

Nos. 19-16487 & 19-16773

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**EAST BAY SANCTUARY COVENANT; et al.,**  
*Plaintiffs-Appellees,*

v.

**WILLIAM P. BARR, Attorney General; et al.,**  
*Defendants-Appellants.*

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On Appeal from the United States District Court  
for the Northern District of California No. 3:19-cv-04073-JST (Tigar, J.)

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**BRIEF OF AMICI CURIAE NON-PROFIT ORGANIZATIONS  
AND LAW SCHOOL CLINICS IN SUPPORT OF PLAINTIFFS-  
APPELLEES AND AFFIRMANCE**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, each amicus party states that it does not have a parent corporation and no publicly held corporation owns 10 percent or more of the stock of any amicus.

Dated: October 15, 2019

/s/ *Blaine Bookey*  
Blaine Bookey

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## INTEREST OF AMICI

Amici are non-profit organizations and law school clinics that represent and otherwise support and advocate for asylum seekers across the country and in the U.S.-Mexico-Central America region. Amici therefore have a strong interest in ensuring federal laws are interpreted to afford asylum protection as Congress intended and the United States' international obligations require. A complete list of amici is contained in the Appendix.<sup>1</sup>

## SUMMARY OF THE ARGUMENT

The latest asylum ban eliminating asylum for individuals who transit through a third country effectively ends asylum at the southern land border. The new Rule slams the United States' doors on the persecuted, upending four decades of uniform practice. This momentous change is neither consistent with the asylum laws Congress created nor factually justified.

The district court correctly enjoined the rule, finding it to be inconsistent with existing asylum laws that only authorize sending asylum seekers to third countries in limited circumstances—where there is a Safe Third Country Agreement or the applicant is firmly resettled. *East Bay Sanctuary Covenant v.*

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<sup>1</sup> Amici submit this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2). All parties have consented to this timely filing. No person or entity other than amici authored or contributed funds intended for its preparation or submission.



*Barr*, 385 F. Supp. 3d 922 (N.D. Cal. 2019).<sup>2</sup> Those existing provisions include carefully crafted safeguards, completely absent here, to ensure “we do not deliver aliens into the hands of their persecutors.” *Id.*

The Administration has provided no justification warranting disturbance of the injunction. The rule unilaterally eliminates a critical form of life-or-death protection for people long recognized as meriting asylum, and places them directly in harm’s way by forcing them to seek protection in countries that cannot provide it and where their lives are at risk. It thereby contravenes the United States domestic and international obligations to offer protection without discrimination and to avoid returning individuals to danger. The Court should affirm the injunction.

## **ARGUMENT**

### **I. The Third Country Asylum Rule Virtually Eliminates Asylum in the United States**

The impact of this rule cannot be overstated and may be the Administration’s furthest reaching attempt yet to end the U.S. asylum system by decree. By rendering ineligible for asylum all non-Mexicans who seek protection at the southern border with extremely limited exceptions, *see* 8 C.F.R. §

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<sup>2</sup> Amici agree with Plaintiffs-Appellees’ arguments, not repeated in this brief, regarding the inconsistencies between the rule and the Safe Third Country and firm resettlement statutory provisions.

208.13(c)(4), the rule leaves few to benefit from this critical protection enshrined in U.S. law.

The vast majority of apprehensions occur at the southern border. Last year, southern border apprehensions accounted for ninety-eight percent of all apprehensions. U.S. BORDER PATROL NATIONWIDE APPREHENSIONS BY CITIZENSHIP AND SECTOR IN FY2018 (2019) (396,579 at the southern border as compared to 4,316 at the northern border and 3,247 at the coastal border sectors).<sup>3</sup>

Although amici are not aware of available data that show precisely what percentage of those apprehended later make applications for asylum, looking to data for family units and unaccompanied children, the stark effects of this rule become apparent. From October 2018 to August 2019, Mexicans made up just 2.6 percent of the total families and unaccompanied children apprehended after crossing the border. U.S. BORDER PATROL SOUTHWEST BORDER APPREHENSIONS BY SECTOR FISCAL YEAR 2019 (2019).<sup>4</sup> This means that—assuming *arguendo* all will seek asylum, which comports with amici’s experience—only 2.6 percent of the families and children would be eligible for asylum under the rule. *See also* DHS OFFICE OF IMMIGRATION STATISTICS, ANNUAL FLOW REPORT, REFUGEES AND

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<sup>3</sup> Available at <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/BP%20Apps%20by%20Sector%20and%20Citizenship%20FY07-FY18.pdf>.

<sup>4</sup> Available at <https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions>.

ASYLEES: 2017 (2019) (showing Mexicans make up a shrinking percentage of asylum seekers in the United States).<sup>5</sup>

Groups working at the border have already begun to see the damage wrought by the rule. The Dilley Pro Bono Project (“Project”), which represents asylum-seeking mothers and their children detained at the South Texas Family Residential Center in Dilley, Texas, reports that credible fear denials have skyrocketed since the rule took effect.<sup>6</sup> Between February 1, 2017 and May 11, 2019, families served by the Project received negative fear determinations in just 1.1 percent of cases. Between August 12, 2019—when the Project began seeing the rule applied—and September 29, 2019, that number jumped to more than 23 percent receiving negative fear findings it appears for failure to meet the higher reasonable fear standard imposed on them following a determination, under the rule, that they are ineligible for asylum. And if you remove from the calculation families that speak rare languages, and likely received positive fear findings solely due to the lack of an interpreter in the Project’s experience, the percentage of negatives would be even higher. The underlying facts of the cases have remained consistent, but the new rule has devastated their chances of receiving protection.

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<sup>5</sup> Available at [https://www.dhs.gov/sites/default/files/publications/Refugees\\_Asytees\\_2017.pdf](https://www.dhs.gov/sites/default/files/publications/Refugees_Asytees_2017.pdf).

<sup>6</sup> The Project’s data is on file with amici.

The rule's exceedingly narrow exceptions, as described in the sections to follow, provide little solace for asylum seekers traveling through Mexico, Guatemala and other countries that simply do not have the infrastructure to adjudicate their claims in a safe, fair, and timely manner and where asylum seekers face a risk of persecution or torture. The rule effectively ends asylum in the United States as it has been known for forty years.

## **II. The Third Country Asylum Rule Results in Refoulement of Bona Fide Refugees**

### **A. The flight of asylum seekers through a third country does not undermine the legitimacy of their claims**

The Administration attempts to justify this monumental assault on our asylum laws by claiming that the rule prioritizes applicants “who need asylum most” because they have “nowhere else to turn” while screening out “meritless asylum claims.” Gov’t Br. at 36 (internal quotation marks and alterations omitted). The underlying assumptions being that if an asylum seeker transited through another country en route to the United States, no matter the conditions of their journey, they already have access to protection elsewhere and their claim is somehow less deserving of belief. In amici’s vast experience, such assumptions have no basis in fact.

Individuals seeking asylum at the United States’ southern border are fleeing gender-based violence, violence perpetrated by gangs, and politically, racially and

religiously motivated persecution, among other heinous acts. *See, e.g.*, Administrative Record (“AR”) 293-95. There are many reasons, that do not undermine the merit of their claims, why asylum seekers may pass through multiple countries while searching for refuge but continue on to the United States because they cannot find safety in the transited countries, or because they wish to reunify with family. The immigration agency and the courts have recognized this reality. *See, e.g., Gulla v. Gonzales*, 498 F.3d 911, 917 (9th Cir. 2007) (finding the agency abused its discretion in denying asylum based on petitioner’s failure to apply for asylum in transit countries where he had valid reasons not to seek refuge there); *Damaize-Job v. INS*, 787 F.2d 1332, 1337 (9th Cir. 1986) (holding asylum seeker need not seek asylum in countries transited before reaching the United States); *Matter of Pula*, 19 I&N Dec. 467, 474 (B.I.A. 1987) (recognizing an asylum seeker “may not have found a safe haven even though he has escaped to another country” and family reunification or other “personal ties” may “motivate[] him to seek asylum here rather than elsewhere”).

The U.N. High Commissioner for Refugees (“UNHCR”) has made clear that the Refugee Convention does not require asylum seekers to apply in the first country they enter after escaping their country of origin. To the contrary, UNHCR has reiterated that, “[t]he primary responsibility to provide protection rests with the State where asylum is sought,” and while there is no “unfettered right to choose

one’s country of asylum,” there is also “no obligation for asylum-seekers to seek asylum at the first effective opportunity.” *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers* ¶¶ 1, 3.i. (2013) (“UNHCR Transfer Guidance”).<sup>7</sup> The assessment must take into consideration practical realities facing asylum seekers and whether they have “a connection” or “close links” with a particular country that make it reasonable for them to apply for protection in one state instead of another. *Id.* (citation omitted); *see also* UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers* ¶ 15 (2019) (“UNHCR Guidance on Irregular Onward Movement”).<sup>8</sup> The Government’s ill-conceived rule flies in the face of the Convention and UNHCR’s thoughtful guidance. *See, e.g., Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (recognizing UNHCR guidance as persuasive authority in interpreting the meaning and scope of the Refugee Convention); *Zhang v. Ashcroft*, 388 F.3d 713, 720 (9th Cir. 2004) (same).

Following passage of the Refugee Act in 1980 until the new rule took effect, individuals who transited through a third country were eligible for asylum so long as they satisfied the stringent burden of establishing they meet the definition of a refugee. *See* 8 U.S.C. §§ 1101(a)(42), 1158. The following cases illustrate why

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<sup>7</sup> Available at <https://www.refworld.org/pdfid/51af82794.pdf>.

<sup>8</sup> Available at <https://www.refworld.org/docid/5d8a255d4.html>.

asylum seekers often do not and often cannot apply for protection before reaching the United States.

- Sixteen-year-old *Jose*<sup>9</sup> fled El Salvador after cooperating with police in a sting operation to identify a Mara 18 gang member who had threatened him. Traveling through Guatemala and Mexico, he suffered a violent attack from the infamous drug cartel Los Zetas during the journey. After arriving in the United States as an unaccompanied child, Jose learned that the Salvadoran government summoned him as a witness to testify in court against the gang member and feared he would be killed if returned. Jose was granted asylum.
- *Martha*, a Salvadoran transgender woman, escaped after being beaten and raped due to her gender identity. She feared applying for asylum in Guatemala and Mexico where it is well-documented that transgender individuals face rampant violence and discrimination. Martha was granted asylum.
- Hailing from Sudan, *Kamal* fled after being tortured and threatened with death for speaking out against the government. Having heard of dangers faced by Sudanese people in Egypt, Kamal made his way to Mexico City. The dangers continued. In Mexico, his contact set him up to be mugged,

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<sup>9</sup> The brief uses pseudonyms to protect the confidentiality of individuals. Documentation of the facts of the case examples are on file with amici.

leaving him without his passport and little money. Kamal presented at the San Ysidro port of entry and was granted asylum last year.

Under the new rule, Jose, Martha and Kamal would be categorically barred from asylum solely because they were unable to obtain a visa that would permit them to board a plane and fly directly to the United States to seek asylum. Nothing about their migration route indicates their claims lack merit. In fact, the arduous journeys they endured to find safety only underscore their fear.

The Administration's further attempt to undermine the merit of all claims by looking to the overall asylum approval rate also falls flat. Gov't Br. 43. Approval rates simply do not provide an accurate representation of the real dangers individuals are fleeing, and otherwise truthful claims may fail for many reasons that are not indicative of fraud. To begin, the Administration has tilted the playing field by impermissibly narrowing the legal definition of a refugee and who qualifies for protection and heightening the high evidentiary burden required to prove eligibility. *See, e.g., Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019) (reversing prior decision recognizing family as a particular social group and encouraging adjudicators to deny all claims brought on these grounds); *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) (overturning precedent recognizing domestic violence as a basis for asylum and encouraging adjudicators to deny similar claims).



Moreover, regardless of increasingly restrictive interpretations, the burden of establishing asylum eligibility is markedly more onerous for asylum seekers who do not have counsel to represent them in proceedings. Recent data show that represented individuals are five times more likely to succeed on their claims.

*Immigration Court Asylum Decisions: Cases with Representation*,

TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (“TRAC”), fig. 3 (Nov. 28, 2017).<sup>10</sup> If an individual is detained (or forced to remain in Mexico), this also substantially hinders their ability to marshal evidence to corroborate their claim and to heal from trauma to be able to share their story in a coherent manner to satisfy the legal requirements. *See, e.g., Detention Management*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT (Oct. 11, 2019)<sup>11</sup> (reporting that as of October 9, 2019, over 50,000 individuals were in immigration detention).

Achieving asylum has always required applicants to clear significant hurdles. Although the government suggests that the overall approval rates indicate somehow that claims of individuals currently fleeing to the United States are not meritorious, a historical look shows approval rates have generally rested below fifty percent. TRAC, fig. 1. In sum, reliance on—what the government touts are low—approval rates to justify this rule is misplaced.

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<sup>10</sup> Available at <https://trac.syr.edu/immigration/reports/491/>.

<sup>11</sup> Available at <https://www.ice.gov/detention-management#wcm-survey-target-id>.

More fundamentally, the fact that some claims may not be found to meet the rigorous definition in U.S. law does not provide sufficient basis for eviscerating protections for those that are. Congress could not have intended for such a critical protection, rooted in our international treaty obligations, to be set aside on such thin evidence. For many, removal is a death sentence. *See, e.g.*, Alex Ellerbeck & Susan Ferriss, *'Third country' deal sends migrants back to the countries they're fleeing*, THE CENTER FOR PUBLIC INTEGRITY (Oct. 10, 2019);<sup>12</sup> Sarah Stillman, *When Deportation is a Death Sentence*, THE NEW YORKER (Jan. 18, 2018).<sup>13</sup>

**B. Forcing asylum seekers to seek protection in transit countries such as Mexico places them in grave danger**

Sending asylum seekers to Mexico and other countries in the region will undoubtedly result in U.S. violations of the duty of nonrefoulement—the centerpiece of U.S. asylum law. Convention Relating to the Status of Refugees, art. 33, ¶ 1, 198 U.N.T.S. 150, 176 (July 28, 1951). News outlets, human rights organizations, UNHCR, and the U.S. government have all documented the extreme dangers for migrants and the shortcomings of the asylum processes in Mexico and elsewhere, including the danger of being unlawfully refouled to their countries of origin without adequate process. *See, e.g.*, AR 636-37 (Wall Street Journal article);

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<sup>12</sup> Available at <https://publicintegrity.org/business/immigration/immigration-decoded/third-country-deal-deportations/>.

<sup>13</sup> Available at <https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence>.

700 (Reuters article), 703 (Human Rights First Factsheet), 721-24 (Amnesty International report).

Consistent with amici's experience working on these issues with thousands of asylum seekers like Jose, Martha and Kamal, the government's own submissions in this case demonstrate that asylum seekers are extremely unlikely to receive protection in Mexico. To begin, the Mexican asylum system is woefully underfunded. A representative from Mexico's refugee agency (known by its Spanish acronym COMAR), recently lamented that, for 2020, the agency has less than thirty percent of the budget necessary to satisfy its mandate. Enrique Sanchez, *Insuficiente presupuesto para refugiados: Comar* [*Insufficient refugee budget: Comar*], EL EXCELSIOR (Sept. 9, 2019);<sup>14</sup> *see also* AR 700 (reporting that the agency's budget is at the lowest in years while applications have increased significantly). Moreover, for many individuals it may be too late, as Mexican law requires migrants to apply within thirty days of entry. Ley sobre Refugiados, Protección Complementaria y Asilo Político [Refugee Law] [Statute on Refugees, Complementary Protection, and Political Asylum], art. 18, Diario Oficial de la Federación [DO], 27-01-2011, últimas reformas DOF 30-10-2014 (Mex).

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<sup>14</sup> Available at <https://www.excelsior.com.mx/nacional/insuficiente-presupuesto-para-refugiados-comar/1335302>.

Worse, Mexico has a pattern of directly abusing asylum seekers and refusing to provide adequate protection, exposing them to extortion, kidnapping and other violent attacks while they wait for their claims to be heard. *See, e.g.*, AR 703 (reporting that “[r]efugees in Mexico are targeted due to their inherent vulnerabilities as refugees but also on account of their race, nationality, gender, sexual orientation, gender identity, and other reasons”); 721 (documenting government abuses of migrants including “torture or ill-treatment by police”). Human Rights First has documented that in the last several months alone there have been “over 340 public reports of rape kidnapping, torture, and other violent attacks against asylum seekers returned to Mexico” under the Administration’s new policy forcing them to remain in Mexico while their claims are pending. *Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy*, at 2 (Oct. 2019);<sup>15</sup> *see also East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1118 (N.D.Cal. 2018) (“68.3 percent of the migrant and refugee populations entering Mexico reported being victims of violence during their transit toward the United States”). Perpetrators of crimes against migrants in Mexico enjoy virtual impunity. *See, e.g.*, Amnesty

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<sup>15</sup> Available at <https://www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf>.

International, *No Safe Place*, at 20 (Nov. 2017) (reporting that 99 percent of crimes against migrants go unpunished).<sup>16</sup>

It has also been widely reported that Mexico regularly returns asylum seekers to their home countries in violation of *its* nonrefoulement obligations. As documented by Amnesty International, the practice is systemic. AR 711 (twenty-four percent of survey respondents had been deported to their country of persecution despite expressing fear to Mexican immigration authorities). The case of *Heidy*, a 32-year-old Guatemalan woman, illustrates the dangers. AR 703. While in Ciudad Juárez, Mexican police attempted to extort Heidy. When she refused to pay, the police took her directly to the airport. Although Heidy expressed a fear of return to Guatemala, and even showed the police her U.S. immigration court papers showing she had an upcoming hearing on her asylum claim, the police nevertheless forcibly returned her to Guatemala.<sup>17</sup> Returning asylum seekers to countries where they are at risk of being returned to their countries of persecution constitutes a violation of the United States' refoulement obligations as well, a concept known as "chain" refoulement. UNHCR Guidance on Irregular Onward Movement ¶ 36 (2019).

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<sup>16</sup> Available at <https://www.amnestyusa.org/wp-content/uploads/2017/11/No-Safe-Place-Briefing-ENG-1.pdf>.

<sup>17</sup> Available at <https://www.amnestyusa.org/wp-content/uploads/2018/01/AMR4176022018-ENGLISH-05.pdf>.

Asylum seekers face similar dangers and obstacles to obtaining protection in Guatemala, El Salvador and Honduras—other common transit countries in the region where the Administration seeks to send them. *See* U.S. DEP’T OF HOMELAND SEC., FACT SHEET: DHS AGREEMENTS WITH GUATEMALA, HONDURAS, AND EL SALVADOR (2019).<sup>18</sup> These Central American countries are experiencing epidemic levels of violence, ranking among the highest murder rates in the world, while utterly failing to protect their own citizens from these abhorrent crimes. *See, e.g.,* UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador*, U.N. Doc. HCR/EG/SLV/16/01 (Mar. 2016); UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala*, U.N. Doc. HR/EG/GTM/18/01 (Jan. 2018); UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras*, U.N. Doc. HCR/EG/SLV/16/01 (July 2016). As a result, men, women and children are fleeing north in search of safe haven.

Primarily known as refugee-sending rather than refugee-receiving countries, the protection systems of Guatemala, El Salvador and Honduras are decidedly unable to handle an influx of asylum seekers. By way of example, it was recently reported that El Salvador’s refugee agency had just a single officer working on

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<sup>18</sup> Available at [https://www.dhs.gov/sites/default/files/publications/fact\\_sheet\\_-\\_agreements\\_with\\_northern\\_region\\_of\\_central\\_america\\_countries.pdf](https://www.dhs.gov/sites/default/files/publications/fact_sheet_-_agreements_with_northern_region_of_central_america_countries.pdf).

asylum claims in the entire country. Nelson Rauda Zablah, *El Salvador Signs Agreement To Accept Asylum Seekers the US Won't Protect*, EL FARO (Oct. 8, 2019).<sup>19</sup> Guatemala's asylum agency has only eight employees, including four asylum officers, and has not resolved a single case this year. Kevin Sieff, *Trump wants border-bound asylum seekers to find refuge in Guatemala instead. Guatemala isn't ready.*, THE WASHINGTON POST (Aug. 16, 2019);<sup>20</sup> *see also* UNHCR, *Factsheet: Guatemala* (Apr. 2019).<sup>21</sup> Honduras fares no better, having evaluated only eighteen applications for asylum in 2017. Inter-American Commission on Human Rights, *Situación de derechos humanos en Honduras [Human Rights Situation in Honduras]*, ORGANIZATION OF AMERICAN STATES, OEA/Ser.L/V/II. Doc. 146 ¶ 321 (Aug. 27, 2019);<sup>22</sup> *see also* U.S. DEPT. OF STATE, HONDURAS 2018 HUMAN RIGHTS REPORT, at 14-15 (Mar. 2019) (reporting that migrants face abuse in Honduras and an overburdened protection system).<sup>23</sup> That

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<sup>19</sup> Available at [https://elfaro.net/en/201909/el\\_salvador/23667/El-Salvador-Signs-Agreement-to-Accept-Asylum-Seekers-the-US-Won%E2%80%99t-Protect.htm](https://elfaro.net/en/201909/el_salvador/23667/El-Salvador-Signs-Agreement-to-Accept-Asylum-Seekers-the-US-Won%E2%80%99t-Protect.htm)

<sup>20</sup> Available at [https://www.washingtonpost.com/world/the\\_americas/trump-wants-border-bound-asylum-seekers-to-find-refuge-in-guatemala-instead-guatemala-isnt-ready/2019/08/15/dff5d1c0-bd4e-11e9-a8b0-7ed8a0d5dc5d\\_story.html](https://www.washingtonpost.com/world/the_americas/trump-wants-border-bound-asylum-seekers-to-find-refuge-in-guatemala-instead-guatemala-isnt-ready/2019/08/15/dff5d1c0-bd4e-11e9-a8b0-7ed8a0d5dc5d_story.html).

<sup>21</sup> Available at <http://www.globalcrrf.org/wp-content/uploads/2019/05/Fact-Sheet-Guatemala-Final-April-2019.pdf>.

<sup>22</sup> Available at <https://www.oas.org/es/cidh/informes/pdfs/Honduras2019.pdf>.

<sup>23</sup> Available at <https://www.state.gov/wp-content/uploads/2019/03/HONDURAS-2018.pdf>.

the Administration would hold out Guatemala, El Salvador, and Honduras as safe countries is both absurd and specious.

The government's citation to a similar transit rule in the European Union ("EU") to support the legality of the rule at issue here is inapposite. Gov't Br. at 19. Unlike the EU context, UNHCR has publicly expressed it is "deeply concerned" that the United States' latest asylum ban "will endanger vulnerable people in need of international protection." *UNHCR deeply concerned about new U.S. asylum restrictions* (July 19, 2019).<sup>24</sup> UNHCR has repeatedly and emphatically stated that reviewing countries' actual practice and compliance with human rights instruments is an essential part of assessing the adequacy of any transfer arrangement of asylum seekers between countries. *See, e.g.*, UNHCR Transfer Guidance.

The most cursory review of human rights conditions in Mexico and other common transit countries in the region clearly shows they do not provide a safe or adequate system of asylum adjudication. By acknowledging that "meritorious asylum claims" will undoubtedly be "channeled" to these countries, Gov't Br. 39, the Administration is all but conceding that, as a direct result, violations of our nonrefoulement obligations will also undoubtedly occur.

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<sup>24</sup> Available at <https://www.unhcr.org/en-us/news/press/2019/7/5d2cdf114/unhcr-deeply-concerned-new-asylum-restrictions.html>.



**C. Withholding of removal and relief under the Convention against Torture do not provide adequate protections**

The continued availability of withholding of removal (“withholding”) under 8 U.S.C. § 1231(b)(3) and protection under the U.N. Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) implemented at 8 C.F.R. §§ 1208.16-1208.18, does not cure the illegality of this policy or the disastrous impacts it will have. *See* Gov’t Br. 43 (justifying policy based on eligibility for withholding and CAT). These forms of relief are simply no substitute for asylum.

Both withholding and CAT require applicants to demonstrate a much higher likelihood of harm in order to obtain protection. *See, e.g., Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (stating that the “clear probability” of harm standard for withholding is “more stringent” than the “well-founded fear” standard for asylum); 8 C.F.R. § 1208.16(c)(2) (“more likely than not” standard for CAT relief). Such a standard poses a nearly insurmountable hurdle, especially for unaccompanied children like Jose and other vulnerable groups. Indeed, the Administration seemingly acknowledges this result—“To be sure, the Departments’ selection of a categorical rule means that some otherwise meritorious asylum claims will be channeled to other countries.” Gov’t Br. 39. As mentioned (*see* Part I. *supra*), asylum seekers in expedited removal face difficulty even

making it through a threshold fear screening to gain access to a full hearing on their withholding or CAT claims.

Even if applicants are able to meet the higher eligibility standard, the rule has devastating, long-term human consequences. Perhaps most significantly, unlike those granted asylum, recipients of withholding or CAT cannot petition for family members to join them. *Compare* 8 C.F.R. § 1208.16(e) *with* 8 U.S.C. § 1158(b)(3); *see also East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 766 (9th Cir. 2018). Denying bona fide refugees asylum violates the fundamental human rights of family unity. *See* Kate Jastram & Kathleen Newland, *Family Unity and Refugee Protection*, REFUGEE PROTECTION IN INTERNATIONAL LAW, 559 (2003).

Being limited to lesser forms of relief has other negative impacts that violate the Convention's mandate to assimilate refugees. Unlike asylees, recipients of withholding and CAT protection are not automatically permitted to work. Instead, withholding or CAT grantees must apply for work authorization and suffer through delays in processing, which can have deleterious effects on their ability to survive. *See* 8 C.F.R. § 274a.12(a)(10); Amer. Immigration Lawyers' Assoc., *AILA Policy Brief: USCIS Processing Delays Have Reached Crisis Levels Under the Trump Administration* (Jan. 2019).<sup>25</sup> They are also not permitted to travel outside the

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<sup>25</sup> Available at <https://www.aila.org/infonet/aila-policy-brief-uscis-processing-delays>.

United States, for example, even to visit their families in a third country, at least not without giving up their right to return to the United States. *See* 8 C.F.R. § 223.1 (refugee travel documents are available only to asylees); 8 C.F.R. § 241.7 (individual is considered to have self-deported if she departs the United States with an outstanding removal order). This status denies *bona fide* refugees their right to freedom of movement under Article 28 of the Refugee Convention, which states governments “shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory.” Finally, recipients of withholding or CAT are not eligible to adjust status to permanent residence, leaving them with precarious and unsettled futures. *See* 8 C.F.R. § 245.1(d)(1) (explaining only those in “lawful immigration status” can seek permanent residency and excluding withholding recipients from such status); *Id.* § 209.2 (authorizing adjustment of status to permanent residence for asylees).

At its core, the rule violates the principle of non-discrimination found in Article 3 of the Refugee Convention and the U.S. refugee protection system by precluding from asylum protection any non-Mexican fleeing persecution who is unable to enter by air, or sea, and therefore arrives at a land port of entry. *See, e.g., Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1059-60 (9th Cir. 2017) (en banc) (examining history of the Refugee Act leading to the “nondiscriminatory definition of refugee”). In doing so, it clearly places cruel and manifestly unsafe obstacles in

front of asylum seekers traveling by land from non-contiguous countries. The Administration's new rule is patently unlawful in flagrant violation of the United States' bedrock domestic and international obligations to protect the persecuted.

### CONCLUSION

For the foregoing reasons, the Court should affirm the district court's injunction.

Dated: October 15, 2019

Respectfully submitted,

/s/ Blaine Bookey

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**Signature** s/Blaine Bookey **Date** October 15, 2019

(use "s/[typed name]" to sign electronically-filed documents)

# **APPENDIX**

## LIST OF AMICI

Asylum Access  
Oakland, California

Asylum Access México  
Ciudad de México, México

Asylum Seeker Assistance Project  
Washington, DC

Boston College Immigration Clinic  
Newton, Massachusetts

Boston University Immigrants' Rights  
and Human Trafficking Program  
Boston, Massachusetts

Casa Cornelia Law Center  
San Diego, California

Catholic Legal Immigration Network  
Inc.  
Silver Spring, Maryland

Center for Gender & Refugee Studies  
San Francisco, California

Center for Victims of Torture  
St. Paul, Minnesota

Centro Legal de la Raza  
Oakland, California

CGRS-California  
San Francisco, California

Columbia Law School Immigrants'  
Rights Clinic  
New York, New York

Community Justice Alliance  
Sacramento, California

Community Legal Services in East Palo  
Alto  
East Palo Alto, California

Dolores Street Community Services  
San Francisco, California

Harvard Immigration and Refugee  
Clinical Program  
Cambridge, Massachusetts

HIAS  
Washington, DC

Hofstra Law School Asylum Clinic  
Hempstead, New York

Immigrant Justice Clinic  
Tucson, Arizona

Immigrant Leal Center  
Omaha, Nebraska

Immigrant Legal Defense  
Oakland, California

Immigrant Rights Clinic, University of  
California, Hastings  
San Francisco, California

Immigration Clinic, University of  
North Carolina School of Law  
Chapel Hill, North Carolina

Immigration Clinic, USC Gould School  
of Law  
Los Angeles, California

Immigration Law Clinic, University of  
Massachusetts School of Law  
N. Dartmouth, Massachusetts

International Human Rights Clinic, UC  
Irvine School of Law  
Irvine, California

International Human Rights Law  
Clinic, American University  
Washington College of Law  
Washington, DC

International Refugee Assistance  
Project  
New York, New York

James E. Rogers College of Law,  
Immigrant Justice Clinic  
Tucson, Arizona

Migrant and Immigrant Community  
Action Project  
Saint Louis, Missouri

National Immigrant Justice Center  
Chicago, Illinois

National Survivor Network  
Los Angeles, California

New York Law School Asylum Clinic  
New York, New York

Pangea Legal Services  
San Francisco, California

Program for Torture Victims  
Los Angeles, California  
Refugees International  
Washington, DC

Safe Passage Project  
New York, New York

San Diego Volunteer Lawyer Program,  
Inc.  
San Diego, California

Southwestern Law School Community  
Lawyering Clinic  
Los Angeles

St. Francis Community Services,  
Catholic Legal Assistance Ministry  
St. Louis, Missouri

The Advocates for Human Rights  
Minneapolis, Minnesota

The Cornell Asylum & Convention  
Against Torture Appellate Clinic  
Ithaca, New York

The Florence Immigrant & Refugee  
Rights Project  
Florence, Arizona

University of Chicago Law School  
Mandel Legal Aid Clinic  
Chicago, Illinois

University of Illinois College of Law  
Immigration Law Clinic  
Champaign, Illinois



University of Miami School of Law,  
Human Rights Clinic  
Miami, Florida

Urban Morgan Institute for Human  
Rights, University of Cincinnati  
College of Law  
Cincinnati, Ohio

University of the District of Columbia -  
Immigration & Human Rights Clinic  
Washington, DC

Women's Refugee Commission, Inc.  
Washington, DC

## CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will automatically send an email notification of such filing to the attorneys of record who are registered CM/ECF users.

Dated: October 15, 2019

/s/ Blaine Bookey  
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*Attorney for Amici Curiae*