August 22, 2019

ATTORNEY GENERAL RAOUL CHALLENGES FEDERAL RULE THAT RISKS DEPORTATION OF LAWFUL RESIDENTS

Chicago — Attorney General Kwame Raoul today joined a coalition of 18 attorneys general in opposing the federal government's new rule vastly expanding the use of expedited removal. Under the new rule, the U.S. Department of Homeland Security is authorized to deport certain individuals living anywhere in the United States without the due process protections afforded in normal removal proceedings, such as the right to an attorney or a hearing before a judge.

Raoul and the coalition filed an amicus brief before the U.S. District Court for the District of Columbia urging the court to grant a preliminary injunction to halt the implementation of the rule, which was issued without advance notice or opportunity for public comment.

"The administration's expanded expedited removal process goes against our values as a country," Raoul said. "Not only does it authorize immigration agents to engage in racial profiling, but it puts millions of immigrants living in Illinois and across the country at risk of deportation without due process. This rule is unfair, unlawful, and – above all else – un-American."

Under the rule, the federal government is expanding the use of expedited removals to allow federal officials to deport undocumented immigrants from anywhere in the United States under a fast-tracked process that generally does not allow for access to legal representation, witnesses, or a meaningful opportunity to present evidence and defenses. The rule significantly increases the risk that people will be erroneously deported and virtually eliminates access to the protections afforded during formal immigration hearings.

The U.S. Department of Homeland Security is allowing expedited removal proceedings to be used to deport undocumented immigrants living anywhere in the United States if the individuals cannot establish, to the satisfaction of a rank and file immigration officer, that they have continuously resided in the country for two years. The rule also lacks a clear legal standard. As a result, lawful residents, U.S. citizens, asylees, or other individuals with legal protections that enable them to remain in the country could be mistakenly subjected to deportation.

In the brief, Raoul notes that the policy will inflict serious harm on Illinois' families and communities. Mixed-status households with both lawful and undocumented residents may be torn apart with little or no time to prepare or seek legal representation. The prospect of sudden and unexpected separation can cause children to experience serious mental health problems, including depression and anxiety.

Attorney General Raoul encourages immigrants living in Illinois and immigration advocates to be aware of the expanded process and access additional information available on the National Immigrant Justice Center's website. Raoul also encouraged state and local law enforcement officials to access his office's online Guidance to Law Enforcement on authority under Illinois and federal law to engage in immigration enforcement.

The Attorney General's office also offers "Know Your Rights" resources for immigrants and immigration advocates free of charge on the Attorney General's website. Information is available in English, Spanish, Arabic, Chinese, Hindi, Polish, Serbian and Urdu, along with a mobile version and printable pocket-sized guide.

Joining Raoul in filing the amicus brief are the attorneys general of California, Connecticut, Delaware, the District of Columbia, Hawaii, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Vermont, Virginia, and Washington.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

MAKE THE ROAD NEW YORK; LA UNION DEL PUEBLO ENTERO; and WECOUNT!;

Plaintiffs,

v.

KEVIN MCALEENAN, Acting Secretary of the Department of Homeland Security, in his official capacity; MATTHEW T. ALBENCE, Acting Director of United States Immigration and Customs Enforcement, in his official capacity; KENNETH T. CUCCINELLI, Acting Director of United States Citizenship and Immigration Services, in his official capacity; MARK MORGAN, Acting Commissioner of U.S. Customs and Border Protection, in his official capacity; and WILLIAM BARR, Attorney General of the United States, in his official capacity;

Defendants.

No. 19-cv-2369 (KBJ)

AMICUS CURIAE BRIEF OF THE STATES OF CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, VERMONT, VIRGINIA, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF PLAINTIFFS

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INTRODUCTION AND STATEMENT OF INTEREST

The federal government has significantly expanded the summary deportation process known as expedited removal, with no advance notice or opportunity for comment. The process allows low-level immigration officers to summarily deport anyone apprehended anywhere in the country who cannot satisfy the officer that he or she is lawfully in the country, has been continuously present here for at least two years, or has a credible fear of persecution if deported. Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019). The States of California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Vermont, Virginia and Washington, and the District of Columbia (the Amici States) respectfully submit this brief as amici curiae to support plaintiffs' motion for a preliminary injunction suspending this expansion.

The Amici States are home to hundreds of thousands of people who have come to this country because they fear persecution, torture, or violence in their countries of origin or to seek a better life for their families.[1] These individuals are welcome members of our communities. They face severe consequences if placed in expedited removal. For some, the stakes are "life or death, since [they] face torture or worse upon returning to their home countries."[2] Even for those who do not face persecution, a removal order may result in permanent separation from their spouses and children and the lives they have built in the United States.

The Amici States have a strong interest in ensuring that all people residing within their borders—citizens and non-citizens alike—are treated fairly, especially when facing such severe

[1] For example, New Jersey is home to around 440,000 individuals without documentation, the majority of whom are long-term residents. Office of Immigration Statistic, Dep't of Homeland Sec. (DHS), *Population Estimates: Illegal Alien Population Residing in the United States: January 2015* at 2, 5 (Dec. 2018), https://tinyurl.com/OffImmStatsUndoc (estimating size of undocumented population as of January 2015).

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

consequences. Defendants' significant expansion of the expedited removal process substantially increases the risk that people will be erroneously deported, while according those caught up in the proceedings virtually none of the process provided in formal immigration hearings. Not surprisingly, this has led to numerous documented cases of erroneous deportation, with dire consequences for the people removed. People have been erroneously expelled who have lived in the United States for years, have children who are U.S. citizens, are fleeing violence, persecution and torture, or have lawful status, including U.S. citizenship.

Many of the Amici States invest significant resources to help fund, either directly or through immigrant services organizations, legal and other services to immigrants residing within their borders, including those who have been granted or are seeking asylum. These funds are generally aimed at increasing access to legal services and information about constitutional rights to better enable immigrants to protect themselves and their families.[3] California, for example, provided more than $43 million in funding for this purpose in the past fiscal year.[4] The expanded use of expedited removal undermines these efforts. It will greatly increase the demand for state resources to provide immigrant assistance, and may require Amici States to divert funds from other purposes to meet the needs of residents subjected to the expedited removal process.[5]

The new rule also fails to account for the disruption caused by summarily detaining and expelling productive members of our communities. These residents provide care and support to children or other family members, pay taxes, provide goods and services in their communities,

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

[4] Cal. Dep't of Soc. Servs., *Immigration Branch: Immigration Services Funding: Tentative Award Announcement* (Jan. 3, 2019), https://tinyurl.com/CDSS-ImmServs2019; *Immigration Services Contractors*, Cal. Dep't of Soc. Servs., https://tinyurl.com/Cal-DSS-ISC (last visited Aug. 8, 2019); Cal. Dep't. of Soc. Servs., *Immigration Services Program Update* 17 (March 2019).

[5] *E.g.*, 84 Fed. Reg. 35,409, 35,411 (recognizing that even prior to the new rule's enactment, the rate of expedited removal may be increasing).

and otherwise contribute to society. They cannot simply be plucked from the lives they have established without causing great hardship to children, relatives, employers, and Amici States.

Had Amici States been given the opportunity to comment on this new rule *before* it was implemented, they would have detailed the dangers with extending so broadly a process that is fraught with potential for error and abuse. Thus, the harms to Amici States support the issuance of a preliminary injunction to preserve the status quo and prevent widespread harm.

ARGUMENT

Amici States have an interest in the well-being of all of their residents, and in ensuring that citizens and non-citizens alike are accorded the process they are due when threatened with being deported, separated from their families, and deprived of their livelihoods. Expansive use of summary deportations under the expedited removal process undermines these interests. It subjects anyone in any part of the country who is suspected of being here illegally to a deportation process lacking any meaningful way of defending against removal and devoid of effective oversight. Expansive use of expedited removal will likely lead to an increase in wrongful deportations that will cause significant disruptions to communities where they occur.

I. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

One factor a court considers when determining whether to issue a preliminary injunction is whether the "injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The public interest is particularly relevant in cases where the impact of an injunction reaches beyond the parties and carries a potential for public consequences. *Hernandez v. Sessions*, 872 F. 3d 976, 996 (9th Cir. 2017). Further, in cases like this, which affect many non-parties (including the Amici States), courts consider the hardship to third parties as part of the public interest analysis. *League of Women Voters of United States v. Newby*, 838 F.3d 1, 12-14 (D.C. Cir. 2016); *Mova Pharm. Corp v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998). For

example, an injunction is in the public interest where it ensures that immigrants are not improperly held in immigration detention, *Hernandez*, 872 F.3d at 996, or requires "governmental agencies [to] abide by the federal laws that govern their existence and operations," *League of Women Voters*, 838 F.3d at 12; s*ee also Texas Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 246 (D.D.C. 2014) ("[T]he Secretary's compliance with applicable law constitutes a . . . compelling public interest.") (quotation omitted).

Here, the public interest strongly favors suspending implementation of the new expedited removal rule, at least until its legality and constitutionality can be resolved. Without an injunction, hundreds of thousands of residents of Amici States—including citizens, lawful residents, asylees, or residents otherwise exempt from expedited removal—will be in danger of summary deportation without a meaningful opportunity to establish their status, as explained below.

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

A. Expedited Removal Process

Expedited removal is designed to "maximize[] . . . executive power, minimize[] process, and eliminate[] judicial intervention—with a singular goal to deport at high velocity."[6] During the expedited removal process, subject to certain exceptions for individuals claiming a credible fear of persecution, individuals can be hastily removed without a regular immigration court hearing before a judge, access to counsel, or the opportunity to apply for most forms of relief

[6] Stephen Manning & Kari Hong, *Getting It Righted: Access to Counsel in Rapid Removals*, 101 Marq. L. Rev. 673, 675-76 (2018).

from removal. 8 U.S.C. § 1225(b)(1)(A)(i).[7] Instead, both the fact-finding and adjudication functions are given to a DHS line-level immigration enforcement officer whose decision to deport someone via expedited removal is generally final, subject only to approval by a supervisor. 8 U.S.C. § 1225(b)(1)(A)(i).[8] Despite the significant penalties that result from a removal order, including a ban on readmission ranging from five years to life, and potential criminal penalties for reentry, such orders generally are not subject to either judicial review or appeal. 8 U.S.C. § 1225(b)(1)(C) (orders generally not subject to review or appeal); 8 U.S.C. § 1182(a)(9)(A)(i) (ban on readmission); *id.* § 1326 (criminal penalties for reentry).

Initially, the expedited removal powers were used almost exclusively at the border with the purpose of ensuring speedy, "high velocity" deportations for those found entering the United States without documentation.[9] Gradually, expedited removal was expanded, first to immigrants arriving by sea who had not been lawfully admitted or paroled into the country and could not demonstrate they had been present here for at least two years. Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924 (Nov. 13, 2002). In 2004, the federal government further extended expedited removal to undocumented individuals who were apprehended within 14 days of arrival in the United States by land and within 100 air miles of any land border. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,878, 48,879 (Aug. 11, 2004). Despite the increased risk of erroneous deportations under this summary process, the use of expedited removals jumped from

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

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

[9] Manning & Hong, *supra* note 6, at 676, 697-98.

approximately 42,000 immigrants in 2004 to 193,000 in 2013—about 44 percent of the total number of people deported that year.[10] In 2017, 35 percent of all removals from the United States were conducted through expedited removal.[11]

DHS reports that in fiscal year 2018, the time from initial detention to deportation averaged 11.4 days for individuals in expedited removal, compared to 51.5 days for persons "placed into full removal proceedings."[12] Generally, the entire process consists of an interview with an immigration officer who fills out a standardized form, and may even be in a remote location.[13] Fewer than 20 percent of the people ordered removed through expedited removal (and reinstatement of removal)[14] ever see an immigration judge.[15]

The process is rife with potential for errors or abuse and has been misused to deport legitimate asylum seekers, longtime residents with family who are U.S. citizens, children, individuals with valid work and tourist visas, "and others with significant ties or legal claims to be in the United States."[16]

B. Amici State Residents Will Face Substantial Risk of Wrongful Deportation Under the New Rule

Since the inception of expedited removal, reports have documented substantial errors in

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[10] Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Immigration Enforcement Actions: 2004* at 6 (Nov. 2005), https://tinyurl.com/ImmEnf2004; Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Annual Report: Immigration Enforcement Actions: 2013* at 5 (Sept. 2014), https://tinyurl.com/ImmEnf2013.

[11] Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Immigration Enforcement Actions: 2017* at 9 (Mar. 2019), https://tinyurl.com/ImmEnf2017.

[12] 84 Fed. Reg. 35,409, 35,411.

[13] Manning & Hong, *supra* note 6, at 682-83, 690.

[14] Reinstatement of a final removal order occurs where the person departed the United States "under an order of removal and . . . unlawfully reentered the United States." Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Immigration Enforcement Actions: 2017* at 4 (Mar. 2019), https://tinyurl.com/ImmEnf2017. Similar to expedited removal, the person may be ordered removed without a hearing before an immigration judge. *Id.*

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

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

the system, including significant numbers of people: (1) forced by officers to sign documents they cannot read or understand; (2) misinformed about or denied their right to apply for asylum; and (3) denied the ability to collect documentary or other information to support a valid defense against expedited removal.[17] Given the inexorable speed at which the process takes place, there is rarely an opportunity to consult with an attorney, obtain witnesses, or collect documentary evidence, such as a birth certificate, lease, or employment form, that might prevent immediate deportation. For people traumatized by the harm they fled or the shock of being uprooted from family and friends, the short timeline may increase the likelihood they will be unable to clearly articulate the basis for immigration relief.[18] Hasty decisions made by low-level immigration officers with broad discretion and little to no judicial review also compound the likelihood of error.[19] These errors occurred even before the federal government's recent efforts to greatly expand expedited removal; thus, it is likely that expanding the scope of the system will only magnify the mistakes.

Moreover, expedited removal regulations do not provide the applicant with any notice as to how continuous presence in the United States may be established or what burden of proof or legal standard is to be applied by the immigration officer making the determination. 8 C.F.R.

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

[18] Kathryn Shepherd & Royce Bernstein Murray, Am. Immigration Council, *The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers* 9-16 (May 2017), https://tinyurl.com/AIC-Perils (finding that many in expedited removal who are seeking asylum are suffering from significant trauma, including the emotional impact of family separation, which may have an effect on their ability to tell their story).

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

§ 235.3. Instead, expedited removal is allowed if the person does not "establish[] to the satisfaction of the immigration officer" that he or she has been physically present in the United States continuously for two years. 8 C.F.R. § 235.3(b)(1)(ii). Lack of a clear legal standard can result in immigration officers applying an unfairly high burden of proof and/or inconsistent burdens, and is especially problematic in this context, where people are compelled to try to prove a negative—that they have not left the country for a period of up to two years.[20]

Such a truncated procedure, with little to no process or judicial review and a lack of articulable legal standards, means the likelihood of wrongful deportation from the United States is far greater than in a full deportation proceeding. The failure to provide a right to counsel only increases the probability of mistakes. A national study of 1.2 million immigration cases found that detained immigrants with counsel were ten times more likely to seek relief than those without counsel and more than twice as likely to obtain relief from removal.[21]

Multiple reports have documented the grave consequences of wrongful deportation. For example, a 2014 report described a U.S. citizen who was issued an expedited removal order by an officer who did not believe a U.S. citizen would speak only Spanish. After spending many years in Mexico trying to return to the United States, she found an attorney who, after months of litigation, was able to prove her case.[22] The new rule increases the likelihood of errors like these by expanding expedited removal immediately without first providing adequate training to immigration officers. DHS's Notice states that, in light of the greater use of expedited removal,

[20] Am. Immigration Council, *supra* note 17; Cassidy & Lynch, *supra* note 17, at 35.

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

[22] ACLU Found., *supra* note 16, at 4-5.

Immigration and Customs Enforcement (ICE) will develop and deploy updated expedited removal training for its officers, including proper referral for credible fear screening. 84 Fed. Reg. 35,409. In the meantime, numerous individuals will be subjected to a process without meaningful review, lacking clear standards, and conducted by untrained immigration officers.

Lastly, the summary process may also unjustly deprive individuals who otherwise would be eligible to make a legal claim to stay in the United States any opportunity to pursue such relief. For example, a witness or victim of a crime who might be otherwise eligible to remain in the country is prohibited from making such a claim in expedited removal proceedings.[23] Similarly, individuals who are profiled on the basis of national origin or race or arrested in violation of their Fourth Amendment rights will be effectively prevented from raising those violations in the expedited removal process by the lack of a neutral adjudicator or any procedure for deciding such issues. This is especially troubling where, as here, concerns about racial profiling are particularly acute. To date, expedited removal has almost exclusively been applied to persons who are from Mexico and three Central American countries, namely Guatemala, Honduras, and El Salvador. Nationals from these four countries accounted for 98 percent of all expedited removals in fiscal year 2013, 97 percent in fiscal year 2012, 96 percent in fiscal year 2011, and 94 percent in fiscal year 2010.[24]

C. The Expedited Removal Process is Perilous for Asylum Seekers

In expedited removal cases, if a non-citizen expresses an intent to seek asylum, the statute

[23] *Compare* 8 U.S.C. § 1225(b)(i) (identifying limited grounds for challenging inadmissibility in expedited removal), *with* 8 U.S.C. § 1101(a)(15)(U) (identifying that witnesses and victims to a crime not in expedited removal proceedings can, under certain circumstances, petition for relief from removal).

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

requires the immigration officer to make a referral to an asylum officer for an interview to determine whether the applicant "has a credible fear of persecution." 8 U.S.C. § 1225(b)(1)(B)(v). If the asylum officer concludes that no credible fear exists, applicants are "removed from the United States without further hearing or review," except for an expedited review by an immigration judge, which must be concluded within seven days. During this time period, individuals may be detained by the federal government. 8 U.S.C. § 1225(b)(1)(B)(iii); *see also* 8 C.F.R. § 1208.30(g); *but see* 8 C.F.R. §§ 212.5(b), 235.3(b) (discussing parole of noncitizens in expedited removal); *Flores*, slip. op. at 15-18 (same). If the asylum officer concludes that a credible fear exists, individuals are placed in removal proceedings. 8 U.S.C. § 1225(b)(2)(A); 8 C.F.R. § 208.30(f). While the asylum case is pending, they may remain in detention. *E.g.*, 69 Fed. Reg. 48,877-48,881 (Aug. 11, 2014) (discussing circumstances under which parole into the U.S. may be granted).

Many recent arrivals requesting asylum are from the Northern Triangle of Central America (El Salvador, Honduras, and Guatemala),[25] one of the most violent regions in the world, "akin to the conditions found in the deadliest armed conflicts in the world today."[26] The law excludes asylum seekers who pass the "credible fear" interview from being subject to expedited removal. However, immigration officers retain virtually unchecked authority to determine whether to refer the individual for a credible fear interview in the first instance, subject only to review by a supervisor. The United States Commission on International Religious Freedom

[25] U.S. Citizenship & Immigration Servs., *Credible Fear Workload Report Summary FY 2018* at 3, https://tinyurl.com/USCIS-CredFear.

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

found that the federal government lacked sufficient quality assurance mechanisms to ensure that asylum seekers were not improperly returned to their home countries.[27] Multiple reports have found that not all persons in the expedited removal process who express a fear of persecution if deported are provided a credible fear screening interview.[28] The Commission reported that, in some cases, immigration officers pressured individuals expressing fear into withdrawing their application for admission, and thus their request for asylum, despite DHS policies forbidding the practice.[29] In other cases, officers failed to ask if the arriving individual feared return.[30] Even where the individuals expressed such fear, officers failed to document it, resulting in denial of a credible fear screening.[31] In still other cases, individuals were denied a credible fear interview because officers interviewed them in a language they could not understand.[32]

The increased use of the summary expedited removal process heightens the risk that an individual will not know to assert, or immigration officers will not recognize, a valid claim for refuge from abuse, violence, or persecution in the person's country of origin. As a result, the new rule jeopardizes the interests of the States and the public in ensuring that persons eligible for refuge in this country are not "deliver[ed] . . . into the hands of their persecutors." *Leiva-Perez v.*

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[27] U.S. Comm'n on Int'l Religious Freedom, *supra* note 17, at 8-9.

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

[29] *E.g.*, U.S. Comm'n on Int'l Religious Freedom, *supra* note 17, at 5-6; *see also* Cassidy & Lynch, *supra* note 17, at 23.

[30] *Id.*

[31] U.S. Comm'n on Int'l Religious Freedom *supra* note 17, at 53, 54-55, 57; Cassidy & Lynch, *supra* note 17, at 21; *see also* Letter from Nat'l Immigrant Justice Ctr. et al. to U.S. Dep't of Homeland Sec. Office of Civil Rights & Civil Liberties & Office of the Inspector Gen., at 12-22 (Nov. 13, 2014), https://tinyurl.com/NIJCtoCRCL (explaining that "[w]hen applicants express fears, CBP officials fail to capture those statements in the required documentation or include mistaken information"); John Washington, The Intercept, *Bad Information: Border Patrol Arrest Reports Are Full of Lies That Can Sabotage Asylum Claims* (Aug. 11, 2019), https://tinyurl.com/Washington-BadInfo.

[32] Cassidy & Lynch, *supra* note 17, at 27-28.

Holder, 640 F.3d 962, 971 (9th Cir. 2011) (per curiam). The consequences for those who are returned to their home countries can be deadly. For example, a 2014 Report described the story of Braulia A. and Hermalinda L. who were gang-raped and shot after being deported to Guatemala; Braulia's son, who joined her in Guatemala after her deportation, was murdered by the same gang.[33] Laura S. told border officials that she was afraid of her abusive ex-partner; her pleas ignored, she was deported and murdered by him within days of her return to Mexico.[34]

Furthermore, when federal authorities place asylum seekers in expedited removal, they are often housed in units designed like criminal, not civil, detention facilities, with little or no privacy or freedom of movement. These facilities are often already overwhelmed and filled to capacity, and fail to provide even the most basic services and care.[35] "[P]enal detention conditions risk re-traumatizing asylum seekers who experienced or fear persecution or torture," and prolonged detention can cause severe chronic emotional distress, including chronic anxiety, physically damaging stress levels, depression, and suicide, and post-traumatic stress disorder.[36]

III. THE NEW RULE HARMS THE STATES' INTEREST IN PROTECTING RIGHTS OF RESIDENTS

Recognizing the importance of proper legal guidance during immigration proceedings where constitutionally protected due process rights are at stake,[37] many of the Amici States fund

[33] ACLU Found., *supra* note 16, at 4.

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

[35] Cassidy & Lynch, *supra* note 17, at 40-42; Office of Inspector Gen., U.S. Dep't of Homeland Sec., *Management Alert – DHS Needs to Address Dangerous Overcrowding Among Single Adults at El Paso Del Norte Processing Center* (May 30, 2019), https://tinyurl.com/DHSOIG-MA.

[36] Cassidy & Lynch, *supra* note 17, at 9, 43-44.

[37] *E.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (due process clause of the constitution applies "to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.").

nonprofit organizations to provide legal assistance in immigration-related matters. For example, Illinois funds more than five dozen community organizations providing citizenship and others services to immigrants.[38] New Jersey provides $2.1 million in state funds to provide legal services to individuals facing detention or deportation due to their immigration status.[39] Similarly, since fiscal year 2015-16, California has allocated $147 million to nonprofit legal service organizations for immigration-related programs.[40] The State of Washington allocated $1 million for fiscal year 2019 to contract with organizations and attorneys providing legal representation to asylum seekers and other immigrant populations in the state.[41] In calendar year 2018, the state of Connecticut's Judicial Branch provided $13,886,873, through the Connecticut Bar Foundation to nonprofit civil legal services providers in the state.[42] All of those nonprofits provide legal services to immigrants, including asylees, asylum seekers, and refugees.[43] Under a 2019 Oregon law, the nonprofit Innovation Law Lab will receive $2 million in state funding to represent Oregonians in removal proceedings.[44] New York's Fiscal Year 2020 Enacted Budget includes $10 million to support the expansion of the Liberty Defense Project, the first-in-the-nation, state-led public-private project administered by New York's Office for New Americans to assist immigrants, regardless of status, in obtaining access to legal

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

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

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

[41] 2018 Wash. Sess. Laws 2152, https://tinyurl.com/WA-SessLaw.

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

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

[44] H.B. 5050, 80th Legis. Assemb., 2019 Reg. Sess. (Or. 2019), https://tinyurl.com/Or-HB5050; *About Equity Corps*, Equity Corps Or., https://tinyurl.com/EquityCorpsOr (last visited Aug. 7, 2019).

services and process.[45] Community Legal Aid Society, Inc. of Delaware (Delaware Legal Aid) receives federal and state funding for the legal services it provides to immigrants. State funding for 2018-2021 amounted to approximately $1.5 million, which included funding to provide victim-based services to non-citizens.

The Amici States also have a significant interest in protecting the rights of asylees.[46] For instance, Amici States welcomed more than 72 percent of the asylum applicants granted asylum in 2016.[47] Since 1990, an average of more than 22,000 individuals have been granted asylum annually.[48] California welcomes by far the most individuals who are granted asylum, with almost 44 percent of the total in fiscal year 2016.[49]

Substantial expansion of the expedited removal process magnifies the harms visited upon both those who are seeking asylum and those who have been granted asylum. Because of the expansion, it is likely that more people who express a credible fear of persecution will be detained by the federal government under conditions that will result in re-traumatization.[50] When non-citizens ultimately granted asylum return to their communities, Amici States, their local jurisdictions, and non-governmental organizations funded by Amici States will be called upon to provide additional mental health and other services. The Amici States' public health

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

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

[47] Nadwa Mossad & Ryan Baugh, Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Refugees and Asylees: 2016* at 10 fig.7 (Jan. 2018), https://tinyurl.com/Mossad-Baugh-DHS.

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

[49] Mossad & Baugh, *supra* note 47, at 8.

[50] Cassidy & Lynch, *supra* note 17, at 14 (noting that "[a]s Expedited Removals have increased, so too have claims of fear by non-citizens in that process").

care systems will also face the increased health needs of those who were denied preventative care and necessary mental health and medical treatment in detention.

Many of the Amici States have invested in specialized services to meet asylees' needs. In California, for example, the Immigration Branch of the California Department of Social Services has various forms of assistance for certain eligible asylees and refugees including programs that provide cash assistance and employment services.[51] These program benefits and services are typically administered by county social services departments or through county contracts with local providers to deliver direct services.[52] The State of Washington allocated approximately $2.4 million for fiscal year 2018 to provide employment services for organizations serving asylum seekers and other immigrant populations in the state.[53] For fiscal year 2020, the District of Columbia allocated $2.5 million to programs that provide services and resources to its immigrant population.[54] The New York State Office of Temporary and Disability Assistance provides various forms of financial and social services assistance to eligible asylees and refugees through its Refugee Resettlement Program, appropriating $26,000,000 in state fiscal year 2019-2020.[55] For state fiscal year 2019-2020, New York has also appropriated $2,397,000 for the Response to Human Trafficking Program, a state-funded program to assist human trafficking victims not otherwise eligible for services due to their immigration status.[56] In Vermont, the state Department of Health works with asylees from the moment they arrive through a

[51] *See Services for Refugees, Asylees, and Trafficking Victims*, Cal. Dep't of Soc. Servs., https://tinyurl.com/Services-CDSS (last visited Aug. 12, 2019).

[52] *Id.*; *see also Refugee & Asylee Benefits*, SF-CAIRS, https://tinyurl.com/SF-CAIRs (last visited Aug. 12, 2019).

[53] 2018 Wash. Sess. Laws 2220, https://tinyurl.com/WA-SessLaw.

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

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

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

community-based system of care. It collaborates with local health care partners to provide health screenings and integrate asylees into the health care system. It also provides translated information on public health and wellness for these new Vermonters.[57]

The potential influx of additional asylees will likely put pressure on local governments and providers to seek additional funding from the Amici States. Amici States, who have a strong interest in ensuring that asylees can become healthy and productive state residents, may have to divert funds from other purposes to meet the growing need caused by Defendants' new rule.

Finally, the evidence suggests that one of the principal purposes of harsh federal policies such as the new rule is to deter legitimate asylum seekers from obtaining relief.[58] The Amici States have a strong interest in ensuring that asylum seekers are not denied protection accorded to them under federal law. Courts have held that similar policies treating asylum seekers harshly in order to deter others from attempting to enter the United States are unconstitutional. *See 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").

IV. THE NEW RULE WILL INFLICT SERIOUS HARM ON INDIVIDUALS, FAMILIES, COMMUNITIES, AND THE PUBLIC SERVED BY AMICI STATES

DHS's decision to expand expedited removal will inflict broad and systemic harm on the individuals, families, communities, and the broader public served by Amici States. People who

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[57] *See Refugee Health Program*, Vt. Dept. of Health (VTDOH), https://tinyurl.com/VTDOH-RHP (last visited Aug. 15, 2019).

[58] *See Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States*, White House (Nov. 9, 2018), https://tinyurl.com/Pres-Proc ("Virtually all members of family units . . . that are found to have a credible fear of persecution, are . . . released into the United States. Against this backdrop of near-assurance of release, the number of such aliens traveling as family units who enter through the southern border and claim a credible fear of persecution has greatly increased . . . . Failing to take immediate action to stem the mass migration the United States is currently experiencing and anticipating would only encourage additional mass unlawful migration . . . .").

have lived in this country for one or two years (or more) have begun to build lives here. They contribute to our economy and civic life in countless ways. For instance, immigrants make up more than a third of California's workforce and undocumented immigrants in California each year contribute an estimated $3 billion in state and local taxes.[59] In 2015, immigrant workers comprised 10 percent of the labor force in Minnesota.[60] Immigrant-led households in Minnesota paid $1.1 billion in state and local taxes in 2014.[61] Eight percent of all self-employed Minnesota residents in 2015 were immigrant business owners, who generated $489.1 million in business income.[62] In 2015 in Connecticut, one of every six workers was an immigrant, comprising 17.6 percent of the labor force.[63] As of 2017, Connecticut had 525,813 immigrant residents, about 14.7 percent of the state population, who generated $14.5 billion in spending power and paid almost $6 billion in taxes annually.[64] The 37,285 immigrant entrepreneurs in Connecticut produced total sales of $15.6 billion and employed 95,177 people.[65] Immigrant households in Vermont contributed nearly $135 million in federal taxes and nearly $58 million in state and local taxes in 2014.[66] In Massachusetts, one in five workers is an immigrant and undocumented immigrants pay an estimated $185 million in taxes each year.[67] Undocumented immigrants in

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

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

[61] *See id.* at 4.

[62] *Id.*

[63] Am. Immigration Council, *Immigrants in Connecticut* 2 (Oct. 13, 2017), https://tinyurl.com/AmImC-CT.

[64] New Am. Economy, *Immigrants and the Economy in Connecticut*, https://tinyurl.com/NewAE-CT (last visited Aug. 19, 2019).

[65] *Id.*

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

[67] Am. Immigration Council, *Immigrants in Massachusetts* 3, 5 (Oct. 5, 2017), https://tinyurl.com/AmIC-MA.

New Jersey paid an estimated $587.4 million in state and local taxes in 2014.[68] Approximately 4.5 million immigrants live in New York State.[69] Some 2.8 million immigrant workers comprise roughly 27.8 percent of the state's labor force.[70] In 2014, New York State immigrant-led households paid $26.5 billion in federal taxes and $15.9 billion in state and local taxes, and had $103.3 billion in after-tax income spending power.[71]

A. Families will be torn apart

Millions of children born to undocumented immigrants in the United States are U.S. citizens by virtue of having been born in the United States. As a result, millions of people live in "mixed-status" households, where one or both parents may be undocumented, while some or all of the children (and, sometimes, a spouse) are U.S. citizens.[72] Expanding expedited removal means that these "mixed-status" families face separation with little or no time to prepare.

Studies show that children faced with the likelihood of a family members' deportation can experience serious mental health problems, including depression, anxiety, self-harm, and regression.[73] Studies also show that children's concerns about their parents' immigration status can impair their socio-emotional and cognitive development.[74] And children whose immigrant mothers are subject to deportation have higher incidence of adjustment and anxiety disorders.[75]

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

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

[70] *Id*. at 10.

[71] *Id*. at 7.

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

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

[74] Hirokazu Yoshikawa, *Immigrants Raising Citizens: Undocumented Parents and Their Young Children* 120-136 (2011); Capps, *supra* note 72, at 8-9.

[75] Jens Hainmueller, et al., *Protecting Unauthorized Immigrant Mothers Improves Their Children's Mental Health*, 357 Science 1041, 1041 (2017).

Of course, these harms only get worse when fears of forcible separation come true. In one study, children with deported parents refused to eat, pulled out their hair, had persistent stomachaches and headaches, engaged in substance abuse, lost interest in daily activities, and had trouble maintaining positive relationships with non-deported parents.[76] These traumatic childhood experiences also can inflict lasting harm, including severe impairments of a child's sense of self-worth and ability to form close relationships later in life, increased anxiety, and depression.[77]

In addition to threatening children's health, deporting a family's financial breadwinner can lead to economic hardship and loss of housing for remaining family members, and can put children, seniors, and disabled family members at serious risk.[78] As a result of increased deportations under the new rule, many families will be forced to seek increased social services,[79] stretching the resources of the Amici States. For example, as of 2011, more than 5,000 children nationally were estimated to be living in foster care due to their parents' detention or deportation.[80] With long-term foster care estimated to cost about $25,000 per child per year,[81] these immigration enforcement actions also cost states and local governments $125 million

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

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

[78] Capps, *supra* note 72, at 9-14, 17-23.

[79] *Id.*

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

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

dollars annually. Such costs could substantially increase with the expansion of expedited removal and the separation of families.[82]

Further, harms are suffered not only by children, but also extend to other residents of the Amici States who suffer the daily uncertainty of not knowing whether their relatives will be placed (erroneously or not) in expedited removal on the way to the grocery store, to work, or even to their children's schools.[83] Many individuals who seek asylum have relatives across the country and those relatives in Amici States are harmed by the federal government's actions.

Finally, the new rule is inhumane, as it fails to include exceptions to delay expedited removal for long-term residents to take care of even the most basic human needs, such as the need for urgent, life-saving medical care. 84 Fed. Reg. 35,409, 35,412.

B. Public safety, worker safety, and access to health care will suffer

The risks undocumented immigrants face under the immigration system make them some of the most vulnerable people residing in Amici States. The federal government's dramatic expansion of expedited removal only exposes these residents to even more abuse. It is foreseeable that they will be even less likely to report crime or exploitation or to seek needed medical care, which obstructs the efforts of Amici States to protect the public.

Amici States are dedicated to ensuring that police and prosecutors are able to do their jobs to protect public safety. *See, e.g., Alfred L. Snapp & Son, Inc. v. P.R. ex rel. Barez*, 458 U.S. 592, 601 (1982) (discussing states' sovereign interests in enforcing criminal code). But by

[82] Papenfuss, *supra* note 76 (discussing scores of crying children left abandoned after largest ICE raid in a decade); Immigrant Legal Res. Ctr., *Immigration Enforcement & the Child Welfare System* 2 (Dec. 11, 2017), https://tinyurl.com/ImmChildWelfare.

[83] Kelly Heyboer, *ICE Arrests Surging in N.J. Under Trump. Here's Why.*, N.J. On-Line (Feb. 2018), https://tinyurl.com/Heyboer-ICEArrests (ICE has increased arrests and detentions of immigrants in New Jersey by 42%; many have been arrested at courthouses, children's schools, and at their work places).

subjecting hundreds of thousands additional immigrants to unexpected and hasty deportation, expedited removal makes them less likely to report crimes to law enforcement, even if they are victims.[84] When law enforcement is unable to obtain evidence of crimes, public safety suffers. For example, Delaware Legal Aid reports that among immigrants there is now rampant fear of contacting law enforcement for help or to report a crime. The organization says its clients and their communities do not distinguish between federal immigration enforcement or prosecutors and state social services agencies or Family Court, but view them all as "the government." As a result, Delaware Legal Services reports that more of its clients and their children are staying in unsafe or abusive situations. This not only endangers those families, but also damages Delaware's ability to investigate and prosecute crimes, which renders all Delawareans less safe.

Similarly, the Amici States have an interest in ensuring enforcement of wage and hour and employment safety laws that protect not only the specific workers but also ensure economic fairness and a safe workplace for all of the Amici States' residents. *See, e.g.*, *Metropolitan Life Ins. Co v. Massachusetts*, 471 U.S. 724, 756 (1985) ("The States traditionally have had great latitude under their police powers to legislate as 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.'") (quotation omitted). When fear of immigration enforcement is high, immigrants are more vulnerable to unlawful wage theft and health and safety workplace

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

violations. Unscrupulous employers can take advantage of their fear of deportation to keep them from reporting violations, making it more difficult for Amici States to enforce their labor laws.[85]

Further, Amici States have a substantial interest in ensuring that its residents access medical treatment and preventative care. Amici States who fund and provide health care services to immigrants can reduce future medical costs when they prevent health problems from becoming more extreme and expensive. Unfortunately, immigration enforcement fears, which will only increase with the expansion of expedited removal, cause immigrant families to forego preventative medical care. In recent studies, health care providers are finding that immigrant families are increasingly skipping health care appointments and abstaining from scheduling routine prevention or primary care appointments for their children.[86] Clinics across the country have noticed a significant decline in clinic visits due to this Administration's harsh immigration enforcement policies.[87] The expansion of expedited removal will further dissuade immigrants from seeking cost-effective preventive care that saves lives and reduces costs in Amici States.

V. THE STATES ARE HARMED BY THE FAILURE TO PROVIDE A NOTICE-AND-COMMENT PROCESS

Amici States could have, and would have, identified all of the foregoing problems with the new rule before it was implemented had the federal government provided an opportunity for comment.[88] But this rule was implemented with no advance notice and no opportunity for comment from affected individuals, organizations, States, or the public in general.

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

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

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

[88] Several Amici States intend to submit objections during the *post hoc* comment period.

Public notice and comment promotes good government by ensuring the decision-maker has access to complete information about potential pitfalls and ramifications of, and alternatives to, the proposed action. Public participation ensures that agency actions are tested through exposure to diverse public comment, that the process is fair to affected parties, particularly where "governmental authority has been delegated to unrepresentative agencies," and that affected parties have "an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005); *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980).

Defendants' failure to engage in pre-rule notice and comment not only deprived the States of the opportunity to participate in the rulemaking process but also deprived the DHS Secretary and the public of the benefit of their unique perspectives. 84 Fed. Reg. 35,409, 35,410. The opportunity to comment on proposed federal actions is vital to the States' ability to protect their residents. As sovereigns responsible for the health, safety, and welfare of millions of people within their respective borders, the Amici States have unique interests and perspectives to contribute, particularly where, as here, federal actions will cause residents of our States unnecessary, substantial, and enduring harm. Further, the record developed through the notice and comment process might have resulted in changes to the rule and would have aided the court in its review of the action. *See United Mine Workers*, 407 F.3d at 1259.

CONCLUSION

The Amici States support plaintiffs' motion for a preliminary injunction.

Dated: August 21, 2019

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Guidance: *Illinois Laws Governing Law Enforcement Interactions with Immigrant Communities*

Updated December 2021

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Guidance to Local Law Enforcement on Illinois Laws Governing Interactions with Immigrant Communities

Illinois law largely prohibits law enforcement from participating in actions to enforce immigration law. This guidance is intended to clarify the restrictions on participation in immigration enforcement by state and local law enforcement in Illinois, and to remind law enforcement of certain legal obligations to assist foreign nationals and immigrant victims of crimes.

I. Purpose

Local law enforcement[1] agencies in Illinois are dedicated to protecting the communities they serve. Promoting public safety requires assistance and cooperation from the community so that law enforcement can gather the information necessary to solve and deter crime. Law enforcement has long recognized that a strong relationship with the community encourages individuals who have been victims of or witnesses to a crime to cooperate with the police. Establishing and maintaining trust with community members is crucial to ensuring that they report crimes, provide witness statements, cooperate with law enforcement, and feel comfortable seeking help when they are concerned for their safety.

Building trust is particularly crucial in immigrant communities where residents may be reluctant to engage with their local police department if they are fearful that such contact could result in deportation for themselves, their family, or their neighbors. This is true of not only undocumented individuals who may be concerned about their own immigration status, but also U.S. citizens who may be worried about their parents, their children, or other members of their family who immigrated to the United States. With this goal in mind, Illinois law enforcement agencies are subject to the Illinois TRUST Act, which helps bolster community trust and cooperation by affirming that law enforcement agencies in Illinois are largely prohibited from participating in immigration enforcement. And, under the Voices of Immigration Communities Empowering Survivors ("VOICES") Act, Illinois law enforcement officers must follow specific procedures to support immigrants victimized by violent crime or human trafficking who help law enforcement investigate or prosecute criminal activity. In 2021, the Illinois General Assembly expanded the protections and obligations in both these laws through a new law, the Way Forward Act. This updated guidance incorporates the new protections and obligations from the Way Forward Act.

Public safety suffers when violent crimes go unreported or witnesses withhold information from law enforcement.[2] In the interest of public safety, local law enforcement officials have an

[1] Throughout this guidance, "local law enforcement" is used to describe state and local law enforcement agencies such as municipal police departments, sheriffs' offices, Illinois State Police, and other non-federal law enforcement authorities. This includes campus police departments serving public and private higher education institutions.

[2] *See* Min Xie & Eric P. Baumer, *Neighborhood Immigrant Concentration and Violent Crime Reporting to the Police: A Multilevel Analysis of Data from the National Crime Victimization Survey*, 57 CRIMINOLOGY 2 (May 2019) (observing much lower rates of violence reporting in newer immigrant communities).

incentive to ensure that their policies and conduct facilitate cooperation from immigrants and their communities.[3]

II. Illinois Laws Prohibiting Local Law Enforcement from Engaging in Federal Civil Immigration Enforcement

No federal law compels law enforcement in Illinois to assist with or participate in any immigration enforcement action. At the state level, Illinois law generally prohibits participation in immigration enforcement by state and local law enforcement. For example, a local law enforcement agency in Illinois cannot: give an immigration agent access to individuals in its custody; detain individuals pursuant to a federal administrative warrant; detain individuals pursuant to an immigration detainer request from U.S. Immigration and Customs Enforcement (ICE); or share information about individuals in its custody with federal immigration authorities. Importantly, local law enforcement officers cannot arrest an individual for violation of a federal law without a warrant unless state law has granted them authority to do so,[4] and Illinois law prohibits local law enforcement from stopping, arresting, searching, or detaining an individual based on his or her citizenship or immigration status.[5] In addition, now that the Way Forward Act is in effect, law enforcement agencies must submit annual reports to the Illinois Attorney General's Office to show compliance with many of these requirements.

a. Local law enforcement is prohibited from participating in enforcement of federal civil immigration law.

The federal government cannot require local law enforcement to enforce federal law.[6] In fact, any authorization from the federal government for local law enforcement to enforce federal immigration law is effective only if it is accompanied by authority under state law.[7] Any requests from federal immigration authorities—such as ICE or U.S. Customs and Border Protection (CBP)—for assistance from local law enforcement to detain an individual or to provide access to individuals held by local authorities must be viewed as requests, not obligations.[8] State law dictates whether local law enforcement can comply with those requests.

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[3] While this guidance focuses on obligations in Illinois law, local law enforcement agencies are encouraged to consider whether their internal policies promote trust and confidence among community members. For example, some local law enforcement agencies require officers to identify the jurisdiction they represent when engaging with community members to encourage transparency and cooperation and to avoid any concern or confusion about whether the officers work for federal immigration authorities.

[4] *Arizona v. United States*, 567 U.S. 387, 414 (2012) (noting that the "authority of state officers to make arrests for federal crimes is, absent federal statutory instruction, a matter of state law") (citing *United States v. Di Re*, 332 U.S. 581, 589 (1948)).

[5] 5 ILCS 805/15(b).

[6] *Printz v. United States*, 521 U.S. 898, 923–24 (1997) (finding that the U.S. Constitution prohibits the federal government from compelling the states to enact or administer a federal regulatory program).

[7] *Arizona*, 567 U.S. at 414.

[8] *Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1004 (N.D. Ill. 2016); *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014); *Ortega v. U.S. Immigration & Customs Enforcement*, 737 F.3d 435, 438 (6th Cir. 2013); *Liranzo v. United States*, 690 F.3d 78, 82 (2d Cir. 2012); *United States v. Uribe-Rios*, 558 F.3d 347, 350 n.1 (4th Cir. 2009);

In Illinois, local law enforcement generally cannot assist in the enforcement of federal civil immigration law. The Illinois TRUST Act states that a "law enforcement agency or official may not participate, support, or assist in any capacity with an immigration agent's enforcement operations."[9] It further specifies that local law enforcement:

- May not transfer any person into an immigration agent's custody;
- May not give any immigration agent access, including by telephone, to any individual who is in the law enforcement agency's custody;
- May not permit immigration agents' use of agency facilities or equipment, including the use of electronic databases not available to the public, for any investigative or immigration enforcement purpose; and
- May not otherwise render collateral assistance to federal immigration agents, including by coordinating an arrest in a courthouse or other public facility, transporting any individuals, establishing a security or traffic perimeter, or providing other on-site support.[10]

Local law enforcement may provide these types of assistance only in two narrow circumstances: when they are presented with a federal criminal warrant; or when they are otherwise required by a specific federal law.[11]

To demonstrate compliance with these and other TRUST Act measures, the law requires law enforcement agencies to report annually to the Illinois Attorney General's Office on any requests from federal immigration authorities related to their participation, support, or assistance in any immigration agent's civil enforcement operation. The report must also include specific information about how law enforcement addressed the request.[12]

United States v. Female Juvenile, A.F.S., 377 F.3d 27, 35 (1st Cir. 2004); *Giddings v. Chandler*, 979 F.2d 1104, 1105 n.3 (5th Cir. 1992).

[9] 5 ILCS 805/15(h)(1). In certain states, local law enforcement may enter into a formal working agreement with the Department of Homeland Security known as a Section 287(g) agreement to assist in the "investigation, apprehension, or detention of aliens in the United States." 8 U.S.C. § 1357(g) (Section 287(g) of the Immigration and Nationality Act). Illinois law, however, prohibits any law enforcement agency or official in Illinois from entering into a Section 287(g) agreement. 5 ILCS 835/5(b).

[10] 5 ILCS 805/15(h)(1)-(4).

[11] 5 ILCS 805/15(h).

[12] 5 ILCS 805/25(a)(1).

b. Local law enforcement is prohibited from sharing information with federal immigration authorities.

The question of whether local law enforcement may voluntarily share citizenship or immigration status information with federal authorities is governed by state law, not federal law.[13] **In Illinois, the TRUST Act generally prohibits local law enforcement from sharing information with federal immigration agents.** Specifically, the TRUST Act states that local law enforcement:

- May not provide information in response to any immigration agent's inquiry or request for information regarding any individual in law enforcement custody;
- May not provide to any immigration agent information not otherwise available to the public relating to an individual's release or contact information; and
- May not provide immigration agencies direct access to any electronic database or data-sharing platform maintained by the local agency.[14]

Again, local law enforcement may provide these types of assistance only when they are presented with a federal criminal warrant, or when otherwise required by a specific federal law.[15]

c. Local law enforcement is prohibited from stopping, arresting, searching, or detaining an individual solely based on citizenship or immigration status.

Immigration is governed by federal law.[16] And although some provisions of federal immigration statutes are criminal, deportation and removability are matters of civil law, not criminal law.[17] Whether an individual is lawfully present in the United States is a question of federal civil immigration law.[18] The U.S. Supreme Court has held that "it is not a crime for a removable alien to remain present in the United States."[19] Thus, unlawful presence alone does not establish probable cause that an individual has committed an offense under Illinois law. The fact

[13] *See City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 872 (N.D. Ill. 2018), *aff'd on other grounds sub nom. City of Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020); *City & County of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 953 (N.D. Cal. 2018), *aff'd on other grounds sub nom. City & County of San Francisco v. Barr*, 965 F.3d 753 (9th Cir. 2020); *New York v. Department of Justice*, 343 F. Supp. 3d 213, 237 (S.D.N.Y. 2018), *rev'd*, 951 F.3d 84 (2d Cir. 2020).
[14] 5 ILCS 805/15(h)(5)-(7).
[15] 5 ILCS 805/15(h).
[16] *Arizona*, 567 U.S. at 394-95.
[17] *See Gonzales v. City of Peoria*, 722 F.2d 468, 474-75 (9th Cir. 1983) (discussing the distinction between criminal andcivil federal immigration law).
[18] *Id.*
[19] *Arizona*, 567 U.S. at 407 ("If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.").

that a person might be subject to deportation is not a lawful reason for arrest or detention by local law enforcement.[20]

Accordingly, **the Illinois TRUST Act states that a "law enforcement agency or law enforcement official shall not stop, arrest, search, detain, or continue to detain a person solely based on an individual's citizenship or immigration status."**[21] This is true even if an officer is aware that an administrative warrant has been issued for an individual. In general, local law enforcement officers need a criminal warrant to arrest a person, unless state law has granted them authority to make a warrantless arrest. This is true whether the arrest is for a violation of state or federal law.[22] Illinois law permits arrest by local law enforcement only if the officer has a criminal arrest warrant, has reasonable grounds to believe a warrant has been issued, or has reasonable grounds to believe that the individual is committing or has committed a criminal offense for which arrest is permitted.[23]

d. Local law enforcement has no authority to arrest an individual based on an ICE administrative warrant.

Neither federal nor state law authorizes local law enforcement officers to arrest an individual pursuant to an ICE administrative warrant.[24] Local law enforcement officers might learn that an individual is subject to an administrative warrant when performing a criminal background check in the FBI's National Crime Information Center database. However, ICE administrative warrants do not indicate that an individual has committed a criminal offense, nor do they constitute probable cause that a criminal offense has been committed.[25] ICE administrative warrants are prepared by ICE employees and are not approved or reviewed by a judge.[26] Furthermore, administrative warrants issued by ICE authorize only U.S. Department of Homeland Security (DHS) or ICE agents to arrest the individual, not local law enforcement. **Thus, any arrest by local law enforcement solely based on an administrative warrant issued by ICE is not an arrest pursuant to a criminal warrant or a finding of probable cause.**[27]

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[20] *Id.*; *see also Galarza*, 745 F.3d at 641 ("The [Immigration and Nationality Act] does not authorize federal officials to command state or local officials to detain suspected aliens subject to removal."); *Morales v. Chadbourne*,793 F.3d 208, 217–18 (1st Cir. 2015) (new seizures as a result of an immigration detainer must be supported by probable cause).
[21] 5 ILCS 805/15(b).
[22] *Miller v. United States*, 357 U.S. 301, 305 (1958) (noting that the lawfulness of a warrantless arrest for violation of federal law by state peace officers is "determined by reference to state law").
[23] 725 ILCS 5/107-2.
[24] *See United States v. Toledo*, 615 F. Supp. 2d 453, 459 (S.D. W. Va. 2009) (discussing the sheriff's lack of authority to enforce an ICE administrative warrant).
[25] *El Badrawi v. Department of Homeland Security*, 579 F. Supp. 2d 249, 276 (D. Conn. 2008); *Toledo*, 615F. Supp. 2d at 459.
[26] 8 U.S.C. § 1357; *see also United States v. Abdi*, 463 F.3d 547, 551 (6th Cir. 2006) (describing the process to obtain an ICE administrative warrant).
[27] Illinois law authorizes peace officers to arrest an individual only when a warrant has been issued for a criminal offense—not a civil offense. 725 ILCS 5/107-2.

e. Local law enforcement cannot detain individuals pursuant to a federal immigration detainer request.

DHS and ICE issue "immigration detainers" or "hold requests" when they have identified an individual in the custody of local law enforcement who might be in violation of civil immigration laws.[28] An immigration detainer is a notice from federal authorities that an individual in the custody of local law enforcement might be in violation of civil immigration laws; it typically asks the local agency to detain the individual for up to an additional 48 hours past his or her release date to allow federal authorities to assume custody.[29] ICE policy establishes that all detainer requests (Form I-247A) will be accompanied by one of two forms signed by an ICE immigration officer: either (1) Form I-200 (Warrant for Arrest of Alien) or (2) Form I-205 (Warrant of Removal/Deportation).[30] These forms are administrative warrants signed by ICE officers that authorize other ICE officers to detain an individual.[31] They are not criminal warrants issued by a court and they do not establish individualized probable cause that an individual has committed a criminal offense. Only federal officers have the authority to arrest an individual for a violation of civil immigration law without a criminal warrant.[32]

Accordingly, **the Illinois TRUST Act prohibits law enforcement officials and agencies from complying with immigration detainers**. It states that a "law enforcement agency or law enforcement official shall not detain or continue to detain any individual solely on the basis of any immigration detainer or civil immigration warrant or otherwise comply with an immigration detainer or civil immigration warrant."[33] Consistent with the Illinois TRUST Act, federal courts have determined that immigration detainers are voluntary requests with which local law enforcement need not comply,[34] as they do not constitute individualized probable cause sufficient

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[28] *See* 8 C.F.R. § 287.7; U.S. Immigration and Customs Enforcement, Policy No. 10074.2 "Issuance of Immigration Detainers by ICE Immigration Officers" (March 24, 2017).

[29] *See Abdi*, 463 F.3d at 551.

[30] U.S. Immigration and Customs Enforcement, Policy No. 10074.2 "Issuance of Immigration Detainers by ICE Immigration Officers" (March 24, 2017). Similarly, local law enforcement is not authorized to arrest or detain an individual based on the previously issued Form I-247D (Immigration Detainer – Request for Voluntary Action), Form I-247N (Request for Voluntary Notification of Release of Suspected Priority Alien) or Form I-247X (Request for Voluntary Transfer).

[31] For the purposes of the Trust Act, a civil immigration warrant also is defined to include Form I-203.

[32] *Arizona*, 567 U.S. at 407; 8 U.S.C. § 1357.

[33] 5 ILCS 805/15(a). In some states, local law enforcement may enter into formal agreements with the federal government to detain people who have been apprehended for violating federal civil immigration law. *See* 8 U.S.C. § 1103(a)(11)(B). Illinois law, however, also prohibits law enforcement agencies and officials from entering into any "agreement to house or detain individuals for federal civil immigration violations." 5 ILCS 805/15(g)(1). *See McHenry County v. Raoul*, No. 21-cv-50341, ECF No. 41 at *8 (N.D. Ill. Dec. 6, 2021) ("[T]he federal government can only house [ICE] detainees in the facilities of a state or a state's political subdivision via a cooperative agreement . . . . The State of Illinois, by legislative act, has decided that its political subdivisions may not enter or remain in such agreements.").

[34] 8 C.F.R. 287.7(a) (describing a detainer as a "request"); *Galarza*, 745 F.3d at 645 (concluding detainers are requests and collecting decisions from five other federal circuits characterizing detainers as requests); *Prim v. Raoul*, No. 20-cv-50094, 2021 WL 214641, at *3 (N.D. Ill. Jan. 21, 2021) ("ICE detainer forms issue a request to local officials and not a compulsory duty").

for detaining an individual.[35] Any detention of an individual after his or her release date is considered a new arrest and must be based on probable cause that a crime has been committed.[36]

Holding detainees past their scheduled release for ICE pick up could expose the law enforcement agency to civil liability, as it has in other jurisdictions. Local law enforcement agencies have been held liable for detaining an individual beyond his or her release date in response to an immigration detainer.[37] On top of the prohibitions outlined in the Illinois TRUST Act, the Illinois and federal constitutions prohibit unreasonable searches and seizures.[38] **Any detention of an individual without a judicial warrant—including prolonging an initial detention—must be supported by probable cause that an individual committed a criminal offense.** An ICE administrative warrant does not meet this standard.[39]

To ensure compliance, the TRUST Act requires that law enforcement submit an annual report to the Illinois Attorney General's Office regarding all immigration detainer requests or civil immigration warrants that the law enforcement agency received. Among other information, the report must include the date and time that the individual subject to the immigration detainer or civil immigration warrant was released or transferred, as well as the government agency to which the individual was transferred.[40]

f. Local law enforcement generally may not inquire about immigration status and may not deny services to people in their custody on the basis of their immigration status.

As noted, immigration is a matter of federal law, not state law. And although some states authorize state or local law enforcement to enforce federal immigration law, there is no express or inherent authority under Illinois law that permits state or local law enforcement to do so.[41] **Thus, the Illinois TRUST Act generally prohibits law enforcement agencies and officials from "inquir[ing] about or investigat[ing] the citizenship or immigration status or place of birth of any individual in the agency or official's custody or who has otherwise been stopped or**

[35] *Moreno*, 213 F.Supp.3d at 1007-08 (holding that ICE's practice of issuing detainers without individualized determination of the equivalent of probable cause was unlawful).
[36] *Morales*, 793 F.3d at 217; *Moreno*, 213 F. Supp. 3d at 999.
[37] *Santos v. Frederick County Bd. of Commissioners*, 725 F.3d 451, 464–65 (4th Cir. 2013); *see also Villars v. Kubiatowski*, 45 F.Supp.3d 791, 801–03 (N.D. Ill. 2014) (denying motion to dismiss claims against village police department for detaining individual post-bond); *Galarza*, 745 F.3d at 645 (finding county liable for unlawful detention pursuant to an immigration detainer).
[38] Ill. Const. 1970, art. I, § 6; U.S. Const., amend. IV.
[39] *Santos*, 725 F.3d at 464–65; *see also Villars*, 45 F.Supp.3d at 801–03; *Galarza*, 745 F.3d at 645; *People v. Hyland*, 2012 IL App (1st) 110966, ¶ 25 (finding that investigative alert was not sufficient to support a probable cause for arrest).
[40] 5 ILCS 805/25(a)(2).
[41] *See People v. Lahr*, 147 Ill.2d 379, 382, 589 N.E.2d 539 (Ill. 1992) (recognizing that the authority of local police officers to effectuate an arrest is dependent on the statutory authority given to them by the political body that created them); *Gonzales*, 772 F.2d at 475 (requiring that state law grant local police the "affirmative authority to make arrests" under the specific provisions of the Immigration and Nationality Act that they sought to enforce).

detained by the agency or official."[42]

There are certain circumstances under which local law enforcement may appropriately inquire about a person's citizenship, immigration status, or place of birth. Local law enforcement may, for instance, notify a person "about that person's right to communicate with consular officers from that person's country of nationality," or may be required to facilitate communication with consular offices as described in Part III below.[43] Local law enforcement may also request evidence of citizenship or immigration status pursuant to certain state and federal firearms laws.[44]

Other legal requirements also limit law enforcement's ability to treat persons in their custody differently on the basis of citizenship or immigration status. Specifically, the Illinois TRUST Act states that "a law enforcement agency or law enforcement official may not deny services, benefits, privileges, or opportunities to an individual in custody or under probation status . . . on the basis of the individual's citizenship or immigration status" or any civil immigration proceedings pending against the person (including the issuance of an immigration detainer or administrative warrant).[45] Such benefits and services include "eligibility or placement in a lower custody classification, educational, rehabilitative, or diversionary programs."[46]

III. Illinois Laws Requiring Law Enforcement to Assist Foreign Nationals and Immigrant Victims of Crimes

a. Custodial facilities must facilitate consular communication.

Over fifty years ago, the United States ratified the Vienna Convention, which requires federal, state, and local government authorities to inform detained or arrested foreign nationals of their right to contact their national consulate. To promote compliance with existing international legal obligations, Illinois amended its criminal code, effective January 1, 2016, to detail law enforcement's obligations.[47] Law enforcement officials in charge of a custodial facility are directed to:

- Ensure that, within 48 hours of an individual's booking or detention, foreign nationals are advised that they have a right to communicate with an official from the consulate of their country; and

- If a foreign national requests consular notification or the notification is mandatory by law, ensure notice is given to the appropriate officer at the consulate of the foreign national in

[42] 5 ILCS 805/15(e).
[43] *Id.*
[44] Specifically, the Firearm Owners Identification Card Act (430 ILCS 65/0.01 *et seq*.), the Firearm Concealed Carry Act (430 ILCS 66/1 *et seq*.), Article 24 of the Criminal Codes of 2012 (720 ILCS 5/24-1 *et seq*.), or 18 U.S.C.§§ 921-931.
[45] 5 ILCS 805/15(f).
[46] *Id.*
[47] 725 ILCS 5/103-1(b-5).

accordance with the U.S. Department of State Instructions for Consular Notification and Access;[48] and

- Ensure that the foreign national is allowed to communicate with, correspond with, and be visited by, a consular officer of his or her country.

This statute does not create any affirmative duty for law enforcement to investigate whether an arrestee or detainee is a foreign national.[49]

b. Law enforcement officials must complete U-visa and T-visa certification forms.

In order to encourage immigrant victims of crimes to come forward and work with law enforcement, federal law permits survivors of certain crimes to apply for U-visa or T-visa nonimmigrant status based on their willingness to assist law enforcement in investigating or prosecuting the crime.[50] Survivors of qualifying crimes, such as domestic violence and sexual assault, may apply for U-visas;[51] survivors of severe human trafficking may apply for T-visas.[52] A key component of the U-visa and T-visa application process is the certification form, by which a certifying agency[53] confirms the survivor's helpfulness or willingness to assist in the investigation or prosecution of the qualifying crime. Though these visas are created by federal law, they require forms certified by state and local law enforcement agencies responsible for detecting, investigating, and prosecuting qualifying criminal activity.

The VOICES Act, 5 ILCS 825/1 *et seq.*, sets forth requirements for certifying agencies that receive requests to complete U-visa or T-visa certification forms. As amended by the Way Forward Act, the VOICES Act requires each agency to:

- Designate a supervisory official or officials as the agency's certifying official(s) who must respond to requests for certification forms;

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[48] Resources from the U.S. Department of State for law enforcement are available at https://travel.state.gov/content/travel/en/consularnotification.html.

[49] 725 ILCS 5/103-1(b-5)(1).

[50] 8 U.S.C. § 1101(a)(15)(T), (U); U.S. DEPARTMENT OF HOMELAND SECURITY, U VISA LAW ENFORCEMENT RESOURCE GUIDE (2020), *available at* https://www.dhs.gov/sites/default/files/publications/20_1228_uscis_u-visa-law-enforcement-resource-guide.pdf; *DHS*, T VISA LAW ENFORCEMENT RESOURCE GUIDE (2020), *available at* https://www.uscis.gov/sites/default/files/document/guides/T-Visa-Law-Enforcement-Resource-Guide.pdf.

[51] Qualifying crimes for a U visa include any of the following (or any similar activity in violation of federal, state, or local criminal law): "rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of title 18); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes." 8 U.S.C. § 1101(a)(15)(U)(iii).

[52] 8 U.S.C. § 1101(a)(15)(T). For additional guidance about how human trafficking is defined in T visa eligibility, *see* 8 CFR 214.11(a); *DHS*, T VISA LAW ENFORCEMENT RESOURCE GUIDE (2020), *available at* https://www.uscis.gov/sites/default/files/document/guides/T-Visa-Law-Enforcement-Resource-Guide.pdf.

[53] "Certifying agencies" include state and local law enforcement agencies, prosecutors, and other agencies that are responsible for investigating or prosecuting qualifying crimes. 5 ILCS 825/5. However, only law enforcement agencies are required to submit annual reports to the Office of the Illinois Attorney General under the VOICES Act. 5 ILCS 825/20.

- Make publicly available information regarding the agency's procedures for certification requests;

- Arrange regular trainings for its certifying official(s);

- Not disclose the immigration status of a victim or person requesting a certification form, except to comply with federal or state law, legal process, or when authorized by the victim or requester;[54] and

- Follow certain timeframes and procedures to complete certification forms submitted by victims of qualifying criminal activity.[55]

Unlike federal law, which allows state and local agencies discretion in determining whether to complete these certification forms, the VOICES Act mandates that certifying agencies in Illinois complete certification forms if certain requirements are met.

Agencies that receive a certification request by a victim of qualifying criminal activity must:[56]

- Within 90 business days of receiving the request, complete the certification form and provide it to the requester;

- Apply a rebuttable presumption[57] that the victim is, has been, or is likely to be helpful to the detection, investigation, or prosecution of the qualifying criminal activity; and

- Fully complete and sign the certification form and include details about the nature of the crime and a detailed description of the victim's helpfulness or likely helpfulness.

If requested to recertify or reissue a certification form, the certifying official must provide the reissued certification within 90 business days of that request.[58]

The 90-day deadlines are expedited to 21 business days in three circumstances. First, the expedited deadline applies if the requester is in federal immigration removal proceedings or detained. Second, the expedited deadline applies if the children, parents, or siblings of the requester would reach an age within the 90-business-day period that would make them ineligible for certain benefits under federal law. If they would reach that age within the 21 business day period, then the

[54] 5 ILCS 825/10(g).
[55] "Victim of qualifying criminal activity" means a person described in Section 1101(a)(15)(U)(i)(I) of Title 8 of the United States Code, in the definition of "victim of a severe form of trafficking" in Section 7102(14) of Title 22 of the United States Code, or in any implementing federal regulations, supplementary information, guidance, and instructions; *see* 5 ILCS 825/5 (definitions).
[56] 5 ILCS 825/10(d)-(e).
[57] This presumption exists as long as the victim has not refused or failed to provide information and assistance that law enforcement reasonably requested. 5 ILCS 825/10(d).
[58] 5 ILCS 825/10(e).

certifying official has just 5 business days to complete and provide the certification form to the requester. And third, the expedited deadline applies if the person seeking recertification has a deadline to respond to a request for evidence from United States Citizenship and Immigration Services (USCIS).[59] The 90-day statutory deadlines can be extended only upon written agreement with the requester or requester's representative.[60]

If a certifying official denies a certification request, then the official must provide written notice of the denial to the requester explaining why the available evidence does not support a finding that the person is a victim of qualifying criminal activity, and provide contact information should the requester desire to appeal the decision.[61] If a requester appeals, the certifying agency or official must respond to the appeal within 30 business days.[62] The requester is also entitled to file a mandamus action or seek other equitable relief against the certifying agency in a circuit court without exhausting administrative appeals.[63]

To ensure compliance with the VOICES Act, law enforcement agencies must report annually to the Illinois Attorney General's Office on every request for completion of a certification form. This report must include the date that each request was received, and the date on which the law enforcement agency responded (either with a completed certification form or a written notice explaining the denial).[64]

IV. Summary

- Law enforcement authorities in Illinois generally are prohibited from assisting with any immigration enforcement operation. State law prohibits Illinois law enforcement from entering into immigration enforcement agreements with immigration authorities, from complying with immigration detainers, from transferring individuals into immigration agents' custody, and from allowing immigration agents access to state and local facilities for investigative or enforcement purposes.

- State law likewise generally prohibits Illinois law enforcement from sharing information with federal immigration enforcement agents about individuals in their custody, including those individuals' release dates.

- Law enforcement may not stop, arrest, search, or detain any individual on the sole basis that they are undocumented. A removable alien's presence in the United States is not a crime. Arrests may be made only when law enforcement have a criminal warrant or probable cause that a criminal offense has been committed.

[59] 5 ILCS 825/10(d).
[60] 5 ILCS 825/10(d)(4), (e).
[61] 5 ILCS 825/11(a). The written notice must be submitted to the address provided in the request.
[62] 5 ILCS 825/11(a).
[63] 5 ILCS 825/11(b).
[64] 5 ILCS 825/20.

- Local law enforcement agencies may not detain an individual beyond his or her release date pursuant to an immigration detainer or civil immigration warrant.

- Illinois law also prohibits local law enforcement agencies from treating individuals in their custody differently on the basis of their citizenship or immigration status.

- Custodial facilities must allow foreign nationals to communicate with consular offices.

- Law enforcement agencies are required to create procedures to ensure they timely certify forms for eligible victims of certain crimes who apply for U-visas or T-visas.

- Law enforcement agencies must report annually to the Illinois Attorney General's Office regarding their compliance with the TRUST Act and the VOICES Act.