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January 13, 2020

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

RE: Comments on *Asylum Application, Interview, and Employment Authorization for Applicants*, 84 Fed. Reg. 62,374 (Nov. 14, 2019), RIN 1615-AC27

Dear Acting Secretary Wolf, Acting Director Cuccinelli, and Chief Deshommès:

We, the undersigned Attorneys General of New Jersey, California, the District of Columbia, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington (“The States”), write to oppose the U.S. Department of Homeland Security’s (“the Department”) proposal to change asylum application and work authorization processing. *Asylum Application, Interview, and Employment Authorization for Applicants*, 84 Fed. Reg. 62,374 (Nov. 14, 2019), RIN 1615-AC-19 (“Proposed Rule” or “NPRM”).

An animating value of the United States is embodied in the now-famous lines inscribed on the Statue of Liberty: “Give me your tired, your poor / Your huddled masses yearning to breathe free.” The United States has committed itself to providing asylum seekers a haven from persecution, regardless of whether they are rich or poor. Indeed, in establishing the framework for today’s asylum system in the Refugee Act of 1980, Congress made clear it was codifying “one of the oldest themes in America’s history—welcoming homeless refugees to our shores.” S. Rep. No. 96-256, at 1 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 141, 141. These foundational values are likewise reflected in the country’s international commitments, including the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (“Convention”), and the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (“Protocol”).

The Proposed Rule is an assault on the values reflected in the Refugee Act. It introduces delays, confusion, and unnecessary administrative burdens into the asylum application and work authorization processes and prolongs uncertainty and vulnerability for asylum seekers. Among other changes, the Proposed Rule would require asylum seekers to wait 365 days from the date their asylum application is *received by* U.S. Citizenship and Immigration Services (“USCIS”) to apply for an Employment Authorization Document (“EAD” or “work permit”), 84 Fed. Reg. at 62,375, more than double the required work authorization waiting period under current law, 8 C.F.R. § 208.7. The Proposed Rule also bars several groups of asylum seekers from applying for work permits, including those who enter the United States without inspection outside of a port of entry. 84 Fed. Reg. 62,377. It would also hinder the ability of asylum seekers to rectify any mistakes on their applications, and it expands the categories of “applicant caused delays,” which allows USCIS to deny work authorization applications without prior notice. *Id.* at 62,376-77.

By barring many applicants from EADs completely and indefinitely delaying others’ EADs, the Proposed Rule imposes economic hurdles that will harm both asylum seekers and States and serve as a deterrent to seeking asylum in the first instance. Limiting EAD access will push asylum seekers into the underground economy, impede their ability to take care of themselves and their families, and harm their health and wellbeing. The States, too, will feel these consequences. The States, for their part, welcome thousands of asylum seekers each year who contribute greatly to their communities and economies.¹ The Proposed Rule will lower tax and spending revenue in the States and harm businesses within the States that will have to find replacements and alternative labor. It will also increase reliance on state-funded programs, and hinder the States’ ability to enforce their own labor and civil rights laws.

Further, if finalized, the Proposed Rule would violate the Administrative Procedure Act (“APA”). Most importantly, several aspects of the Proposed Rule are directly contrary to the text of the Immigration and Nationality Act (“INA”) and the Department failed to engage in reasoned decision making in issuing the Proposed Rule. The Department also failed to conduct the required analysis of the Proposed Rule’s federalism and fiscal impacts and did not consider less burdensome alternatives. For all these reasons, the Proposed Rule must be withdrawn.

I. The Proposed Rule Will Harm Asylum Seekers

The country’s commitment to sheltering refugees without regard to their penury or wealth, as embodied in its international treaties and the framework established by the Refugee Act, is consonant with the significant sacrifices that asylum seekers make to get to the United States. Many of these individuals fully exhaust their resources in fleeing persecution and in traveling to the United States. Separate and apart from the assets that many asylum seekers abandon in fleeing their home countries, as the Department has found, asylum seekers may spend up to \$9,200 for their journey to seek protection at the United States border.² For many such

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 See 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>.

asylum seekers the right to seek gainful employment is inextricably connected to their ability to seek and obtain asylum through what is often a lengthy and complex administrative process.

Contrary to the country's longstanding commitments and values, the Proposed Rule takes direct aim at the right of asylum seekers to meaningfully apply for and obtain asylum by proposing two categories of changes to existing DHS regulations. First, it proposes a suite of changes to the EAD framework that have both the purpose and effect of dramatically delaying the process by which asylum seekers can obtain the work authorization that they need to support themselves during the asylum process. Collectively, these changes essentially eliminate any timely path to work authorization and, with it, the ability of all but the wealthiest asylum seekers to meaningfully apply for and obtain asylum. Second, the Proposed Rule introduces additional changes to the asylum process itself that make it more onerous and less fair. Both sets of changes, if adopted, will work significant harm on asylum seekers.

A. The Changes to Work Authorization Procedures Will Hurt Asylum Seekers

Under current law, asylum seekers already face a significant period of unemployment before they are lawfully permitted to work. They are required to wait 150 days after submitting an asylum application before applying for a work permit. 8 C.F.R. § 208.7. Although current regulations require the Department to grant or deny an EAD application within 30 days, *see* 8 C.F.R. § 208.7, it has filed a separate notice of proposed rulemaking that would eliminate the 30-day processing requirement in favor of a regime that would permit the Department an indefinite amount of time to adjudicate a simple work permit application. *Removal of 30-Day Processing Provision for Asylum Applicant Related Form I-765 Employment Authorization Applications*, 84 Fed. Reg. 47,148 (Sept. 9, 2019) (30-day Adjudication NPRM).

While asylum seekers wait for work authorization, they often face severe housing and financial insecurity.³ Concerns about waiting periods, with their attendant “negative impact on human welfare,” led the U.S. District Court for the Western District of Washington to enjoin the Department from ignoring the 30-day EAD application processing requirement. *Gonzalez Rosario v. United States Citizenship & Immigration Servs.*, 365 F. Supp. 3d 1156, 1162 (W.D. Wash. 2018). As the court recognized, “[a]sylum seekers are unable to obtain work when their EAD applications are delayed and, consequently, are unable to financially support themselves or their loved ones.” *Id.*

By doubling the EAD waiting time for many asylum seekers, and barring others from working completely, the Proposed Rule is sure to have a negative impact on asylum seekers' welfare.

³ 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>.

1. The Proposed Rule Introduces Significant Delays and Uncertainty into the EAD Application Process

The Proposed Rule introduces a suite of changes to the EAD application process that share a common theme: delay asylum seekers' ability to work to the point of deterring their asylum claims.

First and foremost, the Department seeks to more than double the EAD waiting period. It proposes to increase the minimum waiting period from 150 days to 365 days, so that an asylum seeker will have to wait a full year before even submitting an EAD application, much less having it approved. 84 Fed. Reg. at 62,375. The proposed waiting period would therefore deliberately and uniformly institute waits that dwarf application processing delays already found to harm "human welfare" in *Rosario*. 365 F. Supp. 3d at 1162. Moreover, the Department proposes to apply this change to current asylum seekers with pending asylum applications, even though many such individuals will have structured their affairs in reliance on their previously applicable (and running) waiting period. 84 Fed. Reg. at 62,376.

Compounding matters, the Department pairs this draconian 365-day waiting period with other changes that introduce additional setbacks and uncertainty into the work authorization process, including:

- *Eliminating the issuance of recommended approvals for a grant of affirmative asylum:* Under current law, if an asylum officer recommends that an asylum application be approved before the required minimum waiting period ends, the asylum seeker may apply for employment authorization based on the recommended approval. *See* 8 C.F.R. § 208.7. The Proposed Rule would eliminate this avenue for expediting work authorizations—even though there has been a finding of substantive merit to the underlying asylum application. The Department estimates that this change will delay work authorization for affected individuals by an additional 52 days. 84 Fed. Reg. at 62,375, 62,414.
- *Eliminating the "deemed complete" rule:* Under current regulations, an application for asylum will automatically be deemed "complete," triggering the start of the EAD waiting period, if USCIS fails to return the incomplete application to the asylum seeker within 30 days of submission. *See* 8 CFR § 208.3(c)(3). The Proposed Rule would remove this requirement. 84 Fed. Reg. at 62,375-76; *see also* 8 C.F.R. § 208.4(c).
- *Limiting EAD validity periods:* The Proposed Rule limits work authorization periods to a maximum increment of two years, with USCIS retaining discretion to set periods far shorter than that, which introduces additional uncertainty into the lives of asylum seekers and may foreclose them from certain types of jobs where employers value long-term predictability with respect to their workforce. 84 Fed. Reg. at 62,376.
- *Hastening and introducing uncertainty regarding when EADs terminate:* Where current law permits EADs to be renewed during federal court review of an asylum denial, the NPRM proposes to eliminate such renewals and to terminate work authorization immediately on the date an asylum application is denied by an asylum officer, or, 30 days

after an Immigration Judge denies a case on review with an Immigration Court. If an applicant appeals the Immigration Judge's decision to the Board of Immigration Appeals (BIA), the EAD expires when and if the BIA denies the application. This change introduces uncertainty about the end date of asylum seekers' work authorization where appeals are intended but have not yet been filed. It will also have the effect of making it harder for asylum seekers to obtain employment, as employers may well disfavor the uncertainty resulting from not knowing how long a prospective employee will be permitted to work lawfully in the country. 84 Fed. Reg. at 62,375.

- *Denying EAD applications based on overbroad definition of applicant-caused delay:* The NPRM proposes that various actions by an asylum seeker—including (a) amending an asylum application, (b) requesting an extension to submit additional evidence beyond a date that permits meaningful consideration prior to a previously scheduled asylum interview, or (c) failing to appear to receive a decision as designated—will constitute an applicant-caused delay, which, if not resolved by the date the EAD application is adjudicated, will result in the denial of that application. 84 Fed. Reg. at 62,377.

These changes—particularly viewed in conjunction with the Department's other proposed administrative actions, *see, e.g., 30-day Adjudication NPRM*, 84 Fed. Reg. 47,148—indefinitely delay the ability of asylum seekers to obtain work authorization. Asylum seekers will wait well over a year before they are permitted to work lawfully, and whatever authorization they eventually obtain, they will still face the uncertainty of it being reduced to ever shorter durations at USCIS's discretion, which as a practical matter may dissuade employers from hiring them in the first place.

The Proposed Rule does not stop there, however. In addition to indefinitely delaying the ability of asylum seekers to obtain work authorization, it also seeks formally to bar certain classes of asylum seekers from obtaining any work authorization. The Department seeks to exclude, among others, (1) immigrants who, absent "good cause," entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry; (2) immigrants who have failed to file for asylum within one year of their last entry, unless and until an asylum officer or Immigration Judge determines that an exception to the statutory requirement to file for asylum within one year applies; and (3) at USCIS's discretion, immigrants who have been charged but not convicted with certain crimes, including driving under the influence of drugs or alcohol. 84 Fed. Reg. at 62,375. Again, the Proposed Rule would be applied retroactively to these individuals with pending asylum applications and, for some provisions, even to those with pending work authorization applications and renewals. 84 Fed. Reg. at 62,376.

Simply put, these regulatory changes impede, delay, and effectively prevent asylum seekers from obtaining lawful work during the pendency of their asylum application. By so doing, the Proposed Rule not only renders work authorization largely a dead letter, but also undermines the asylum process itself. Moreover, even individuals currently in the asylum application and adjudication process would be subject to an entirely new set of rules with respect to their work authorization applications, exacerbating the chaos and confusion around their asylum claims and impeding their ability to maintain their asylum claims.

Under the Department's restrictive approach to work authorization, fewer asylum seekers will have the resources to hire legal counsel to navigate them through the complex and evolving immigration bureaucracy.⁴ That matters a great deal. 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.⁵ Unrepresented individuals are more likely to be affected by appeals, delays in their claims, and more unreliable adjudications.⁶ 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), and pro bono providers are already stretched thin.⁷ Without the ability to work, many asylum seekers will be unable to afford counsel, and many more meritorious cases may be denied.

2. The Proposed Rule Will Harm Asylum Seekers' Health and Wellbeing

The Proposed Rule also exacts a high human cost. By delaying or denying work authorization, the Proposed Rule will prolong periods of unemployment and exacerbate poverty for asylum seekers, inflicting significant harm to their health and welfare.

To begin with, without gainful employment, asylum seekers are more vulnerable to food insecurity. One study found that 85 percent of recently arrived refugee families were food insecure, with 42 percent experiencing child hunger.⁸ Studies of refugees resettled in the United States and elsewhere suggest a commonsense reason for this: that immigrants have limited or no income, a problem that the Proposed Rule will only make worse.⁹

Asylum seekers will suffer adverse physical health consequences as a result of their inability to work. Without employment and employer-sponsored healthcare, many asylum seekers will be unable to afford health insurance, which directly correlates with health outcomes.¹⁰ Stress and environmental factors stemming from poverty have a negative impact on

⁴ 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).

⁵ *Id.*

⁶ 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>.

⁷ Sabrineh Ardalan, *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>.

⁸ Craig Hadley & Daniel Sellen, *Food Security and Child Hunger among Recently Resettled Liberian Refugees and Asylum Seekers: A Pilot Study*, 8 J IMMIGR. MINOR HEALTH 369 (2006), available at <https://tinyurl.com/snuethy>.

⁹ Sigrun Henjum, et al., *"I worry if I will have food tomorrow": A Study on Food Insecurity among Asylum Seekers Living in Norway*, 19 BMC PUBLIC HEALTH 592 (2019), available at <https://tinyurl.com/urdfxdc> (citing studies regarding the United States).

¹⁰ Jacob Goldin, et al., *Health Insurance and Mortality: Experimental Evidence from Taxpayer Outreach*, NBER Working Paper No. 26533 (Dec. 2019), <https://www.nber.org/papers/w26533>; Steffie Woolhandler, MD et al, *The Relationship of Health Insurance and Mortality: Is Lack of Insurance*

health as well.¹¹ For these reasons, low-income adults in the United States have higher rates of physical limitations, heart disease, diabetes, stroke, and other chronic conditions, compared to higher-income Americans.¹² 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.¹³ These harms also affect children, who make up a significant share of asylum seekers.¹⁴ Children in poor families are seven times more likely to have poor or fair health than children in affluent families.¹⁵ The health consequences of childhood poverty can last throughout a lifetime.¹⁶

Asylum seekers' mental health will also suffer. Prolonged financial instability from unemployment will exacerbate their trauma and mental anguish. Asylum seekers often face multiple layers of traumatic experiences before seeking asylum in the United States. Indeed, to be eligible for asylum, 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.¹⁷ Studies show that “asylum seekers are at particular risk of developing mental illness, including post-traumatic stress disorder (PTSD), depression, and anxiety.”¹⁸ 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.¹⁹ Per Human Rights First: “Several studies have shown that extended delays in adjudicating claims—and the resulting uncertainty in asylum seekers’

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://tinyurl.com/rfuvdce>.

¹¹ Dheuv Khullar & Dave A. Chokshi, *Health, Income, & Poverty: Where We Are & What Could Help*, HEALTH AFFAIRS (October 4, 2018), <https://tinyurl.com/KhullarChokshi>.

¹² *Id.*

¹³ *Id.*

¹⁴ 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>.

¹⁵ Robert Wood Johnson Foundation, *Overcoming Obstacles to Health*, 11 (Feb. 2008) <https://tinyurl.com/ObstacletoHealthReport>.

¹⁶ *Id.* at 9.

¹⁷ 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>.

¹⁸ Piyal Sen, *The mental health needs of asylum seekers and refugees – challenges and solutions*, BJ PSYCH INTL. (May 1, 2016), available at <https://tinyurl.com/yyqd79xt>.

¹⁹ 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>.

futures—are associated with psychological distress ‘above and beyond the impact of traumatic events.’”²⁰

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.²¹ Studies show that the “long-term unemployed have at least a twofold risk of mental illness, particularly depression and anxiety disorders, compared to employed persons.”²² According to some reports, financial stress is the second most common cause of suicide.²³ People in debt are three times as likely to have a mental health issue, especially depression, anxiety, and psychotic disorders.²⁴ 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.²⁵ 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.”²⁶

In addition, many asylum seekers, and particularly those who cannot lean on the support of family or friends in a new country, may become homeless without work authorization.²⁷ 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.²⁸ 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.”²⁹ Asylum seekers, in particular, can have a difficult time adjusting to homeless shelters due to linguistic and other barriers.³⁰

²⁰ 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>.

²¹ 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>.

²² 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>.

²³ Brett Whysel, *3 Vicious Cycles: Links Among Financial, Physical And Mental Health*, FORBES (June 27, 2018), <https://tinyurl.com/WhyselForbes>.

²⁴ *Id.*

²⁵ Money and Mental Health Policy Institute, *The Facts*, <https://tinyurl.com/MoneyandMentalHealth>.

²⁶ 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, Volume 203, Number 1, January 2015.

²⁷ Human Rights First, *Callous and Calculated*, *supra* note 3.

²⁸ 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>.

²⁹ The Centers for Disease Control and Prevention, *Homelessness as a Public Health Law Issue: Selected Resources*, <https://tinyurl.com/CDCPhomelessness>.

³⁰ Ted Hesson, *Why So Many Asylum Seekers Come to America and Wind Up Homeless*, VICE (May 11, 2016), <https://tinyurl.com/HessonHomelessness>.

3. The Proposed Rule Will Induce Many Asylum Seekers to Enter into Dangerous and Exploitative Employment

Denied an avenue to work lawfully and facing poverty, many asylum seekers will work without authorization in the underground economy. The shift to underground work will put asylum seekers in exploitative and dangerous employment situations.

Unauthorized employees are more likely to endure labor abuses, including harassment and violence, than their authorized counterparts.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 surveyed immigrant workers with work authorization 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 According to one study, in New York City, 77 percent of surveyed low-wage workers who worked overtime in the previous week reported that they had not been paid the correct amount.³⁵ 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.³⁶ 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.³⁷ Women without legal authorization face particularly dangerous work-place situations—in a study of 150 female farmworkers in California, 40 percent had suffered sexual harassment.³⁸ 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.

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).

³⁵ Annette Bernhardt, Diana Polson, and James DeFilippis, *Working Without Laws: A Survey of Employment And Labor Law Violations In New York City*, National Employment Law Project (2010), 18 available at <https://tinyurl.com/Workingwithoutlaws>.

³⁶ 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>.

³⁷ *Id.*

³⁸ 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>.

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

B. The Changes to Asylum Procedures Will Harm Asylum Seekers

The Department also proposes changes to its asylum procedures that will harm asylum seekers. In particular, the Proposed Rule establishes new procedural grounds for denying asylum applications. It creates, for example, a new requirement that asylum seekers provide biometrics at a "biometric services appointment," for which the applicant will be charged \$85, and it makes the failure of an asylum seeker to attend such an appointment grounds for dismissing or referring their asylum application. 84 Fed. Reg. at 62,376, 62,404, 62,423. The Proposed Rule also increases the likelihood that an applicant's failure to appear for an asylum interview will be grounds for dismissing or referring the asylum application. Current law states that the "[f]ailure to appear for a scheduled interview" and the "[f]ailure to comply with fingerprint processing requirements without good cause" when taken together "may result in dismissal of the application." The current law also provides a clear ground by which these failures are excused—namely, when "the notice of the interview or fingerprint appointment was not mailed to the applicant's current address and such address had been provided to USCIS by the applicant prior to the date of mailing." 8 C.F.R. § 208.10. The NPRM removes this important exception, potentially subjecting asylum applications to dismissal or referral to immigration court even where the Department sent notice of the interview or appointment to the wrong address. *See* 84 Fed. Reg. at 62,423.

In addition, the Department proposes to eliminate its obligation to send notices of failure to appear to applicants before dismissing or referring cases to immigration court. *See id.* Thus, while the NPRM proposes to permit an applicant who misses an asylum interview or biometrics services appointment to "demonstrate[] that he or she was unable to make the appointment due to exceptional circumstances," *id.*, for many that opportunity will be illusory because, without any notice from the Department, they will have no idea that they missed an appointment, much less that an explanation is needed to preserve the viability of their asylum application.

These changes flout basic notions of due process and fairness, and they introduce the type of procedural hurdles that are likely to disproportionately affect individuals who cannot afford or otherwise obtain legal representation—a population whose numbers will only increase given the myriad ways, discussed above, in which the Proposed Rule restricts work authorization for asylum seekers.

³⁹ Heckathorn, *supra* note 34 at 18.

⁴⁰ Michael Grabell & Howard Berks, *They Got Hurt At Work — Then They Got Deported*, NPR (Aug. 16, 2017), <https://tinyurl.com/GrabellNPR>.

⁴¹ *Id.*

II. The Proposed Rule Harms States

The Proposed Rule will make the asylum process more arduous for all applicants and as such will negatively impact the States in profound ways. First, the Proposed Rule will make it much more difficult, if not impossible, for many to legally work, costing the States millions of dollars in lost tax revenue and diminished economic growth. Second, the resulting delays and denials of work authorization will lead to increased healthcare costs shouldered by the States. Third, the Proposed Rule will burden the States' other social service providers, including state-funded non-profit service providers. Fourth, and finally, the Proposed Rule will make it more difficult for the States to enforce their own laws, particularly those designed to protect workers from unfair and abusive conditions of employment.

The Proposed Rule will especially harm the States signatory to this letter. In 2017, the most recent year for which data is available, the States signing this letter include five of the top ten States of residence for individuals whose affirmative asylum applications were granted.⁴² Combined, these six States were home to over 60 percent of the individuals granted asylum by USCIS in the United States.⁴³ USCIS asylum offices within the States are considering 40 percent of the 327,984 pending affirmative asylum applications.⁴⁴ Based on calculations involving the most recent available data, these offices receive an average of approximately 45,615 asylum applications per year.⁴⁵ The States also hosted over 10,000 or 80 percent of the 13,248 total immigration court grants of asylum in 2018.⁴⁶

A. The Proposed Rule Will Deprive the States of Important Streams of Revenue

The States benefit from all immigrants, including asylum seekers, being able to work within their borders. Asylum seekers contribute to the States through increased tax revenue and increased purchasing power. By preventing thousands of individuals from working and by delaying other asylum seekers' ability to work for at least an extra seven months, the Proposed Rule will significantly lower the tax revenue that the States expect to receive from asylum seekers participating in the economy.

While the Department does not fully account for the losses that will result from the Proposed Rule, *see supra* Part III, even its own estimates demonstrate the significant impact that

⁴² Mossad, *supra* note 1, at tbl. 13.

⁴³ *Id.*

⁴⁴ USCIS, *Asylum Office Workload March 2019* 6 (April 18, 2019), <https://tinyurl.com/AsyOfficeWorkload0319>.

⁴⁵ *Id.*; USCIS, *Asylum Office Workload February 2019* 5 (April 18, 2019), <https://tinyurl.com/AsyOfficeWorkload0219>; USCIS, *Asylum Office Workload January 2019* 2 (May 23, 2019), <https://tinyurl.com/AsyOfficeWorkload0119>; USCIS, *Asylum Office Workload December 2018* 2 (May 23, 2019), <https://tinyurl.com/AsyOfficeWorkload1218>; USCIS, *Asylum Office Workload November 2018* 2 (May 23, 2019), <https://tinyurl.com/AsyOfficeWorkload1118>; USCIS, *Asylum Office Workload October 2018* 2 (May 23, 2019), <https://tinyurl.com/AsyOfficeWorkload1018>

⁴⁶ U.S. Dep't. of Justice, *Statistics Yearbook: Fiscal Year 2018* at 28, tbl. 14 available at <https://tinyurl.com/t3v39le>.

it could have. The Department estimates that 305,000 asylum seekers will be affected by the Proposed Rule in the first year alone, with just under 300,000 affected in subsequent years. 84 Fed. Reg. at 62,378. A subset of those affected by the Rule, at least 150,000 asylum seekers, would be affected by the proposed 365-day waiting period. The Department estimates that the federal government could lose up to \$682.9 million in tax revenue under the Proposed Rule. *Id.* at 62,379. Notably, this high figure does not even include the losses incurred by barring previously eligible groups from obtaining EADs. The Department also does not calculate losses to the States, but given the States' high population of impacted individuals, the States anticipate losing substantial tax revenue.

Although unauthorized workers pay taxes, tax revenue increases when immigrants can legally work, and the States could stand to lose substantial revenue if the Proposed Rule is implemented. Currently, undocumented immigrants residing in the States pay approximately \$7.4 billion in state and local taxes annually.⁴⁷ This would increase by approximately \$1.4 billion if undocumented immigrants were given legal status.⁴⁸ The same way in which tax revenues increase when immigrants are permitted to work legally, so too do tax revenues increase when asylum seekers are permitted to work legally. In addition, the States are likely to experience the economic impact of wage theft that asylum seekers are likely to experience as a result of the Proposed Rule, *see supra* Part I. A. 3. Stolen wages lead to lost tax revenue that is necessary for maintaining public services and programs.⁴⁹ The Proposed Rule prevents asylum seekers from legally entering the workforce for extended periods of time, thereby depriving the States of substantial revenue.

The Proposed Rule will also significantly reduce the spending power of asylum seekers, thereby weakening the economies of the States. Curtailing work authorization for asylum seekers or cutting others off from EADs prematurely will result in lost wages and money that does not flow to the States' businesses and economies. The New American Economy estimates that immigrants exercise billions in spending power each year, totaling over \$724.8 billion in the States.⁵⁰ Indeed, the Department itself recognizes that up to \$4.4 billion could be lost in wages, 84 Fed. Reg. at 62,381, and thus money that is not flowing into the economy.

Further, as the Proposed Rule acknowledges, "a portion of the impacts of this rule would also be borne by companies that would have hired the asylum applicants" or "would have continued to employ asylum applicants had they been in the labor market longer." 84 Fed. Reg. at 62,380. By the Department's own admission, businesses will not only lose potential labor, but also will likely have to find replacement labor because the Proposed Rule cuts short asylum seekers' ability to continue working, even if their asylum cases are ongoing in federal court. *Id.* Although the Department asserts that businesses potentially could find other labor to substitute

⁴⁷ Inst. on Taxation and Econ. Policy, *Undocumented Immigrants' State & Local Tax Contributions* 3 (Mar. 2017), <https://tinyurl.com/ITTEP-UndocTaxes>.

⁴⁸ *Id.*

⁴⁹ Payroll Fraud: Targeting Bad Actors Hurting Workers and Businesses, before the S. Subcomm. on Employment and Workplace Safety, 113th Cong. 2 (November 12, 2013) (testimony of Catherine K. Ruckelshaus, General Counsel of the National Employment Law Project), <https://tinyurl.com/wt4bseo>.

⁵⁰ New Am. Econ., *Immigrants and the economy: Map the Impact*, <https://www.newamericaneconomy.org/locations/>.

for the jobs that asylum applicants currently hold, *id.* at 62,381, its own analysis belies that premise. The Department acknowledges that with the unemployment rate at a “50-year low [. . .] it could be possible that employers may face difficulties finding reasonable labor substitutes.” *Id.* at 62,380. If no labor substitutes are found, the Department estimates that the total costs of the Proposed Rule on businesses could reach over \$4.4 billion. *Id.* at 62,380. Indeed, the Department acknowledges that it “does not know the portion of overall impacts of this rule” for employers. *Id.*

While the Department makes no inquiry into the “wages, occupations, industries, or businesses that may employ such workers,” *id.* at 62,406, there is substantial data that several sectors of the States’ economies disproportionately employ immigrants and are likely to face costs while trying to find labor substitutes. 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 jobs, and 41 percent of those in computer and sciences.⁵¹ Likewise, approximately 43 percent of employed undocumented workers in Illinois are employed in the food services and manufacturing industries.⁵² 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.⁵³ Immigrants in Michigan comprise close to 34,000 of the State’s entrepreneurs.⁵⁴ One in six 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.⁵⁵ The Proposed Rule will likely harm these sectors by depleting their labor forces. Businesses and industries that will be disproportionately affected by the Proposed Rule will not only have to seek new pools from which to draw employees, but also will have to replace employees who prematurely lose access to their work authorizations and deal with new uncertainty about the duration of employees’ work authorizations.

B. The Proposed Rule Will Increase States’ Healthcare Costs

For many asylum seekers, eliminating or delaying the ability to work will result in denying essential healthcare. Employed asylum seekers and their families may rely on employer-sponsored health insurance, but the unemployed, whose ranks will increase under the Proposed Rule, 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, under the Proposed Rule, many

⁵¹ Am. Immigration Council, *Immigrants in California* 4 (Oct. 4, 2017)

<https://tinyurl.com/CAPImmigrants-in-CA>.

⁵² 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>.

⁵³ New Am. Econ., *The Contributions of New Americans in New York* (New York, NY) 9-10 (Aug. 2016) <https://tinyurl.com/y5z96o5z>.

⁵⁴ *State Demographics Data: Michigan*, Migration Pol’y Inst., <https://tinyurl.com/MI-Immigrant-Workforce>

⁵⁵ Am. Immigration Council, *Immigrants in Connecticut* (Oct. 13, 2017) <https://tinyurl.com/y35tkvs5>.

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

Adult asylum seekers, who in many 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.⁵⁶ One survey documented the fear that many immigrants are experiencing as a result of the Trump administration's anti-immigration rhetoric and policies, which prevents them from seeking necessary health services, including timely emergency room care.⁵⁷ In the long term, without health insurance, these individuals 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 bear the cost of care of uninsured patients.⁵⁸

Lack of health insurance also will worsen the overall public health. For example, the uninsured are less likely to receive vaccinations, which prevent the spread of infectious diseases throughout the community.⁵⁹ According to one study, while 44 percent of insured adults received the flu shot, only 14 percent of uninsured adults did.⁶⁰ Inoculation helps prevent the spread of the flu, which resulted in some 79,400 deaths nation-wide in 2017-2018.⁶¹ When more people have quality healthcare, 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 healthcare. Many localities and the 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,⁶² and also offers undocumented state residents access to its Community or

⁵⁶ Stacey McMorrow 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/McMorrowPublicHealth>; 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>.

⁵⁷ Linda Carroll, *Anti-immigrant rhetoric may put health of U.S. Latinos at risk*, REUTERS (Nov. 1, 2019) <https://tinyurl.com/CarrollReuters>.

⁵⁸ 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).

⁵⁹ 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>.

⁶⁰ *Id.*

⁶¹ 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>.

⁶² 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.

Crisis Residences regardless of their ability to pay,⁶³ which may see an increased demand since fewer immigrant families will be able to afford health insurance under the Proposed Rule. This concern is exacerbated by the fact that recent restrictive immigration policies and rhetoric have caused a rise in mental health problems among Latino immigrants.⁶⁴ The need for mental health services will be borne by the States' health systems.

C. The Proposed Rule Burdens Service Providers and Nonprofits in the States

The States fund nonprofits and other service providers to protect asylum seekers from deportation. If the Proposed Rule goes into effect, state-funded efforts to support this vulnerable population will become more difficult and more expensive. Nonprofits may need to shift resources to handle the likely influx of asylum seekers who will need pro bono services because they can no longer afford private counsel.

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, 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.⁶⁵ New Jersey allocated \$3.1 million in state funds in FY 2020 for legal assistance to individuals in removal proceedings.⁶⁶ 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.⁶⁷ 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.⁶⁸ Among other programs, New York has allocated \$10 million in its FY 2020 enacted 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.⁶⁹ 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.⁷⁰ 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.⁷¹

⁶³ *Id.*

⁶⁴ Reuters, *Immigration raids are tied to worse mental health among Latinos*, NBC News (Nov. 22, 2019) <https://tinyurl.com/yxxpe7pe>.

⁶⁵ 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>.

⁶⁶ See N.J. Dep't of Treasury, Office of Mgmt. & Budget, *Appropriations Handbook FY2019-2020*, B-204, <https://tinyurl.com/yxw256og>.

⁶⁷ Cal. Dep't of Soc. Serv. (CDSS), *Immigration Services Program Update* 1 (Mar. 2019).

⁶⁸ 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>.

⁶⁹ See N.Y. St., Div. of Budget, *Governor Cuomo Announces Highlights of the FY 2019 State Budget* (Mar. 30, 2018) <https://tinyurl.com/y6qv2jev>.

⁷⁰ H.B. 5050, 80th Or. Legis. Assemb., 2019 Reg. Sess. (Or. 2019) <https://tinyurl.com/Or-HB5050>.

⁷¹ Connecticut Bar Foundation, IRS Form-990 (2018) <https://tinyurl.com/yxaf7avg>.

Even with this state and local funding, immigration nonprofits providing legal assistance have limited resources.⁷² 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 frustrate and impede the interests of their funders, which include the States.

Additionally, several of the States have allocated funds for other 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 wellbeing, English-language proficiency, and academic performance of their students.⁷³ 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.⁷⁴ 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.⁷⁵

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.”⁷⁶

⁷² 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[.]”)

⁷³ *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/yvfv3ogn>.

⁷⁴ 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> .

⁷⁵ 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>.

⁷⁶ U.N. High Commissioner of Refugees, *Engaging With Employers In The Hiring Of Refugees* 5 (2018) <https://www.unhcr.org/5adde9904.pdf>

D. The Proposed Rule Will Make It More Difficult for States to Enforce Their Own Laws

The Proposed Rule interferes with the States' ability to enforce their labor and civil rights laws. As described, *supra* Part I. A.3., as a result of the Proposed Rule, asylum seekers will be increasingly likely to enter into the underground economy, and increasingly less likely to report ongoing labor and civil rights violations. 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).

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. Gov. Code §§ 12900-12996; Cal. Bus. & Prof. Code § 17200 *et seq.*; Cal. Lab. Code § 200-1200; 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); 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). These laws are enforced without respect to immigration status, but effective enforcement relies on employees' ability and willingness to report violations. Despite the significant labor and civil rights abuses that befall unauthorized workers, fear of reprisal and deportation often inhibits unauthorized workers from reporting such violations.⁷⁷ 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.⁷⁸ A study in Chicago found that, of the immigrant workers who have suffered a workplace injury and report it to their employer, 23 percent reported being either immediately fired or threatened with deportation.⁷⁹

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 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.

⁷⁷ Human Rights Watch, “*At Least Let Them Work*” *supra* note 21; Daniel Costa, *supra* note 31.

⁷⁸ Human Rights Watch, “*At Least Let Them Work*” *supra* note 21.

⁷⁹ Heckathorn, *supra* note 34, at 18.

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. Furthermore, without work authorization, asylum seekers will feel less comfortable making claims with the States' agencies, and consequently will endure exploitative and discriminatory employment practices for a longer time period. Indeed, 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, *see supra* Part I. A. 3., actions—such as this Proposed Rule—that discourage timely reporting of violations interfere with the States' abilities to enforce their laws and should be avoided.

III. The Proposed Rule Is Against the Law

The Proposed Rule violates the APA because it is contrary to law and arbitrary and capricious. Additionally, the Department failed to conduct the required federalism and regulatory analysis under Executive Order 13,132 and 12,866 and the Unfunded Mandates Reform Act.

A. The Proposed Rule Is Contrary to Law

Under the APA, agency action may be set aside where it is “not in accordance with law.” 5 U.S.C. § 706(2). Where a statute is unambiguous and the “intent of Congress” is clear in foreclosing agency action, “that is the end of the matter.” *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Applying these well settled principles, the Proposed Rule is contrary to the INA, and the treaties it implements, in a variety of respects.

First, the Proposed Rule denies EADs to asylum seekers who failed to enter the United States lawfully through a “port of entry.” But as the Ninth Circuit explained, § 1158 of the INA “reflects our understanding of our treaty obligation to not ‘impose penalties [on refugees] on account of their illegal entry or presence.’” 932 F.3d at 772 (quoting Convention, art. XXXI, § 1, 189 U.N.T.S. at 174); *see also* 8 U.S.C. § 1158(a)(1). Denying work authorization to an asylum seeker based on his or her not entering the country at a port of entry is precisely such an impermissible “penalty.” Indeed, the Department all but acknowledges that penalizing such asylum seekers is the whole point of the endeavor, when it discusses how, in its view, this “port of entry” requirement “will *incentivize* aliens to comply with the law.” 84 Fed. Reg. 62,392 (emphasis added). While the Department argues that this requirement is “consistent with U.S. obligations under the 1967 Protocol because it exempts aliens who establish good cause for entering or attempting to enter the United States at a place and time other than lawfully through a U.S. port of entry,” 84 Fed. Reg. at 62,392, the Proposed Rule falls short because it defines “good cause” far more narrowly than is required by our international treaties.⁸⁰

⁸⁰ Compare 84 Fed. Reg. at 62,422 (stating that “good cause does not include the evasion of U.S. immigration officers, convenience, or for the purpose of circumvention of the orderly processing of asylum seekers at a U.S. port of entry”), with Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection*, at (Oct. 2001), at 34 <https://www.unhcr.org/3bcfdf164.pdf> (“To come directly from the country in which the claimant has a well-founded fear of persecution is recognized in itself as ‘good cause’ for illegal entry. To ‘come directly’ from such country via another country or countries in which he or she is at risk or in which generally no protection is available, is also accepted as ‘good cause’ for illegal entry.”), and *id.* at 11

Second, the 365-day waiting period is contrary to § 1158(d)(2), which provides that an “applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.” 8 U.S.C. § 1158(d)(2) (emphasis added). The Department effectively amends the statute to more than double this mandatory waiting period. To be sure, the statute expressly proscribes granting work authorization “prior to” 180 days, but to construe the provision exclusively as a floor would be to disregard the context of its enactment and history. In adopting the 180-day bar, Congress largely codified the approach taken by the Immigration and Naturalization Service (“INS”) in 1994, which had concluded that “all applicants could have work authorization after 180 days” unless their claims were denied. *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) (“*EAD Final Rule*”). In codifying a 180-day waiting period, Congress adopted the careful balance that INS had struck between “discourag[ing] applicants from filing meritless claims solely as a means to obtain employment authorization” and “provid[ing] legitimate refugees with lawful employment authorization.” *Id.* This dramatic increase is also contrary to congressional intent. The same Congress that enacted the 180-day bar also declared it to be “national policy” that “[s]elf-sufficiency has been a basic principle of United States immigration law since this country’s earliest immigration statutes”; that immigrants “rely on their own capabilities and the resources of their families, their sponsors, and private organizations”; and that “it is a compelling government interest to enact new rules for eligibility . . . in order to assure that aliens be self-reliant.” 8 U.S.C. § 1601(1), (2), (5). It is implausible that this Congress meant to confer roving administrative discretion to the Department to unilaterally subvert this “compelling interest” by drastically increasing the mandatory waiting period. Indeed, in seeking to double the 180-day period, the Department appears to eschew any limiting principle and could, on its untenable theory, set a decades-long waiting period.

Third, Congress has specifically enumerated three classes of immigrants ineligible to apply for asylum, *see* 8 U.S.C. § 1158(a)(2), and six categories of immigrants who cannot be granted asylum, *see id.* § 1158(b)(2), and the fact that an asylum seeker may lack financial resources is not one of these enumerated grounds. And yet, as explained above in Parts I. A. 1 and I. B., the Proposed Rule effectively denies asylum seekers the right to obtain the work authorization they need to meaningfully apply for and obtain asylum—and all the more so when viewed in conjunction with the Department’s other proposed administrative actions. *E.g.*, *30-day Adjudication NPRM*, 84 Fed. Reg. 47,148. The result is that a meaningful right to asylum has been frustrated to the point of having been effectively denied to a class of immigrants whom Congress never intended to exclude from the asylum process. That is contrary to the INA.

(“The notion of ‘good cause’ has also not been the source of difficulty; being a refugee with a well-founded fear of persecution is generally accepted as a sufficient good cause.”), *and id.* at 17 (quoting ruling in Swiss Federal Court that a “refugee has good cause for illegal entry especially when he has serious reason to fear that, in the event of a regular application for asylum at the Swiss frontier, he would not be permitted to enter Switzerland.”).

B. The Proposed Rule Is Arbitrary and Capricious

Under the APA, federal agencies must consider “the advantages *and* the disadvantages of agency decisions” before taking action. *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (emphasis in the original). As the Supreme Court has held, “agency action is lawful only if it rests on a consideration of the relevant factors,” and an agency may not “entirely fail to consider an important aspect of the problem” when deciding whether regulation is appropriate. *Id.* at 2706-07 (quoting *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Automobile Ins. Co. (State Farm)*, 463 U.S. 29, 43 (1983) (brackets and quotation marks omitted)). If an agency action is not “based on a consideration of the relevant factors,” that action is arbitrary and capricious under the APA. *State Farm*, 463 U.S. at 40–43 (citing 5 U.S.C. § 706(2)(A)). An agency action also is arbitrary and capricious if the agency “offered an explanation for its decision that runs counter to the evidence before the agency” or if it considered “factors that Congress has not intended it to consider.” *Id.* at 43.

Here, the Proposed Rule is arbitrary and capricious because the Department has neither fully considered its harmful effects, nor analyzed the full scope of its impact. *Michigan*, 135 S. Ct. at 2707. Additionally, the Department’s justifications for the Proposed Rule are unreasonable. *State Farm*, 463 U.S. at 52 (agency explanations must show that the rulemaking is the result “of reasoned decision making.”).

1. The Department Failed to Consider the Disadvantages of the Proposed Rule

The Department failed to adequately analyze, and in some instances failed to even mention, several negative consequences that will result from the Proposed Rule, including: (1) the injuries it will inflict on asylum seekers; (2) the harms to the States and their economies; and (3) the full economic and fiscal costs of barring many currently eligible applicants from EADs.

First, the Department does not adequately consider the harms that will befall asylum seekers, such as those discussed in Part I, should the Proposed Rule be adopted. The Department briefly mentions that asylum seekers may work illegally to make ends meet, but it does not address the increased exploitation that results from employment in the underground economy. 84 Fed. Reg 62,386, n.48. The Department also does not consider that the inability to work will affect asylum seekers’ health, housing, and the outcome of their claims for protection. In focusing on deterring what it perceives as frivolous asylum claims, the Department does not adequately reconcile that objective with the likelihood that the Proposed Rule will force many bona fide asylum seekers, who simply do not have the means to go without employment, to abandon their meritorious asylum claims. *See id.* at 62,401. Beyond the harms caused by the EAD provisions, the Department does not at all analyze how the Proposed Rule’s several modifications to the affirmative asylum process will affect applicants.

Second, the Department does not adequately address harms to the States and their fiscal health. While the Department recognizes that the Proposed Rule “could” affect individual States’ tax revenue and impact entities that provide assistance to asylum seekers, it does not attempt to quantify these costs and fails to consider many other harms to the States that will result. *Id.* at

62,418-19. For instance, it fails to consider that the States are employers too, and that this Proposed Rule could affect the States' workforces. The Department also has not considered that the States have an important interest in enforcing their own labor and civil rights laws, which is undermined by the way in which the Proposed Rule would drive asylum seekers into the underground economy.

Third, the Department's regulatory impact analysis omits significant economic and fiscal losses that will result from the Proposed Rule. The Department, for example, does not calculate the lost wages or tax revenue that will result from blocking several groups of asylum seekers from EADs, such as those who entered without inspection. *Id.* at 62,416. The Department cannot have thoroughly weighed the advantages and disadvantages of the Proposed Rule without having an estimate for this loss—a loss that could be in the hundreds of millions of dollars. To be sure, the Department estimates that the Proposed Rule's extended waiting period will result in lost wages of \$269.5 to \$815.9 million and lost tax revenue of \$41.3 to \$125 million each year. *Id.* at 62,410. Given the magnitude at which the Department estimates the cost of delaying EADs, its failure to quantify the costs of denying EADs to thousands of individuals was unreasonable and demonstrates the arbitrary and capricious nature of this rulemaking.

In sum, the Department ignored several key factors in promulgating the Proposed Rule and, as such, it did not conduct the analysis required under the APA.

2. The Department's Justifications for the Proposed Rule Are Unreasonable

The Department argues that various aspects of the Proposed Rule are necessary to deter unmeritorious asylum claims as well as illegal entries, to mitigate the administrative burden on an overwhelmed asylum system, and to discourage applicants from unduly delaying their proceedings. As set forth below, however, the Department's reasoning is flawed, unsupported, and relies on factors that Congress did not intend for it to consider.

First, the Department justifies the Proposed Rule by arguing that it will deter purportedly unmeritorious claims, which it alleges is necessary because of an increase in asylum applications. 84 Fed. Reg. at 62,383. This argument is unreasonable. At the outset, deterring people from seeking humanitarian protection in the United States—a right enshrined in the INA and international law—is not a valid justification for a rule that will effectively block poor applicants from the asylum process. 8 U.S.C. § 1158(a); *see also R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 188–90 (D.D.C. 2015) (granting preliminary injunction against policy of detaining asylum seekers to send “a message of deterrence to other Central American individuals who may be considering immigration” and finding deterrence is not a valid reason to force someone to be civilly committed); *Ms. L. v. U.S. Immigration & Customs Enf't*, 302 F. Supp. 3d 1149, 1166–67 (S.D. Cal. 2018) (denying motion to dismiss substantive due process claim, holding that alleged “government practice. . . to separate parents from their minor children in an effort to deter others from coming to the United States . . . is emblematic of the exercise of power without any reasonable justification . . .”).

In addition, there is no indication that the people who are most harmed by the Proposed Rule—the poor—have unmeritorious claims. As described above, *supra* Part, I. A., asylum applicants often are leaving everything behind to embark on a costly journey to seek protection. These applicants, for whom indefinite unemployment may not be feasible may be just as likely as wealthy applicants to have been subject to persecution and have cognizable claims for relief.

The Department particularly takes aim at those who entered without inspection, barring them from EADs because “asylum is a discretionary benefit that should only be reserved for those who are truly in need of protection.” 84 Fed. Reg. at 62,392. But there is no reason to believe that these applicants are not “truly in need of protection.” *Id.* To the contrary, both the statute and the courts recognize that people who enter without authorization are often “truly in need of protection.” *Id.* Indeed, the INA is clear that *all* noncitizens within the United States have the right to claim asylum, regardless of “whether or not [they arrived] at a designated port of arrival.” 8 U.S.C. § 1158(a). Based on this fundamental principle, the courts preliminarily struck down the Department’s prior attempt to block applicants who entered without inspection from asylum, finding it was arbitrary and capricious. *See Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55,934 (Nov. 9, 2018); *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 772 (9th Cir. 2018), *stay denied* 139 S. Ct. 782. In so ruling, the Ninth Circuit explained that an applicant’s manner of entry “has nothing to do with asylum itself.” *Id.* In fact, the court found that entering without inspection could be “wholly consistent with [a] claim to be fleeing persecution.” *Id.* at 773 (quoting *Akinmade v. INS*, 196 F.3d 951, 955 (9th Cir. 1999)); *see also Nreka v. U.S. Attorney Gen.*, 408 F.3d 1361, 1368 (11th Cir. 2005) (“[T]here may be reasons, fully consistent with the claim of asylum, that will cause a person to possess false documents ... to escape persecution by facilitating travel.”) (quoting *Matter of O-D-*, 21 I&N Dec. 1079, 1083 (BIA 1998)); *Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987) (while manner of entry can be one discretionary factor to consider in granting asylum, it “cannot, as a matter of law, suffice as a basis for a discretionary denial of asylum”). Now that courts have held that the Department cannot simply bar these applicants from asylum, the Department attempts through the Proposed Rule, to make the process so onerous that the prospect of protection is illusory. In so doing, the Department is not weeding out fraudulent claims, but rather weeding out poor applicants who may be “truly in need of protection.” 84 Fed. Reg. at 62,392.

Even if deterring a purported surge in non-bona fide claims was a valid justification for making changes to the EAD process, something the States do not concede, delaying EADs by seven months—more than double the current waiting period, and blocking many asylum seekers from EADs entirely, is an unreasonable way to meet this goal. To be sure, the former INS found that the current regulatory framework, which is based upon the congressionally specified 180-day waiting period, is sufficient to “discourage applicants from filing meritless claims.” *EAD Final Rule*, 59 Fed. Reg. at 14,780. The Department does not adequately explain why the INS’s prior findings regarding the EAD process and the integrity of the asylum system are now incorrect. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (explaining that, where a new policy “rests upon factual findings that contradict those which underlay its prior policy” the agency should provide a more detailed justification).

Second, the Department contends that the Proposed Rule will lower the amount of illegal entries by removing “incentives for [immigrants] to enter the United States illegally for economic reasons.” 84 Fed. Reg. at 62,417. Yet, by erecting additional barriers to lawfully seeking asylum, the Proposed Rule may have the perverse effect of increasing the frequency of unauthorized entries and the number of people who choose to stay in the shadows. This is especially likely when these changes are viewed in the context of other restrictive policies that make seeking asylum a dangerous, often fruitless, and lengthy endeavor. Under the Department’s metering policy, asylum applicants must wait several weeks or months in dangerous conditions in Mexico to request asylum at a port of entry, and the Migrant Protection Protocols force many applicants to remain in these conditions during the pendency of their claims.⁸¹ Through a series of recent regulatory changes, the Department has made asylum not just difficult to obtain, but also risky to even request, as the Department is now sending asylum applicants to dangerous third countries rather than processing their cases.⁸² *Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act*, 84 Fed. Reg. 63,994 (Nov. 19, 2019); *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019). Thus, applicants must go through extremely harsh circumstances to have their claim considered, and then they face a steep uphill battle to have it granted. By adding a lengthy delay for employment authorization to this already difficult process, the Proposed Rule likely will not discourage unlawful entries; instead it will encourage those who have and will enter the United States in this manner from applying for asylum and from seeking work authorization. The one thing the Proposed Rule actually disincentivizes, in short, is the asylum process itself.

Third, the Department argues that several aspects of the Proposed Rule are necessary to mitigate the administrative burden of the asylum process, but at the same time, it adds several additional burdens for adjudicators. 84 Fed. Reg. at 62,383. For instance, EAD adjudicators will now have to determine if an applicant falls into any of the barred categories, and if an exception to that bar will apply. *Id.* at 62,392. The added adjudicatory burdens are particularly significant, given the fact-intensive inquiries the NPRM proposes, including its “totality of the circumstances” and “good cause” standards. *See id.* at 62,375. These will be extremely fact-intensive determinations that go well beyond what is provided for on a simple Form I-765 Application for Employment Authorization.

Fourth, the Department claims that the Proposed Rule will reduce incentives for applicants to delay the processing of their asylum applications. 84 Fed. Reg. at 62,417. This is unpersuasive, because the current regulatory scheme is effective in discouraging applicant

⁸¹ Administrative Record for *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019) at AR664 (“The irony of [the metering measure] is that it is going to drive people who are trying to apply for asylum at ports of entry and do things the right way into the mountains and deserts”); Office of Inspector General, U.S. Dep’t of Homeland Sec., OIG 18-84, *Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* 5-7 (2018); Ben Harrington and Hillel Smith, “*Migrant Protection Protocols*”: *Legal Issues Related to DHS’s Plan to Require Arriving Asylum Seekers to Wait in Mexico*, Congressional Research Office (May 9, 2019), <https://tinyurl.com/MPPCBO>.

⁸² Notably, while the Department claims the Proposed Rule will allow it to process bona fide claims, the Department shows no indication that it would change any of its processing policies even if asylum receipts drop.

caused delays to asylum processing. Under the current system, any applicant caused delay stops the accrual of the 150 days required to file an EAD. 8 C.F.R. § 208.4(c). Thus, the system already deters applicants from delaying their asylum interviews and hearings, as these delays directly correlate with when they can receive their EADs.⁸³ The Proposed Rule will not have the same effect. Rather, because applicants have to wait 365 days regardless, and because many asylum seekers will be ineligible for work permits outright, there is less incentive for applicants to move along their cases, particularly during the early stages.

Finally, the States note that the Proposed Rule undermines the reasoning behind the Department's other recent proposed and final regulations. For example, in proposing to eliminate the 30-day adjudication deadline, the agency argued that it needed more time to vet EAD applications. *30-day Adjudication NPRM*. Yet, the Department is now proposing that applicants submit EAD applications later in the process, which suggests that the Department's true motivation is to simply delay asylum applicants' ability to work indefinitely.⁸⁴ Additionally, the Department adopted a new definition of the term "public charge," purportedly out of its interest in ensuring immigrants are self-sufficient. *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,306, RIN 1615-AA22. While the public charge definition does not apply to asylum seekers, the fact remains that the Department is undermining its own stated goal by directly attacking immigrants' ability to become self-sufficient. The Department's self-contradictory reasoning in its regulatory changes illustrates that these proposals are intended to dismantle the asylum system Congress created, rather than improve it.

In light the Department's failure to adequately assess the disadvantages of the Proposed Rule and the Department's dubious reasoning in promulgating it, the Proposed Rule, if adopted, would be arbitrary and capricious.

C. The Department Failed to Comply with Executive Orders and the Unfunded Mandates Reform Act

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

⁸³ The Department may contend that this is not effective enough, because it only deters applicants within the first 150-days of the pendency of their applications. But, under the last-in first out policy means that most affirmative asylum applications are decided within that time period. USCIS News Release, *USCIS To Take Action to Address Asylum Backlog* (Jan. 31, 2018).

⁸⁴ The Department's analysis in that proposed rule estimated that EADs would be issued within seven to nine months after the date of the asylum application. 84 Fed. Reg. at 47,149. These estimates are no longer applicable, since applicants cannot even apply for a year after the date of the asylum application.

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. 51,735 (Oct. 4, 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* in Part II, the Proposed Rule will result in additional costs to the States’ programs and a substantial loss in revenue. The Department does not attempt to analyze this impact and merely states that it “does not expect that the proposed rule would impose substantial direct compliance costs on State and local governments.” 84 Fed. Reg. at 62,419. Despite the States’ clear interests in their revenue, the Department did not consult with the States, which conflicts with prior practice. 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). This is particularly concerning because many of the States Attorneys General also signed a comment letter opposing the 30-day Adjudication NPRM describing our interest in rulemaking that impacts asylum seekers’ EADs.⁸⁵ The Department’s failure to analyze the impact on the States and to 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. 84 Fed. Reg. at 62,419. By the Department’s own admission, the Proposed Rule could result in over \$4.4 billion in losses to businesses. *Id.* at 62,380. Yet, 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* 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 billions of dollars in lost wages, the Department fails to fully address the impact that this loss would have on state and local economies. The Department acknowledges the effects on the States in the form of “a reduction in income tax transfers from employers and employees that could impact individual states and localities” and state social services networks that assist asylum seekers. *Id.* at 62,418. However, it dismisses these costs and fails to account for them entirely in its cost-benefit analysis. Importantly, the Department fails altogether to assess the potential costs and impacts of one of the Proposed Rule’s most sweeping changes: entirely foreclosing any work authorization for asylum seekers who entered the country without inspection. *Id.* at 62,404.

⁸⁵ Comment Letter of 19 State Attorneys General 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, submitted on Nov. 8, 2019.

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.

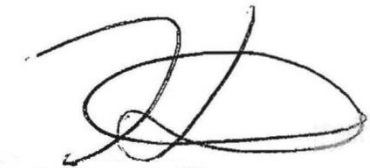
Sincerely,



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A handwritten signature in blue ink, appearing to read 'Peter Neronha', with a large, sweeping flourish at the end.

PETER NERONHA
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A handwritten signature in black ink, appearing to read 'Thomas J. Donovan, Jr.', with a large, sweeping flourish at the end.

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A handwritten signature in blue ink, appearing to read 'Bob Ferguson', with a large, sweeping flourish at the end.

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