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**In the Supreme Court of the United States**

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WILLIAM BARR, ET AL.,

*Applicants,*

v.

EAST BAY SANCTUARY COVENANT, ET AL.,

*Respondents.*

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On Application for Stay Pending Appeal to the United States Court of  
Appeals for the Ninth Circuit

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**MOTION FOR LEAVE TO FILE AND BRIEF FOR THE STATES OF  
ARIZONA, ALABAMA, ARKANSAS, GEORGIA, INDIANA, LOUISIANA,  
MONTANA, NORTH DAKOTA, SOUTH DAKOTA, TEXAS, AND WEST  
VIRGINIA AS AMICI CURIAE IN SUPPORT OF APPLICANTS**

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## MOTION FOR LEAVE TO FILE

The States of Arizona, Alabama, Arkansas, Georgia, Indiana, Louisiana, Montana, North Dakota, South Dakota, Texas, and West Virginia (“Amici States”) move for leave to file a brief as amici curiae in support of the application for a stay; to file the enclosed brief without 10 days’ advance notice to the parties of amici’s intent to file; and to file in unbound format on 8½-by-11-inch paper. See Sup. Ct. R. 37.2(a).

1. *Statement of Movants’ Interest.* The district court enjoined a joint interim final rule issued by the Department of Justice and the Department of Homeland Security that generally requires aliens to seek humanitarian protections at the first available opportunity to be eligible for asylum (the “Rule”). States have a constitutionally committed interest in promoting and protecting the safety and well-being of all persons who enter their borders, whether citizens or not. Still, the States and their elected officials generally must rely on the federal government to set the terms and conditions for whether aliens may enter the States. See *Arizona v. United States*, 567 U.S. 387, 409 (2012). Amici States therefore have a keen interest in the Rule, which seeks to alleviate the humanitarian and national security crisis at the southern border. Amici State’s perspective of the crisis unfolding at the southern border—as well as the harms being inflicted on asylum seekers and states alike—may, therefore, “be of considerable help to the Court.” Sup. Ct. R. 37.1.

2. *Statement Regarding Brief Form and Timing.* Given the expedited consideration of this matter of significant national interest, Amici States

respectfully request leave to file the enclosed brief without 10 days' advance notice to the parties of intent to file and to file in unbound format on 8½-by-11-inch paper. The court of appeals denied in part the federal government's emergency motion for a stay on August 16, 2019, and the application to this Court for a stay was filed on August 26, 2019, with the response due on September 4, 2019. This accelerated timing justifies the request to file the enclosed amicus brief without 10 days' advance notice to the parties of intent to file and in unbound format.

### CONCLUSION

Amici States respectfully request that the Court grant leave to file the enclosed brief in support of the stay application.

September 3, 2019

Respectfully Submitted,

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**BRIEF FOR THE STATES OF ARIZONA, ALABAMA, ARKANSAS, GEORGIA, INDIANA, LOUISIANA, MONTANA, NORTH DAKOTA, SOUTH DAKOTA, TEXAS, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF APPLICANTS**

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**INTEREST OF AMICI CURIAE**

Amici curiae, the State of Arizona, Alabama, Arkansas, Georgia, Indiana, Louisiana, Montana, North Dakota, South Dakota, Texas, and West Virginia (“Amici States”) file this brief in support of Applicants’ Application for a Stay Pending Appeal to the United States Court of Appeals for the Ninth Circuit and Pending Further Proceedings in This Court.<sup>1</sup> The joint interim rule issued by the Department of Justice (“DOJ”) and the Department of Homeland Security (“DHS”) generally requires aliens to seek humanitarian protections at the first available

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<sup>1</sup> Amici States were unable to give ten days’ advance notice of intent to file this brief, as noted in the accompanying motion for leave to file. *See* Sup. Ct. R. 37.2(a).



opportunity to be eligible for asylum. Amici States have a constitutionally committed interest in promoting and protecting the safety and well-being of all persons who enter their borders, whether citizens or not. Further, Amici States are directly affected by the ongoing crisis at the southern border. The joint interim rule is a measured response to the ongoing crisis at the southern border, a crisis that is harming asylum seekers and states alike. The rule serves important purposes and should not have been enjoined.

## **BACKGROUND**

There is a humanitarian and national security crisis occurring at the southern border that is worsening by the day. This crisis spawns, in significant part, from the record number of aliens claiming asylum when apprehended.

On July 16, 2019, DOJ and DHS took a reasonable step to alleviate this crisis by publishing a joint interim final rule, entitled “Asylum Eligibility and Procedural Modifications” (the “Rule”). 84 Fed. Reg. 33829 (Jul. 16, 2019). The Rule aims (among other things) to “mitigate[] the strain on the country’s immigration system by more efficiently identifying aliens who are misusing the asylum system to enter and remain in the United States rather than legitimately seeking urgent protection from persecution or torture.” *Id.* at 33831.

The Rule accomplishes this objective by generally making an alien ineligible for asylum when the alien “enters or attempts to enter the United States across the southern border after failing to apply for protection in a third country outside the alien’s country of citizenship, nationality, or last lawful habitual residence through

which the alien transited en route to the United States.” *Id.* at 33829–30, 33843.<sup>2</sup> This Rule recognizes that, when electing how to utilize scarce resources, priority should be given to aliens who have not had an opportunity to obtain protection elsewhere. *Id.* at 33831, 33839–40.

The Rule provides notable safeguards to protect the most vulnerable. *Id.* at 33835, 33843. First, the Rule does not apply when an alien has applied for, but was denied, protection from persecution or torture in another country. *Id.* Second, the Rule does not apply when an alien is the victim of a severe form of trafficking in persons. *Id.*<sup>3</sup> Finally, the Rule does not apply when an alien travels through a country that lacks adequate protections because the country was not a party to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol, or the Convention Against Torture. *Id.*

In addition to these three exemptions, the Rule also leaves in place other protections—even if an alien is otherwise ineligible for asylum under the Rule. *Id.* at 33830, 33834. An alien is still eligible for withholding and deferral of removal when the alien’s life or freedom would more likely than not be threatened because of the alien’s “race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. §§ 208.16, 1208.16. An alien is

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<sup>2</sup> This Rule only applies prospectively to aliens who enter the United States on or after July 16, 2019. 84 Fed. Reg. at 33830.

<sup>3</sup> A “severe form of trafficking in persons means sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act is under the age of 18 years; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” 8 C.F.R. § 214.11.

also eligible for protection under the Convention Against Torture when the alien would more likely than not face torture in the country of removal. 8 C.F.R. §§ 208.16(c), 208.17(a), 1208.16(c).

The Rule was enacted pursuant to an express delegation by Congress. Asylum is a form of relief committed to the discretion of the Attorney General and Secretary of Homeland Security. 8 U.S.C. §§ 1158(b)(1), 1229a(c)(4)(A)(ii); 8 C.F.R. § 1240.8(d). As such, being statutorily *eligible* for asylum does not *entitle* an alien to asylum. 84 Fed. Reg. at 33832. Consistently, under 8 U.S.C. § 1158(b)(2)(C), the Attorney General and Secretary of Homeland Security are expressly authorized to “establish additional limitations and conditions . . . under which an alien shall be ineligible for asylum” through regulations. The Rule was enacted pursuant to this express delegation from Congress. 84 Fed. Reg. at 33833–34.

Despite the congressional delegation in 8 U.S.C. § 1158(b)(2)(C) and the ongoing immigration crisis, the district court issued a nationwide injunction enjoining the Rule. In doing so, the district court substituted its judgment for a policy choice committed to the discretion of the Attorney General and Secretary of Homeland Security under the Immigration and Nationality Act—a policy choice that represents an important step forward in addressing the crisis at the southern border. The Ninth Circuit denied the federal government’s emergency motion for stay pending appeal insofar as the injunction applied within the Ninth Circuit, but granted the motion for stay insofar as the injunction applied outside the Ninth Circuit.

## ARGUMENT

The Court should grant Applicants’ application for stay pending appeal. With limited federal resources to handle the unprecedented influx of asylum seekers, the Rule reasonably prioritizes claims of aliens who are the most vulnerable or who have not had the opportunity to apply for protection elsewhere. Doing so reduces harm both to asylum seekers and to states.

### **I. The Rule Appropriately Prioritizes Scarce Federal Resources Given The Ongoing Southern Border Crisis**

Over the last ten years, the number of asylum claims have spiked 1,883%. 84 Fed. Reg. at 33838. Further complicating the dramatic increase in asylum claims is the demographic shift in the alien population crossing the southern border toward “predominantly Central American family units and unaccompanied alien minors.” *Id.* It is difficult to care for, process, and “expeditiously repatriate [these] family units and unaccompanied alien children.” *Id.*

The volume of asylum seekers arriving at the southern border “is simply unsustainable” given federal resources that “are stretched too thin.”<sup>4</sup> “DHS facilities are overflowing, agents and officers are stretched too thin, and the magnitude of arriving and detained aliens has increased the risk of life-threatening incidents.”<sup>5</sup> For example, DHS lacks sufficient beds and bed space, medical teams,

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<sup>4</sup> *The Secure and Protect Act: a Legislative Fix to the Crisis at the Southwest Border: Hearing on S. 1494 Before the S. Comm. On the Judiciary*, 116th Cong. (2019) (written testimony of Acting Secretary U.S. Department of Homeland Security Kevin McAleenan) (hereinafter, “McAleenan Testimony”) at 1–2.

<sup>5</sup> Letter from Kirstjen Nielsen, Secretary of Homeland Security, to Bennie Thompson, Chairman of the House Committee on Homeland Security, and Mike

vehicles and transportation workers, and other personnel required to provide humanitarian and operational assistance, including conducting welfare checks, preparing meals, and accounting for personal property. Nielson Letter, *supra* at 2–3. The flood of asylum applications—less than 15% of which are granted—also occupies a large portion of limited docket time and absorbs scarce government resources, exacerbating the backlog of over 900,000 pending immigration court cases. 84 Fed. Reg. at 33839. As then-Secretary of Homeland Security Kirstjen Nielson explained, “We are grappling with a humanitarian and security catastrophe that is worsening by the day, and the Department has run out of capacity . . . .” Nielson Letter, *supra* at 1.

This crisis has “eroded the integrity of our borders.” 84 Fed. Reg. at 33840. The overwhelming number of aliens illegally entering the United States and invoking asylum diverts “an ever-increasing amount” of DHS resources that are necessary to “surveil, apprehend, screen, and process the aliens.” *Id.* at 33839. This in turn has resulted in “a massive increase in illegal crossings of our borders.” Homeland Security Advisory Council, Final Emergency Interim Report CBP Families and Children Care Panel Subcommittee at 1 (Apr. 16, 2019) (hereinafter, “Advisory Council”). Because DHS resources are being absorbed dealing with aliens invoking asylum, DHS “is not able to effectively manage its other border security missions—apprehending migrants illegally seeking to evade detection, including criminal aliens and those who pose a public safety or national security threat;

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Rogers, Ranking Member of the House Committee on Homeland Security (Mar. 28, 2019) (hereinafter, “Nielsen Letter”); McAleenan Testimony, *supra* at 2 (accord).

uncovering instances of trafficking, fraudulent family relationships and other criminal activity among this population, and monitoring the border for drug smuggling and other contraband.” *Id.*

Simply stated, the magnitude of aliens seeking asylum along the southern border has created a humanitarian and security crisis that is preventing DHS from “properly protect[ing] America’s territory, enforc[ing] its immigration laws, and keep[ing] criminals from exploiting our system.” McAleenan Testimony, *supra* at 1; *see also* Nielson Letter, *supra* at 1 (DHS is “increasingly unable” to take operational control of the southern border “given the emergency situation.”).

Given the limited federal resources and the critical need to take operational control of the southern border, it was reasonable for the Attorney General and Secretary of Homeland Security to prioritize asylum claims of aliens who are the most vulnerable or who have not had the opportunity to apply for protection elsewhere.

## **II. The Broken Immigration System Harms Asylum Seekers**

The broken immigration system contributes to harm that asylum laws were designed to prevent. The Rule helps alleviate this harm.

The vast majority of aliens seeking asylum in the United States are composed of Central American family units and unaccompanied alien minors. 84 Fed. Reg. at 33838. These aliens are subject to a dangerous 2,000+ mile trek in which they bypass at least one country (and often multiple countries) where they can seek humanitarian protection. *Id.* at 33839–40. The Rule prudently removes the

incentive for taking this arduous journey—except when truly necessary—by encouraging aliens to seek protection at the earliest opportunity.

Reports of violence and sexual assault along the route to the United States are pervasive. Nielson Letter, *supra* at 2. “In one study, more than 30% of women reported being sexually assaulted along the way, and 70% of all migrants reported experiencing violence.” Kirstjen Nielsen, Secretary of Homeland Security, Remarks on the State of Homeland Security (Mar. 18, 2019) (hereinafter, “Nielsen Remarks”). Girls as young as 10 years old in DHS custody require pregnancy tests to ensure they get essential medical support. Neilson Letter, *supra* at 2.

Drug cartels are also using migrants as “human diversions” and putting migrants at risk by “dropping them at remote locations in the middle of the night,” thereby “forcing [ ] border patrol officers to redirect their coverage to rescue these groups.” McAleenan Testimony, *supra* at 2. “As part of their business model,” smugglers and traffickers are forcing desperate aliens into “inhumane conditions, demanding extraordinary sums of money, and putting lives in danger.” *Id.* These smugglers—many with ties to transnational criminal organizations—may also “deprive aliens of food and water, physically assault them, and place them in dangerous travel conditions, such as locking them in tractor-trailers while outside temperatures reach 115 degrees.” *Id.* at 3. “Still other migrants are trafficked and used as drug mules.” *Id.*

Children are particularly vulnerable to exploitation. For example, adults are fraudulently claiming parentage to children to gain entry in the United States.

Advisory Council, *supra* at 7. Innocent children are also being used repeatedly as pawns by criminal smuggling organizations to help multiple different adults gain illegal entry and release through “child recycling rings.” McAleenan Testimony, *supra* at 2. “Human traffickers have extracted additional fees as a form of indentured servitude” from family units. Advisory Council, *supra* at 7. And, “the risk for commercial sexual exploitation” of children and teens is high. *Id.*

Finally, “given the brutal journey and travel conditions, [aliens] are arriving at the border sicker than ever.” Nielson Remarks, *supra*. Aliens who enter into the United State are “at great risk for multiple medical problems,” including but not limited to, “dehydration, malnutrition, infections, psychological trauma, physical injuries and all aspects” of mistreatment. Advisory Council, *supra* at 7.

The Rule seeks to curtail the humanitarian crisis created by human smugglers bringing men, women, and children across the southern border. By requiring asylum to be claimed at the first available opportunity, the rule aims to reduce human smuggling and its tragic effects. 84 Fed. Reg. at 33840.

### **III. States Bear The Brunt Of The Broken Immigration System**

As set forth above, the federal government lacks sufficient resources to provide for the basic needs of all the aliens seeking asylum and to maintain operational control of the border. States have been forced to shoulder significant burdens as a result. This is particularly so in states, like Arizona and Texas, that share the southern border with Mexico. A few illustrations are provided below:

- Lacking facilities, DHS has reverted to busing and dropping off asylum seekers at local bus stations or “already overwhelmed non-profit shelters.” Advisory



Council, *supra* at 1. Indeed, DHS has affirmatively bused aliens apprehended outside of Arizona into Arizona to utilize resources within the State.<sup>6</sup>

- Lacking medical resources, DHS depends on “community emergency rooms and other medical facilities, as well as local emergency transport systems,” to provide necessary medical treatment to asylum seekers. Advisory Council, *supra* at 7.

- Lacking resources, DHS has released aliens into communities “with unknown vaccination status and without a standard medical examination for communicable diseases of public health concern,” creating significant public health risks. McAleenan Testimony, *supra* at 3.

- It is believed that, lacking resources, DHS has released aliens into local communities without conducting criminal background checks, exposing those local communities to heightened risks of crime and forcing expenditure of resources to mitigate public safety concerns.

- DHS’s inability to maintain operational control of the southern border has resulted in degradation of state environmental resources. For example, the Arizona Department of Environmental Quality estimates that over 2,000 tons of trash are discarded at the Arizona border every year.<sup>7</sup>

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<sup>6</sup> Rafael Carranza, *Migrant Families Apprehended in El Paso Were Transported, Released in Tucson*, [azcentral.com](https://www.azcentral.com/story/news/politics/border-issues/2019/03/07/migrant-families-apprehended-us-mexico-border-being-released-tucson-asylum-seekers/2995413002/) (Mar. 7, 2019).

<sup>7</sup> Arizona Department of Environmental Quality, *Waste* (2016), <https://legacy.azdeq.gov/obep/waste.html>.

- DHS’s inability to maintain operational control of the southern border has resulted in states having to expend significant resources to protect their citizens and enforce their laws against criminal elements. For example, according to a recent survey, “nearly 3% of illegal immigrants in Arizona end up in state prison or jail during the course of a year—four times the rate of U.S. citizens and legal residents.”<sup>8</sup>

- The diversion of resources caused by the immigration crisis has contributed to a dramatic spike in illegal drugs entering the United States through the southern border. Deputy Attorney General Jeffrey A. Rosen Delivers Remarks to the National Sheriffs’ Association (Jun. 17, 2019), <https://www.justice.gov/opa/speech/deputy-attorney-general-jeffrey-rosen-delivers-remarks-national-sheriffs-association> (“[T]he crisis at the southern border is a driver to the drug crisis in our communities.”). For example, between FY 2017 and FY 2018, there was a 38% increase in methamphetamines, a 22% increase in heroin, and a 73% increase in fentanyl, at the southern border. Congressional Border Security Briefing, White House, A Border Security and Humanitarian Crisis (Jan. 1, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/01/Border-Briefing.pdf>. These drugs destroy lives, tear apart families, and have negative effects that ripple through communities across the nation.

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<sup>8</sup> Stephen Dinan, *Study Finds High Rates of Prison, Jail for Illegals*, A.P. News (Feb. 5, 2019), <https://www.apnews.com/b78a2a3c7b9d28c765ca3542e4581382>.

States depend on the federal government to exercise its power over immigration responsibly. *See Arizona v. United States*, 567 U.S. 387, 416 (2012) (“The National Government has significant power to regulate immigration. With power comes responsibility . . . .”). The Rule is a responsible step in mitigating the current immigration crisis. It allows the federal government to focus its resources on aliens who are the most vulnerable or who have not had the opportunity to seek protection elsewhere; it encourages asylum seekers to seek protection at the first available opportunity, thereby reducing human smuggling and its tragic effects; and it helps alleviate significant burdens born by the States, particularly those along the southern border.

### CONCLUSION

The Court should grant Applicants’ application for a stay pending appeal.

September 3, 2019

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