change. All of the Department's justifications are either unsupported or undermined by the facts. First, the Department justifies the Proposed Rule, in part, by a purported concern with fraudulent applications or individuals filing asylum claims simply to obtain work permits. *See e.g.*, 84 Fed. Reg. at 47,150 n.3, 47,160. But the current regulatory and statutory framework, which includes the 150 day waiting period and 30 day deadline, was adopted to weed out meritless claims for asylum. Prior to 1994, asylum applicants could apply for work authorization along with their asylum applications. *Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization*, 59 Fed. Reg. 14,779, 14,780 (Mar. 30, 1994). Concerned with people applying for asylum solely to obtain a work permit, in 1994, the INS proposed the 150 day waiting period, and with that the current 30 day deadline. *Id.* In so doing, the INS stated that 150 days was a "period beyond which it would not be appropriate to deny work authorization to a person whose claim has not been adjudicated" and that such waiting will "reduce the incidence of asylum applications filed primarily to obtain employment authorization." *Id.* The INS adopted the 30 day deadline and ultimately concluded that most asylum claims should be adjudicated within 60 days and "all applicants could have work authorization after 180 days" unless their asylum claims were denied. *Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization*, 59 Fed. Reg. 62,284, 62,290 (Dec. 5, 1994). In 1997, Congress implemented the statutory 180 day waiting period before work authorization can be granted in asylum cases. 8 U.S.C. § 1158(d)(2). Even after this change, the INS maintained the 30 day deadline, because it recognized the importance of ensuring that bona fide asylees are able to obtain work authorization as quickly as possible. *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10,312, 10,317-18 (Mar. 6, 1997). The Department fails to provide a sufficient explanation as to why the INS's rationale in adopting the current regulatory scheme is no longer applicable.

In addition, the Department attempts to justify the regulatory change by claiming that the 30 day deadline does not give it sufficient time to vet applications because of a recent increase in applications. 84 Fed. Reg. at 47,155. According to the Department, it "would be contrary to USCIS's core missions and undermine the integrity of the documents issued if USCIS were to reduce or eliminate vetting procedures solely to meet a 30-day deadline established decades ago." This argument is unpersuasive, as there is no evidence that the Department needs to eliminate or reduce vetting to comply with the deadline. For example, in 2018, there were *more* asylum related EAD applications than there are now—yet, the Department processed over 80 percent of applications within 30 days and did not eliminate or reduce any vetting measures. *Rosario v. USCIS*, 2:15-cv-00813, (W.D. Wash.), ECF No. 146-1 (Aug. 6, 2019). There is no evidence that, even with high asylum application numbers, the 30 day deadline results in increased grants of fraudulent applications.

The Department further contends that the Proposed Rule is necessary because an increase in asylum receipts has made processing asylum-related EADs within 30 days unsustainable. According to USCIS, it has redistributed its adjudication resources to work up to full compliance, and without the deadline it could shift resources to other applications. This reasoning fails for several reasons. First, the Department has presented neither evidence

demonstrating an urgent need to shift resources to other applications, nor evidence of how an extended processing time will assist in this regard, particularly given that the resources will need to be reallocated back to adjudicating the EAD applications at some point. Second, while agency data indicates that there has been a substantial increase in asylum-related EAD applications since 2014, the number of EAD applications dropped by 9 percent between 2017 and 2018,⁸⁸ and this number is on track to drop even further in 2019. *Rosario v. USCIS*, 2:15-cv-00813 (W.D. Wash.), ECF No. 146-1 (Aug 6, 2019) (demonstrating that USCIS has received 53,809 fewer EAD applications in 2019 than at the same point in 2018).

The Department also justifies the Proposed Rule by stating that it is necessary to be consistent with a 2017 EAD regulation that eliminated the 90 day adjudication deadline for those in work-related visa and immigration categories. 84 Fed. Reg. at 47,149. The referenced regulation was promulgated as part of a broader regulatory change for work-related immigrant and nonimmigrant visas. *Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers Final Rule*, 82 Fed. Reg. 82,398, 82,457 (2017 AC21 Rule) (“the 2017 EAD regulation”). The Department’s justification is not well reasoned because the 2017 EAD regulation can be easily distinguished from the Proposed Rule. The 2017 EAD regulation focused only on employment-related immigration, and did not address humanitarian-based immigration applications. The two regulations thus impact entirely different populations, and as such, raise entirely different human welfare concerns. Furthermore, the impact that the agency anticipated for the 2017 EAD regulation was far less than the impact that the agency now anticipates for the Proposed Rule. When implementing the 2017 regulation, the Department believed that delayed EAD adjudications would “be rare and mitigated by the automatic extension provision for renewal applications, which will allow the movement of resources in such situations.” 81 Fed. Reg. 82,407. Here, however, the Department itself anticipates that EAD adjudications will be delayed across the board, estimating that 120,000 applicants per year will wait longer than 30 days. 84 Fed. Reg. at 47,165.

Finally, the Department does not adequately justify why it cannot implement an alternative deadline, such as a 60 or 90 day deadline, if the 30 day deadline is eliminated (although the States do not concede, without seeing any such proposal, that such a change would survive arbitrary and capricious review). The Department provides a cursory explanation for refusing to implement any alternative, stating that setting a deadline “would not provide USCIS with the certainty and flexibility it needs to fulfill its core mission.” 84 Fed. Reg. at 47,167. This statement contradicts the Department’s other statements in the record. For example, the economic impact statement estimates the cost of the Proposed Rule under the assumption that work permits will be adjudicated within 60 or 90 days. If the Department cannot affirm that EADs will be processed within any set time frame, then the Department’s own estimates of the costs are incorrect. On the other hand, if these estimates are correct, then it is unclear why the Department cannot adopt the deadlines it used to calculate them. Notably, the economic impact statement does not calculate the costs of implementing an alternative deadline to demonstrate that the Department has chosen the least burdensome alternative. 84 Fed. Reg. at 47,157.

⁸⁸ U.S. Citizenship and Immigration Services Ombudsman, Annual Report 2019, 72, <https://tinyurl.com/DHSombudsman>.

b. The Proposed Rule does not contain an adequate analysis of federalism concerns or the proposal's fiscal impact

There are several requirements that agencies must comply with to ensure that economic and fiscal harm is considered when promulgating a rule—particularly when that harm will be inflicted upon the States. Under Executive Order 13,132, for policies that have “substantial direct effects on the States,” agencies must consult with State and local officials “early in the process of developing the proposed regulation” and conduct a federalism summary impact statement before issuing a proposed rule. Exec. Order No. 13,132, 64 Fed. Reg. 43,255, 43,257 (Aug. 10, 1999). The Unfunded Mandates Reform Act also requires agencies to prepare a written statement, including a cost benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures by State, local or tribal governments, in the aggregate, or the private sector, of \$100 million or more in any one year. Pub. L. 104-4 § 205 (1995). For such rules, the agency must identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective and least burdensome alternative. *Id.* Executive Order 12,866 requires agencies to assess “all costs and benefits” of a proposed regulation and available alternatives. Exec. Order No. 12,866, 58 Fed. Reg. 51735 (1993). If the agency determines that regulation is required it should “select . . . approaches that maximize net benefits.” Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011). The Department failed to comply with each of these requirements.

First, the Department failed to conduct an adequate federalism analysis under Executive Order 13,132. As described *supra* Part II, the Proposed Rule will result in additional costs to the States’ programs and a substantial loss in revenue. Yet, the Department did not analyze any of these harms, summarily stating that the Proposed Rule “does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.” 84 Fed. Reg. at 47,160, 47,169. Further, despite the States’ clear interests in their revenue, the Department did not consult with the States. Tellingly, this conflicts with prior practice by the INS in enacting work permit related regulations. When the INS proposed a regulation regarding the implementation of an employment verification system, even though the regulation did not require the states to adopt the system, the agency still sought the input of States. *See e.g.*, 52 Fed. Reg. 16,216, 16,218 (May 1, 1987). The Department’s failure to analyze the impact on the States and consult with them violates Executive Order 13,132.

Additionally, despite the expenses and costs that the Proposed Rule will have on both the States and the private sector, the Department did not provide the analysis required under the Unfunded Mandates Reform Act. Indeed, there is no indication that the Department fully considered reasonable alternatives to the Proposed Rule, and that this is the most cost effective option—particularly in light of the substantial losses in tax revenue and economic contributions that will stem from it.

Finally, in violation of Executive Order 12,866, the Department did not assess *all* of the costs associated with the Proposed Rule or provide an analysis of the available alternatives. While the Department recognizes that the Proposed Rule will result in hundreds of millions of dollars in lost wages, the Department fails to address the impact that this loss would have on State and local economies. Further, the Department cursorily suggests that the States may face

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“possible loss of tax revenue.” 84 Fed. Reg. at 47,160. But, loss in revenue to the States will occur, and there is no accounting for it in the Department’s analysis of the costs and benefits.

IV. Conclusion

The Proposed Rule will have devastating impacts on asylum seekers and their families, interfere with the States’ administration of laws, and shift costs onto the States. In addition to these harms—the Proposed Rule will violate the law if it is implemented. For these reasons, we urge the Department to withdraw the Proposed Rule.

Sincerely,



GURBIR S. GREWAL
New Jersey Attorney General



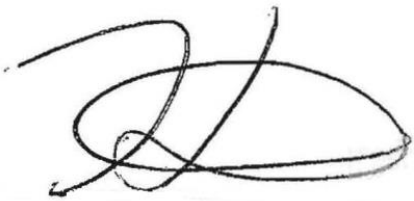
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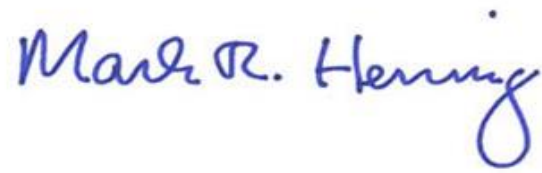
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Handwritten signature of Thomas J. Donovan, Jr. in blue ink, featuring a stylized 'TJDJ' followed by a flourish.

THOMAS J. DONOVAN, JR.
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Handwritten signature of Mark R. Herring in blue ink, written in a cursive style.

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