

EXHIBIT A

The Honorable Jon S. Tigar

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

East Bay Sanctuary Covenant; Al Otro Lado; Innovation Law Lab; and Central American Resource Center in Los Angeles,

Plaintiffs,

v.

Donald J. Trump, President of the United States, in his official capacity; Matthew G. Whitaker, Acting Attorney General, in his official capacity; U.S. Department of Justice; James McHenry, Director of the Executive Office for Immigration Review, in his official capacity; the Executive Office for Immigration Review; Kirstjen M. Nielsen, Secretary of Homeland Security, in her official capacity; U.S. Department of Homeland Security; Lee Francis Cissna, Director of the U.S. Citizenship and Immigration Services, in his official capacity; U.S. Citizenship and Immigration Services; Kevin K. McAleenan, Commissioner of U.S. Customs and Border Protection, in his official capacity; U.S. Customs and Border Protection; Ronald D. Vitiello, Acting Director of Immigration and Customs Enforcement, in his official capacity; Immigration and Customs Enforcement,

Defendants.

Case No. 3:18-cv-06810

**BRIEF OF AMICUS CURIAE
FOR THE STATE OF
WASHINGTON,
COMMONWEALTH OF
MASSACHUSETTS, STATE OF
NEW YORK, AND STATE OF
CALIFORNIA**

1 **I. INTRODUCTION AND INTEREST OF AMICI CURIAE**

2 The States of Washington, Massachusetts, New York, and California (the States)
3 respectfully submit this brief as amici curiae to address the need for emergency relief suspending
4 the Acting Attorney General and Secretary of Homeland Security’s Interim Final Rule: “Aliens
5 Subject to a Bar on Entry under Certain Presidential Proclamations; Procedures for Protection
6 Claims” (the Rule).¹

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8 This is not the sort of rare circumstance that can excuse the Government’s failure to
9 follow the APA’s foundational procedural requirements. If the States had been afforded an
10 opportunity to comment on the effects of barring asylum claims for those who enter at the
11 country’s southern border, they would have advised of the significant and deleterious impact of
12 the Rule. Under an appropriate rulemaking process, the agencies would have been required to
13 consider how the Rule would further incentivize Customs and Border Protection (CBP) to turn
14 asylum seekers away at points of entry (a practice known as “metering”), exacerbate unnecessary
15 human suffering at our country’s doorstep, and cause asylum seekers with meritorious claims
16 prolonged harm resulting from being needlessly forced to wait at the border while their claims
17 are processed. The agencies’ failure to utilize the standard APA process denied the States the
18 right to submit their comments before the Rule – which enacts sweeping policy changes on an
19 issue of national significance – went into effect.
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22 The States have a strong interest in ensuring that federal agencies comply with the APA
23 and refrain from engaging in arbitrary and capricious decision-making, and that their public
24 policies in favor of open government, transparency, and the Rule of Law are vindicated. Further,
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¹ Available at https://www.regulations.gov/document?D=EOIR_FRDOC_0001-0039.

1 the States invest their own resources to provide education, health care, and other services to
2 immigrant families – like all families that reside in our States – and will have a significant role
3 in assisting immigrants and their relatives in the United States who will suffer the trauma and
4 uncertainty that the Rule imposes. The States support the issuance of temporary relief to preserve
5 the status quo and prevent widespread harm while the validity of the agency action is adjudicated,
6 and such relief would clearly serve the public interest.

8 II. ARGUMENT

9 A. The Agencies Evaded Notice and Comment and Waiting Period Requirements, 10 Denying States the Opportunity to Provide Input.

11 The agencies' failure to engage in notice and comment rulemaking as required by the
12 APA deprived the States of their right to participate in the rulemaking process. "The notice and
13 comment requirements are designed to ensure public participation in rulemaking." *Paulsen v.*
14 *Daniels*, 413 F.3d 999, 1004 (9th Cir. 2005) (ellipses and brackets removed). Public participation
15 ensures that "agency regulations are tested via exposure to diverse public comment"; that the
16 process is "fair[] to affected parties"; and that affected parties have "an opportunity to develop
17 evidence in the record to support their objections to the rule and thereby enhance the quality of
18 judicial review." *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407
19 F.3d 1250, 1259 (D.C. Cir. 2005). "It is antithetical to the structure and purpose of the APA for
20 an agency to implement a rule first, then seek comment later." *United States v. Valverde*, 628
21 F.3d 1159, 1164 (9th Cir. 2010) (quoting *Paulsen*, 413 F.3d at 1004). These procedural
22 requirements are so fundamental that if an agency improperly fails to follow them, its regulation
23 must be invalidated. 5 U.S.C. § 706(2)(D) (courts "shall . . . hold unlawful and set aside" agency
24 action taken "without observance of procedure required by law").
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1 The agencies insist that this unilateral action is supported by “good cause,” and that
2 giving the States and the public an opportunity to comment on drastic changes to federal
3 immigration policy would be “impracticable” and “contrary to the public interest.” *See* Interim
4 Final Rule at 65 (citing 5 U.S.C. § 553(b)(B)). They also purport to make the rule effective
5 immediately, dispensing with the 30-day waiting period required by 5 U.S.C. 553(d), arguing
6 that “immediate implementation of this rule is essential to avoid creating an incentive for aliens
7 to seek to cross the border.” 83 Fed. Reg. 55950. The Rule was issued without notice, in the
8 absence of any emergency such as an imminent threat of a terrorist attack, an accident or natural
9 disaster that imperils human life, or even a fiscal emergency. *See* Motion for TRO at 7–8. Thus,
10 the government fails to overcome the “high bar” to invoke the good cause exception. *Valverde*,
11 628 F.3d at 1164.

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14 “The good cause exception is essentially an emergency procedure.” *Id.* at 1165 (quoting
15 *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982)). Failing to follow notice and
16 comment procedures may be excused “only in those narrow circumstances” in which taking the
17 time to comply with the APA’s procedural requirements “would do real harm.” *Id.* at 1164–65.
18 “[T]he good cause exception ... authorizes departure from the APA’s requirements only when
19 compliance would interfere with the agency’s ability to carry out its mission.” *Cal-Almond, Inc.*
20 *v. U.S. Dep’t of Agric.*, 14 F.3d 429, 441 (9th Cir. 1993). It is to be “sparingly used in order to
21 promote public input into agency rulemaking,” *Serv. Emps. Int’l Union, Local 102 v. County of*
22 *San Diego*, 60 F.3d 1346, 1353 (9th Cir. 1994), lest it “carve the heart out of the statute.” *Action*
23 *on Smoking and Health v. CAB*, 713 F.2d 795, 800 (D.C. Cir 1983).
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1 The government also invokes the “foreign affairs” exception to the APA’s procedural
2 requirements, 5 U.S.C. § 553(a)(1). 83 Fed. Reg. 55950. However, the Ninth Circuit rejected
3 this exception’s application to the kind of regulation at issue here, holding that: “The foreign
4 affairs exception would become distended if applied to [DHS] actions generally, even though
5 immigration matters typically implicate foreign affairs. For the exception to apply, the public
6 rulemaking provisions should provoke definitely undesirable international consequences.”
7 *Yassini v. Crosland*, 618 F.2d 1356, 1363 n.4 (9th Cir. 1980) (internal citations omitted).
8 Although foreign relations are briefly discussed in the Rule, *see* 83 Fed. Reg. 55950, the
9 government’s focus is on the United States’ internal interests, not international relations.
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11 The States’ interests in governmental transparency are furthered by the opportunity to
12 comment on proposed federal rulemaking. Moreover, as sovereigns responsible for the health,
13 safety, and welfare of millions of people within their respective borders, the States have unique
14 interests and perspectives to contribute on issues of national importance and widespread impact,
15 particularly when such policies will cause prospective residents of our States unnecessary,
16 substantial, and enduring harm. If the States had been provided with an opportunity to comment
17 on the Rule before it was promulgated, they would have raised these issues before the Rule took
18 effect.² The agencies would have been required to consider those comments in crafting the final
19 regulation, *see* 5 U.S.C. § 553(c), and may have made changes to the proposed rule in response,
20 as agencies often do. The record developed through the notice and comment process in turn
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25 ² For example, since March 2016, Washington State has offered more than 45 comment letters on
26 anticipated or proposed actions by the Administration to delay, repeal or adopt federal regulations. Massachusetts
has submitted dozens of comment letters on proposed regulatory changes, New York offered 45 comment letters,
and California has submitted 59 comment letters since February 2017.

1 would have aided the Court in its review of the action. *United Mine Workers*, 407 F.3d at 1259.
2 That is the way the process is supposed to work.

3 **B. The Interim Final Rule Will Exacerbate Inhumane Border Conditions.**

4 Granting the temporary restraining order could prevent needless harm. On the other side
5 of the ledger, the federal government can assert little to no legally cognizable harm from entry
6 of the injunction. “[T]he government[] . . . cannot suffer harm from an injunction that merely
7 ends an unlawful practice or reads a statute as required to avoid constitutional concerns.”³ The
8 balance of equities tips in favor of a TRO here.

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10 In addition to obvious legal infirmities detailed in the Motion, the Rule raises several key
11 practical and humanitarian concerns. Because the Rule requires people fleeing violence to
12 present requests for asylum only at official U.S. ports of entry, it will increase pressure on border
13 officers to turn away people who try to present themselves—a process known as “metering.”
14 Increasing metering will only exacerbate the inhumane border conditions migrants experience.

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16 Even if metering does not occur, the Rule will increase asylum seekers’ wait times at the
17 border while their claims are being processed. During these long waits, children will not be
18 educated and families will not receive the basic health services that they would receive if they
19 were to be released to live in the States.

20 **1. Increasing Pressure on Ports of Entry Will Increase Metering.**

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22 Along the southern border, CBP regularly prevents asylum seekers from requesting
23 protection at official U.S. ports of entry by turning away individuals before they can reach the

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25 ³ *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (citing *Zepeda v. I.N.S.*, 753 F.2d 719, 727
26 (9th Cir. 1983)). *See also NAACP v. Trump*, 2018 U.S. Dist. LEXIS 139663, at *15 (D.D.C. Aug. 17, 2018)
(finding lack of injury to federal government from order “simply correct[ing] the improper exercise of [DHS]
authority” in case relating to rescission of Deferred Action for Childhood Arrivals [“DACA”]).

1 entry point. This is not an isolated practice, but a widespread policy intended to deter asylum
2 seekers from accessing ports of entry at the U.S.–Mexico border, a policy that the federal
3 government has repeatedly acknowledged over the past year.

4 In June 2018, the DHS Office of Inspector General (OIG) conducted unannounced site
5 visits to CBP and ICE facilities along the southern border.⁴ OIG’s report, issued in late
6 September, confirmed that “CBP was regulating the flow of asylum-seekers at ports of entry
7 through ‘metering[.]’” *Id.* at 5. OIG described the process: “When metering, CBP officers stand
8 at the international line out in the middle of the footbridges” and turn asylum-seekers away
9 before they can cross onto U.S. soil, claiming that there is no space available. *Id.* at 6. CBP
10 instructs officers to “inform individuals that the port is currently at capacity and that they will be
11 permitted to enter once there is sufficient space and resources to process them.” *Id.* at 6.

12 In recent years, CBP has increasingly utilized metering tactics. In April and May 2018,
13 officials at the San Ysidro port of entry near San Diego, California denied entry to a large group
14 of asylum seekers and forced them to wait outside the U.S. gate for days, enduring cold, rain,
15 ants, and lice.⁵ CBP justified the denial of entry based on a lack of processing capacity, despite
16 the fact that the agency had been anticipating the arrival of these 240 asylum seekers for weeks
17 and regularly manages the daily crossing of 20,000 people at this port of entry. *Id.* Individuals
18 seeking to cross were told by CBP that the US did not accept asylum claims at the border, or that
19 they needed to obtain appointments from Mexican officials before they could proceed. *Id.*

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24 ⁴ OFFICE OF INSPECTOR GENERAL, SPECIAL REVIEW – INITIAL OBSERVATIONS REGARDING FAMILY
SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY (Sept. 27, 2018) at 1, available at
25 <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>.

26 ⁵ JASON BOYD AND GREG CHEN, AMERICAN IMMIGRATION LAWYERS ASSOCIATION POLICY BRIEF: NEW
BARRIERS AT THE BORDER IMPEDED DUE PROCESS AND ACCESS TO ASYLUM (June 1, 2018) at 3. Available at
<https://www.aila.org/File/DownloadEmbeddedFile/76208>.

1 Legal representatives who accompanied immigrants wishing to present themselves to
2 CBP officers at ports of entry from 2017 to present have witnessed dozens of people—mostly
3 asylum seekers—being turned away repeatedly. Human Rights First documented over a hundred
4 instances where CBP refused to grant individuals and families access at numerous ports of entry.
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6 BOYD AND CHEN, AMERICAN IMMIGRATION LAWYERS ASSOCIATION POLICY BRIEF at 3. Most of
7 these were families fleeing violence in their home country. *Id.*

8 There is no doubt that metering has and continues to be a policy at ports of entry on the
9 southern border. The OIG noted that CBP “has utilized [metering] at least as far back as 2016 to
10 regulate the flow of individuals at ports of entry.” OIG, INITIAL OBSERVATIONS REGARDING
11 FAMILY SEPARATION at 5-6. In May 2018, DHS Secretary Kirstjen Nielsen publicly admitted
12 that it was DHS policy to meter migrants at the U.S.-Mexico border: “We are ‘metering’, which
13 means that if we don’t have the resources to let them [asylum-seekers] in on a particular day,
14 they are going to have to come back.” AMNESTY INTERNATIONAL REPORT, USA: ‘YOU DON’T
15 HAVE ANY RIGHTS HERE’ (2018) at 11.⁶ Commissioner Kevin McAleenan confirmed a few
16 weeks ago that CBP is preparing to “expand” metering, stating
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18 that if the Border Patrol sees a significant increase in asylum seekers, it will
19 expand metering to other border crossings — effectively blocking immigrants
20 from entering. He said the agency already faced a “significant backlog” of asylum
21 seekers in Tijuana and delays at three to four other crossings daily.⁷

22 Unsurprisingly, metering puts enormous pressure on migrants to enter illegally, as
23 persons fleeing violence are faced with indefinite waits at ports of entry. As OIG found, “DHS
24 regulated the number of asylum-seekers entering the country through ports of entry at the same
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26 ⁶ Available at <https://www.amnesty.org/download/Documents/AMR5191012018ENGLISH.PDF>.

⁷ <http://www.latimes.com/nation/la-na-border-patrol-commissioner-20181026-story.html>

1 time it encouraged asylum-seekers to come to ports.” OIG, INITIAL OBSERVATIONS REGARDING
2 FAMILY SEPARATION at 1. OIG suggested that “limiting the volume of asylum-seekers entering
3 at ports of entry leads some aliens who would otherwise seek legal entry into the United States
4 to cross the border illegally.” *Id.* at 7. Indeed, interviews with a Border Patrol supervisor and
5 migrants confirmed that there is “an increase in illegal entries when aliens are metered at ports
6 of entry.” *Id.* at 7.

8 **2. Metering Exacerbates Inhumane Border Conditions.**

9 Media reports show how families, some with small children, have been forced to sleep
10 on the ground outside ports of entry for weeks as they waited for CBP to allow them to present
11 themselves:

12 Families from El Salvador, Guatemala and Honduras huddle together on the
13 ground near packages of donated diapers and cans of baby formula. Some have
14 endured this limbo for nearly two weeks, sleeping on the ground at night and
15 trying to stay cool during the day as temperatures in this outpost in the Sonoran
Desert surpass 100 degrees.⁸

16 Other reports describe the unofficial bureaucracy that grew out of CBP border refusals at the San
17 Ysidro Port of Entry, where “metered” migrants live for weeks as they wait for CBP to allow
18 them to seek asylum.⁹ Asylum seekers are left to camp out near the U.S.–Mexico border for “up
19 to a month in more than two dozen temporary shelters in Tijuana.”

20 Metering increases the wait at ports of entry for asylum seekers, many of whom are
21 women with children. Faced with days of additional delay at the border, and fearful of losing
22 their place in line, asylum seekers will be exposed to harsh weather conditions, lack of stable
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25 ⁸ <https://www.nytimes.com/2018/06/12/us/asylum-seekers-mexico-border.html>

26 ⁹ <http://www.latimes.com/local/california/la-me-asylum-seekers-notebook-holds-key-to-entry-20180705-story.html>

1 shelter, and inadequate facilities.¹⁰ Just this week, freezing temperatures forced hundreds of
2 waiting migrants outside an El Paso port of entry to seek other shelter.¹¹ Vulnerable adults and
3 children are exposed to greatly increased risks of crime, exploitation, and unsanitary conditions
4 as they languish at the border.¹²

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6 During these periods, children do not go to school and families do not receive basic health
7 and social services that the States would otherwise provide. For these people, whatever trauma
8 caused them to flee their home country will only be compounded. Ultimately, the States will
9 bear the costs of the Rule, as asylum seekers who are accepted will settle in our jurisdictions
10 having unnecessarily experienced more trauma due to the Rule. For example, in FY 2017, almost
11 15,000 accompanied children (those arriving with their families) received positive credible fear
12 determinations and were released from federal custody, many in the amicus States. *See* 83 Fed.
13 Reg. 45486, 45519 (Sept. 7, 2018). The prospective application of this illegal Rule will certainly
14 affect future State residents.

15 16 III. CONCLUSION

17 The States support the issuance of temporary relief to preserve the status quo and prevent
18 widespread harm while the validity of the agency action is being adjudicated, and they urge the
19 Court to grant Plaintiffs' Motion.
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24 ¹⁰ *See* <https://www.nytimes.com/2018/06/12/us/asylum-seekers-mexico-border.html> (describing father
25 and toddler forced to sleep “on cardboard pizza boxes in a squalid entryway to a bathroom at the border crossing”
as they wait for CBP to accept their asylum claim).

¹¹ *See* https://www.upi.com/Top_News/World-News/2018/11/13/Cold-weather-drives-migrants-camped-at-border-bridge-into-shelter/2751542145667/

26 ¹² *See* <http://cmsny.org/publications/heyman-slack-asylum-poe/>

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DATED this _____ day of November, 2018.

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