

In the United States Court of Appeals
for the Ninth Circuit

INNOVATION LAW LAB, et al.
Plaintiffs-Appellees,

v.

KEVIN K. McALEENAN,
ACTING SECRETARY OF HOMELAND SECURITY, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
No. 3:19-cv-807-RS

**BRIEF OF AMNESTY INTERNATIONAL USA,
THE WASHINGTON OFFICE ON LATIN AMERICA,
THE LATIN AMERICA WORKING GROUP & IMUMI
AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES**

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INTEREST OF *AMICI CURIAE*¹

Amnesty International USA is a non-partisan, non-profit organization that, together with more than 70 national and territorial counterparts, makes up Amnesty International. Amnesty International is the world's largest grass-roots human rights organization, comprising a global support base of more than seven million individual members, supporters, and activists in more than 150 countries and territories, including in Mexico and the United States. Amnesty International engages in advocacy, litigation, and education to prevent and end human rights violations and to demand justice for those whose rights have been violated.

Amnesty International's interest in this case stems from a combination of its expertise in the human rights principles underpinning the international refugee protection framework and its expertise on conditions faced by asylum-seekers in Mexico and the United States. For the past several years, Amnesty International has documented the dangers faced by migrants and asylum-seekers in Mexico and analyzed how U.S. and Mexican policies and practices have failed to respect the right to seek asylum.

The Washington Office on Latin America (“WOLA”) is a research and advocacy organization advancing human rights in the Americas. WOLA

¹ The Parties consent to this filing. No entity other than *amici* and its counsel authored this brief or provided funding related to it.

works with partner organizations and migrant shelters in Mexico to research and document crimes and human rights violations against migrants in transit and asylum-seekers in Mexico, and provides policy recommendations to the Mexican and U.S. governments to improve protections for this vulnerable population.

The Latin America Working Group (“LAWG”) mobilizes concerned citizens, organizations, and networks to call for just U.S. policies towards Latin America and the Caribbean. LAWG has published materials to raise awareness about the dangers of the forced return policy to migrants’ rights, including the violence and impunity they are exposed to in Mexico, and has advocated for the end of this harmful policy.

The Institute for Women in Migration (“IMUMI”) is an NGO that advocates for women migrants and their families within Mexico, the United States, and Central America. IMUMI addresses issues important to migrant women and transnational families through legal strategies, research, communication, and policy reform. IMUMI’s interest in this case stems from its monitoring of the implementation of the forced return program in Mexico and the dangers faced by asylum-seekers in Mexico, as well as its interest in assuring access to asylum proceedings in the United States.

SUMMARY OF ARGUMENT

International and domestic law require the United States to comply with the principle of *non-refoulement*, which prohibits sending individuals to a country or jurisdiction where they would face a risk of persecution or other serious human rights violations. The principle of *non-refoulement* encompasses the legal obligation to ensure that asylum-seekers are both protected from endangerment in their country of origin and are not sent to any other country where they would be in danger.

The forced return policy is irreconcilable with this obligation. As a member of this Court has recognized, the policy “is virtually guaranteed to result in some number of applicants being returned to Mexico in violation of the United States’ *non-refoulement* obligations.” *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 511 (9th Cir. 2019) (Watford, J., concurring). This is exactly what is happening: Individuals under the forced return policy are routinely exposed to risks of serious harm in Mexico and possible deportation to their home countries.

A. The forced return policy fails to adhere to the principle of *non-refoulement* because it dispenses with critical safeguards meant to ensure that asylum-seekers with well-founded fears of persecution are not returned to danger. Under the program, asylum-seekers are presumptively returned to Mexico without inquiry into the potential harm they may endure. They must

then wait for weeks to months before receiving an immigration hearing in the United States. The only way to circumvent that result is for individuals to affirmatively state to a Department of Homeland Security (“DHS”) officer that they fear being returned to Mexico. Even when they assert such fear, DHS often returns individuals to Mexico anyway, employing a screening process that even asylum officers have described as a sham. Returnees undergoing screening do not generally have access to counsel, do not receive written explanations of asylum officers’ decisions, and are unable to seek review of the decision.

B. The forced return policy also runs afoul of the principle of *non-refoulement* because it sends asylum-seekers to Mexico, where they will face persecution or a real risk of serious harm. Migrants transiting through Mexico frequently fall victim to kidnappings, homicides, sexual assault, and robbery. They are terrorized by organized criminal elements, corrupt migration authorities, and local police. The Mexican government has not and cannot effectively address these issues. To the contrary, despite an increasing number of forced returnees, neither the U.S. nor Mexican governments have provided meaningful support services to border cities. Returnees, moreover, are routinely deprived of critical identity documents. The U.S. government regularly confiscates returnees’ documents when they are entered into the program, and the Mexican government does not issue returnees any kind of valid identity

documentation upon their return to Mexico. These dangers are sufficient to create a serious risk of *refoulement*.

C. The forced return policy also violates the principle of *non-refoulement* because returnees are exposed to serious risk of return to their countries of origin—a practice known as “chain *refoulement*.” As documented by Amnesty International, Mexico’s immigration authorities do not apprise migrants of their right to apply for asylum and, in fact, regularly deport individuals who express fears of persecution and torture—in clear contravention of Mexican and international law. Indeed, in response to pressure from the United States, Mexico vowed just this past month to increase deportations of Central American migrants, further heightening the likelihood of unlawful deportation.

In short, because the forced return policy exposes returnees to direct and chain *refoulement* in violation of the United States’ domestic and international human rights commitments, it must immediately be enjoined. *Amici* therefore request that this Court affirm the district court’s preliminary injunction order.

ARGUMENT

THE FORCED RETURN POLICY VIOLATES THE UNITED STATES' COMMITMENT TO *NON-REFOULEMENT*

The right to seek asylum is enshrined in the Universal Declaration of Human Rights, to which the United States is a signatory, and the *United Nations 1967 Protocol Relating to the Status of Refugees*, to which the United States is a party.² The cornerstone of the *1967 Protocol* is the principle of *non-refoulement*, which obliges states not to return refugees to any country where they would face persecution or a real risk of serious human rights violations or other abuses.

The principle of *non-refoulement* encompasses several obligations, three of which are relevant here. *First*, prior to any return or transfer, states must conduct individualized screenings to prevent the erroneous transfer of a person to a place where he or she would be at real risk of persecution or serious harm.³ *Second*, *non-refoulement* is violated whenever asylum-seekers are

² Congress enacted the Refugee Act, Pub. L. No. 96-212, 94 Stat. 102 (1980), expressly to “bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 n.19 (1987).

³ UNHCR, *Note on the Principle of Non-Refoulement* (Nov. 1997), <https://www.refworld.org/docid/438c6d972.html> (“Procedures . . . for identifying refugees should provide a guarantee against *refoulement*, by ensuring that persons who are entitled to protection do in fact receive it.”).

sent to any place where they have reason to fear for their lives.⁴ *Third*, states may not engage in chain *refoulement* by sending asylum-seekers to a territory from where they are again transferred to a place where they fear persecution or harm.⁵ The forced return policy transgresses all three of these obligations.

A. The Forced Return Policy Fails To Safeguard Asylum Claimants From Return to Danger

Because the forced return policy sends asylum-seekers back to Mexico without systematically asking them whether they fear harm there, let alone conducting individualized screenings with them, it dispenses with a safeguard critical to ensure that the United States is comporting with its obligation of *non-refoulement*. For more than two decades prior to the forced return policy,

⁴ UNHCR, *Note on the Principle of Non-Refoulement* (Nov. 1997), <https://www.refworld.org/docid/438c6d972.html> (“[R]espect for the principle of *non-refoulement* requires that asylum applicants be protected against return to a place where their life or freedom might be threatened until it has been reliably ascertained that such threats would not exist.”).

⁵ UNHCR, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, at ¶ 12 (May 26, 2004), <https://undocs.org/CCPR/C/21/Rev.1/Add.13> (referring to “an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm . . . either in the country to which removal is to be effected or in any country to which the person may subsequently be removed”); *accord Hirsi Jamaa and Others v. Italy*, ECtHR, Application No. 27765/09, Judgment at ¶ 147 (Feb. 23, 2012) (“It is a matter for the State carrying out the return to ensure that the intermediary country offers sufficient guarantees to prevent the person concerned being removed to his country of origin without an assessment of the risks faced.”).

“immigration officers would typically process asylum applicants who lack valid entry documentation” under a procedure known as “expedited removal.” *Innovation Law Lab*, 924 F.3d at 506; *see* 8 U.S.C. § 1225(b)(1). Even though expedited removal stripped individuals of many basic procedural protections, Congress nonetheless recognized that an individualized screening mechanism prior to return was essential for safeguarding *non-refoulement*. *See* 142 Cong. Rec. H11054, H11066–67 (daily ed. Sept 25, 1996) (“[I]t is . . . important . . . that the process be fair . . . [and] not result in sending genuine refugees back to persecution.”).

Individuals in expedited removal who express a fear of return receive an initial, non-adversarial screening: either a “credible fear” interview, 8 U.S.C. § 1225(b)(1)(A)(ii), or a “reasonable fear” interview, for those in reinstatement proceedings or administrative removal, 8 C.F.R. § 1208.31. During these screenings, the asylum officer must read asylum-seekers a summary of their rights, specifically inquire into their fear of return, allow for the presence and participation of a legal representative, and provide a written record of the screening.

The screening process for the forced return policy is deficient by comparison: (1) It does not require officials to ask about an individual’s fear of return (and often ignores those fears even when articulated); (2) it forces

asylum-seekers to meet a high evidentiary threshold unprecedented for an initial fear screening; and (3) it lacks basic procedural safeguards.

1. Forced Returnees Must Volunteer Their Fear of Return to Mexico to Have Any Hope of Avoiding Return to Mexico

Individuals subject to forced return often arrive at the U.S. border after navigating treacherous, exhausting journeys. They are greeted by a process seemingly designed to disorient. Under the forced return policy, immigration officers are instructed not to ask asylum-seekers whether they fear persecution or torture in Mexico.⁶ The only way to avoid transfer to Mexico is for the asylum-seeker to affirmatively articulate a fear of return to a DHS officer. That aspect of the policy alone “virtually guarantees to result in some number of applicants being returned to Mexico in violation of the United States’ *non-refoulement* obligations.” *Innovation Law Lab*, 924 F.3d at 511 (Watford, J., concurring).

Moreover, before being sent back to Mexico, returnees are generally given no explanation of where they are being sent or why; often, they cannot even access written information about the process in a language they understand. Several returnees told Amnesty International in April 2019 that U.S.

⁶ Dara Lind, *Exclusive: Civil Servants Say They’re Being Used as Pawns in a Dangerous Asylum Program*, Vox (May 2, 2019), <https://www.vox.com/2019/5/2/18522386/asylum-trump-mpp-remain-mexico-lawsuit>.

officials denied their repeated requests for Spanish-language translations of immigration forms prior to being returned to Mexico. A Honduran returnee stated that “[w]e wanted to read the forms in Spanish, but they said it was a waste of time.”⁷ Instead, DHS officers filled out the forms on their behalf, which they were then forced to sign.⁸

Disturbingly, reports from the field show that even when asylum-seekers express a fear of returning to their country of origin *and* of returning to Mexico, their claims are ignored or misrepresented. In one instance, a 46-year-old man from Guatemala, who requested protection at the border with his 17-year-old son, told agents he feared return to his country of origin and that he did not feel safe returning in Mexico.⁹ He emphasized that “the only thing we didn’t want was for them to send us back to Mexico.”¹⁰ However, when Amnesty International reviewed the forms completed by Customs and Border Protection (“CBP”), the forms omitted this information and claimed

⁷ Interview by Amnesty International with Forced Returnees, in Ciudad Juárez, Mexico (April 18, 2019).

⁸ *Id.*

⁹ Interview by Amnesty International with Forced Returnee, in Tijuana, Mexico (April 9, 2019).

¹⁰ *Id.*

only that the man sought entry into the United States “to work and lead a better life.”¹¹

A Honduran man forcibly returned to Tijuana shared a similar experience: “They asked me why I had come from my country, I said I was afraid to return to my country. Many people think we are making this up, but the problems in our country are out of control. They made me sign a paper, and that was it. They didn’t say anything else. They just claimed I’m trying to work.”¹²

During three days in San Diego immigration court in April 2019, Amnesty International observed that no forced returnees (out of 57) were ever explicitly asked whether they feared being sent back to Mexico.¹³ Yet, at various points in their proceedings, over 40 percent nonetheless spontaneously expressed fear of return.¹⁴ All had initially been returned to Mexico despite these stated fears. Many returnees described falling victim to crime and abuse

¹¹ *Id.*

¹² Interview by Amnesty International with Forced Returnee, in Tijuana, Mexico (April 9, 2019).

¹³ Amnesty International, *After Observing Asylum Hearings, Amnesty International Calls to Stop Illegal Pushbacks of Asylum Seekers to Mexico* (Apr. 11, 2019), <https://www.amnestyusa.org/press-releases/after-observing-asylum-hearings-amnesty-international-calls-to-stop-illegal-pushbacks-of-asylum-seekers-to-mexico/>.

¹⁴ *Id.*

in Mexico. One man, for example, stated that the same persecutors he was fleeing from in Honduras managed to pursue him in Mexico, and even located his whereabouts at a Tijuana migrant shelter.¹⁵

There is evidence that American officials are aware of the risks of harm in Mexico. For example, CBP officers expressed knowledge of the possible dangers to two Guatemalan sisters as they walked them over the bridge to Ciudad Juárez. The older sister stated that “when [the CBP officers] got me to the bridge, they joked that I was going to be kidnapped.”¹⁶ And while asylum officers at U.S. Citizenship and Immigration Services, who are trained and thus well-versed in country conditions, “know that Mexican police are often compromised or indifferent, . . . asylum seekers who’ve barely spent time in Mexico often do not.”¹⁷ In these circumstances, placing the burden on asylum-seekers to affirmatively express a fear of return to Mexico is inconsistent with a commitment to uphold *non-refoulement*.

¹⁵ Interview by Amnesty International with Forced Returnee, in San Diego, California (April 11, 2019).

¹⁶ Interview by Amnesty International with Forced Returnee, in Ciudad Juárez, Mexico (April 18, 2019).

¹⁷ Lind, *supra* n. 6.

2. Forced Returnees Are Subject to an Unreasonably High Evidentiary Standard

The forced return policy also fails to guard against *refoulement* because it requires asylum-seekers to meet an exceedingly high evidentiary threshold, absent minimal procedural protections. U.S. law typically guards against *refoulement* by applying a deliberately low evidentiary threshold for individuals who present at the border seeking asylum: a “significant possibility” of winning asylum, for a credible fear interview, and a “reasonable possibility” of persecution or torture, for a reasonable fear interview. *See Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10312, 10320 (Mar. 6, 1997) (“The credible fear standard sets a low threshold of proof of potential entitlement to asylum.”); *Bartolome v. Sessions*, 904 F.3d 803, 808 n.2 (9th Cir. 2018) (reasonable fear interview was “[m]odeled on the credible fear screening mechanism”).

By contrast, under the forced return policy, individuals must show that they would “more likely than not be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion . . . or more likely than not be tortured.” Policy Memorandum, USCIS, *PM-602-0169: Guidance for Implementing Section 235(b)(2)(C) of the Immigration and National Act and the Migrant Protection Protocols*, at 3 (Jan. 28, 2019) (“USCIS Guidance”). Outside of the forced return policy, the “more likely

than not” standard appears just twice in U.S. immigration law: to determine whether individuals are eligible for withholding of removal, 8 U.S.C. § 1231(b)(3), and relief under the Convention Against Torture (“CAT”), 8 C.F.R. § 1208.16(c). Critically, both forms of relief—withholding of removal and CAT—are considered *after* a full immigration court hearing, with all the procedural protections that hearing affords. The forced return policy imposes the same standard at the initial screening interview, with no such opportunity to be heard.

Furthermore, many asylum officers have come to learn that, in practice, they are being forced to interpret the “more likely than not” standard such that it is “all but impossible for applicants to meet.”¹⁸ As one asylum officer noted, “[i]f you want to [make a] positive [decision], you will face Herculean efforts to get it through. If your supervisor says yes, headquarters will probably say no.”¹⁹ According to another asylum officer, “more likely than not” feels “closer to 90 or 95 percent than 51.”²⁰ Early numbers bear out this anecdotal evidence: a June 2019 study of individuals subject to the forced return policy concluded that only 1 percent of the over 8,000 cases analyzed were

¹⁸ Lind, *supra* n. 6.

¹⁹ *Id.*

²⁰ *Id.*

transferred off the docket.²¹ In other words, once returnees are entered into the program, it is virtually impossible to escape.

3. Forced Returnees Lack Adequate Procedural Safeguards

Compounding the flaws with the forced return policy, the screenings contemplated by the policy do not provide adequate procedural safeguards: Individuals who undergo them lack access to counsel, never receive a written explanation of their decision, and cannot seek judicial review of their decision.

Individuals in expedited removal have the right to consult with an attorney before their credible and reasonable fear interviews and may request that counsel attend the interview and advocate on their behalf. 8 U.S.C. § 1225(b)(1)(B)(iv). That protection is absent from the screening mechanism envisaged under the forced return policy. Policy guidance specifically states that, because “assessments are part of either primary or secondary inspection, DHS is currently unable to provide access to counsel during the assessments.” USCIS Guidance at 3. While in practice a very small handful of attorneys

²¹ Reade Levinson, Mica Rosenberg & Kristina Cooke, *Exclusive: Asylum Seekers Returned to Mexico Rarely Win Bids to Wait in U.S.*, Reuters (June 12, 2019), <https://www.reuters.com/article/us-usa-immigration-returns-exclusive/exclusive-asylum-seekers-returned-to-mexico-rarely-win-bids-to-wait-in-us-idUSKCN1TD13Z>. These numbers likely include individuals who were transferred from the forced return docket for other reasons, including medical conditions.

have nonetheless successfully lobbied to attend these screening interviews, that is the exception, not the norm.

In addition, while asylum-seekers in expedited removal are entitled to written notice and explanation of an asylum officer's determination, 8 C.F.R. §§ 208.30, 208.31, reports suggest that officers are not providing applicants with such notice or explanation under the forced return policy.²² That effectively removes any sort of check on the officer's determination and handicaps legal counsel who may eventually be retained to assist these returnees.

The forced return policy also does not contemplate judicial review of the decision to return an asylum-seeker to Mexico. In credible and reasonable fear screenings, asylum-seekers may obtain review from an immigration judge. And this Court recently held that habeas review is also available for individual fear determinations, in order to “provide[] [an additional form of] important oversight of whether DHS complied with the required credible fear procedures.” *Thuraiissigiam v. U.S. Dep’t of Homeland Sec.*, 917 F.3d 1097, 1118 (9th Cir. 2019). The fear screenings under the forced return policy, however, do not contain even a single layer of review, despite the enormous risks

²² Human Rights First, *A Sordid Scheme: The Trump Administration's Illegal Return of Asylum Seekers to Mexico* (Mar. 2019), https://www.humanrightsfirst.org/sites/default/files/A_Sordid_Scheme.pdf.

of harm asylum-seekers face in Mexico. The dearth of such basic safeguards does not comport with U.S. *non-refoulement* obligations.

B. Forced Returnees Face Serious Harm in Mexico.

The lack of procedural safeguards protecting returnees is particularly troubling when considering the real dangers migrants and asylum-seekers face in Mexico as they confront an indefinite wait there. While the U.S. government initially represented that returnees would receive hearings in the United States within 45 days, returnees are now being scheduled for hearings one year in the future.²³ Defendants-Appellants seek to allay any concerns about this prolonged stay by claiming that the forced return policy rests “on assurances that the Mexican government remains committed to fulfilling its own domestic and international obligations.” U.S. Br. 43–44. For its part, the Mexican government has stated that it “will . . . offer jobs, healthcare and education” while returnees “await the adjudication of their asylum claims.”²⁴ But these public assurances belie reality: forced returnees are routinely exposed

²³ Adolfo Flores, *They Were Told 45 Days. Now Asylum-Seekers Are Being Forced to Wait Up to a Year in Mexico*, BuzzFeed News (May 21, 2019), <https://www.buzzfeednews.com/article/adolfoflores/remain-in-mexico-migrants-wait-year-juarez-mpp> (court dates for June 2020).

²⁴ U.S. Dep’t of State, *U.S.-Mexico Joint Declaration* (June 7, 2019), <https://www.state.gov/u-s-mexico-joint-declaration/>.

to serious harms in Mexico, including from the very authorities tasked with protecting them.

1. Forced Returnees To Mexico Are Sent Directly Into Harm's Way.

Asylum-seekers and migrants are facing an increasingly hostile environment in Mexico. This past November, Mexican protesters in border cities proclaimed that Central American migrants “came in like animals” and did not deserve “handouts.”²⁵ Mexican officials in Tijuana and Ciudad Juárez confirmed in conversations with Amnesty International in April 2019 that tensions have continued to rise against migrants and asylum-seekers.

In addition to discrimination, forced returnees are subject to the same harms as other similarly-situated migrants and asylum-seekers: petty crime, kidnappings, extortion, and even death—all targeted against these individuals because of their migrant status. *See E. 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.”).

²⁵ James Frederick, *Shouting ‘Mexico First,’ Hundreds in Tijuana March Against Migrant Caravan*, NPR (Nov. 19, 2018), <https://www.npr.org/2018/11/19/669193788/shouting-mexico-first-hundreds-in-tijuana-march-against-migrant-caravan>.

Crime rates in border cities like Tijuana, Mexicali, and Ciudad Juárez have spiked dramatically, to the point where they are considered some of the most violent cities in the world.²⁶ Criminal groups in Mexico purposely prey on migrants for profit; recent studies indicate that such targeting brings in approximately \$134 million annually for organized criminal groups.²⁷ Kidnapping and extortion of migrants and asylum-seekers is likewise rampant. Kidnappers reportedly demand ransoms of between \$500 and \$10,000 from destitute individuals and families.²⁸ Those who cannot scrape together a payment have been purportedly killed by their captors.²⁹

Alternatively, kidnappers sometimes entice desperate individuals with promises to smuggle them into the United States (or take them by threat of

²⁶ Kate Linthicum, *Five of the Six Most Violent Cities in the World Are in Mexico*, Los Angeles Times (Mar. 14, 2019), <https://www.latimes.com/world/la-fg-mexico-tijuana-violence-20190314-story.html>.

²⁷ Robert Strauss Center, *Organized Crime and Central American Migration In Mexico Fall 2017–Spring 2018*, at 14 (June 2018), http://strausscenter.org/images/pdf/MSI/MSI-2017-2018_PoliciaPRP.pdf (“Strauss Crime Report”).

²⁸ Robert Strauss Center, *Migrant Kidnapping In Mexico: Regional Differences*, at 8 (Nov. 1, 2018), https://www.strausscenter.org/images/MSI/Leutert_KidnappingReport_181119_Final.pdf (“Strauss Kidnapping Report”).

²⁹ Steven Dudley, *Part III: The Gauntlet*, InSight Crime (Nov. 24, 2012), <https://www.insightcrime.org/investigations/part-iii-the-gauntlet/>.

force).³⁰ Some kidnapped migrants and asylum-seekers ultimately find themselves pushed into forced labor, including sex work. This problem is especially prevalent among women and LGBTI individuals.³¹ In 2016 and 2017, the U.N. Refugee Agency reported that “two-thirds of the LGBTI refugees they spoke with had suffered sexual and gender-based violence in Mexico.”³² In a 2018 survey of migrants and refugees along the transit route in Mexico, nearly one-third of women reported experiencing sexual abuse.³³

The following experiences from individuals subjected to forced return provide a human face to the reality on the ground:

- Ronaldo³⁴ (Guatemalan returnee): After being returned to Mexico, Ronaldo was detained for three hours, beaten, and robbed at gunpoint.

³⁰ Strauss Kidnapping Report, *supra* n. 28, at 4.

³¹ Strauss Crime Report, *supra* n. 27, at 13.

³² Strauss Crime Report, *supra* n. 27, at 6.

³³ Médecins Sans Frontières, *Mexico: An Unsafe Country for Thousands of Refugees Fleeing Violence in Central America* (Jun. 20, 2018), <https://www.msf.org/mexico-unsafe-country-thousands-refugees-fleeing-violence-central-america>.

³⁴ This brief uses aliases for some returnees and asylum-seekers.

In court, he stated that he did not want to go back to Mexico because he did not feel safe.³⁵

- Riccy (Honduran returnee): “Yesterday, I stepped out [from a Ciudad Juárez shelter] to buy my lunch, and a man tried to take my [four-year old] son.”³⁶
- Lisa (Honduran returnee): “[The federal police] asked me what nationality I was, I told them I was from Honduras then they say: ‘Come with me.’ They grab my head, bend me over, and take me out of the house and put me in a black car. They covered my eyes with gray tape.” Lisa was kidnapped by the police for ransom and raped multiple times. She stated that although her eyes were covered with tape, she managed to see because her tears soaked through the glue.³⁷

Many crimes against migrants in Mexico go unaddressed by law enforcement: a recent report concluded that 99 percent of crimes committed

³⁵ Robert Moore, ‘I’m in Danger’: *Migrant Parents Face Violence in Mexico Under New Trump Policy*, Texas Monthly (Apr. 25, 2019), <https://www.texasmonthly.com/politics/im-in-danger-migrant-parents-face-violence-in-mexico-under-new-trump-policy/>.

³⁶ *Id.*

³⁷ *Secuestraron Federales a Migrante Hondureña [Honduran Migrant Kidnapped by Federal Police]*, El Diario (June 18, 2019), <https://www.eldiariodechihuahua.mx/estado/secuestraron-federales-a-migrante-hondurena-20190618-1528964/>.

against migrants go unpunished.³⁸ And rather than protect the vulnerable, local Mexican officials sometimes collude with the very criminals who carry out abuses.³⁹ A 2017 survey concluded that a quarter of crimes against migrants had been committed by Mexican police and other government officials.⁴⁰ In some instances, these officials engage in extortion, threatening to abuse, delay, or deport the migrants and asylum-seekers who fail to pay bribes.⁴¹ Such practices “may be increasing as [U.S.] policies force migrants to stay longer on the Mexican side of the border.”⁴²

On this score, the following accounts are particularly illuminating:

³⁸ Amnesty International, *No Safe Place*, at 20 (Nov. 2017), <https://www.amnestyusa.org/wp-content/uploads/2017/11/No-Safe-Place-Briefing-ENG-1.pdf>.

³⁹ Strauss Crime Report, *supra* n. 27, at 22.

⁴⁰ Robert Strauss Center, *The Implementation and Legacy of Mexico’s Southern Border Program*, at 34 (June 2019), https://www.strausscenter.org/images/MSI/PFS_Report_FINAL.pdf.

⁴¹ Emily Green, *Exclusive: Mexican Officials Are Extorting Thousands of Dollars From Migrants Applying For Asylum*, Vice News (Mar. 13, 2019), https://news.vice.com/en_us/article/kzdy4e/exclusive-mexican-officials-are-extorting-thousands-of-dollars-from-migrants-to-apply-for-asylum.

⁴² Araine Francisco & Josefina Salomon, *Mexican Officials Extort Asylum Seekers on Way to USA*, InSight Crime (Mar. 25, 2019), <https://www.insightcrime.org/news/analysis/mexican-officials-extort-asylum-seekers/>.

- Joharvy (Ecuadoran asylum-seeker): “I never in my life thought I was going to get here and be extorted . . . But what was I going to do? I was scared. After so much effort to get here, I prefer to give him all our money than have to return.”⁴³
- Josue (Honduran asylum-seeker): “I don’t feel safe to be here. Anything can happen, because I’m Honduran. The police here are very corrupt, and they steal the money of lots of people.”⁴⁴
- Pamela (Salvadoran asylum-seeker): “Since I’ve been attacked and assaulted by the Mexican police in Mexico City, I wouldn’t feel safe going to the police if I were attacked by people here in Tijuana. They say Tijuana is a very dangerous place, and I’m afraid to go walk around in the streets by myself.”⁴⁵

For those under the forced return policy, local Mexican authorities are too often a source of danger, not protection.

⁴³ Green, *supra* n. 41.

⁴⁴ Interview by Amnesty International with Forced Returnee, in Tijuana, Mexico (April 8, 2019).

⁴⁵ Interview by Amnesty International with Forced Returnee, in Tijuana, Mexico (April 8, 2019).

2. The Mexican Government Is Unable To Protect Forced Returnees

Regardless of whatever public commitments the U.S. and Mexican governments have made regarding the safety of forced returnees, and despite the Mexican government's obligations under international law, the reality is that the Mexican government cannot protect the thousands of people the forced return policy has herded its way. *See Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1072 (9th Cir. 2017) (en banc) (noting as to Mexico's commitments to the protection of LGBTI individuals that "[i]t is not unusual that a country's *de jure* commitments . . . do not align with the *de facto* reality of whether the State is able and willing to provide protection.") (internal quotation marks omitted).

Mexico's support systems have simply been overwhelmed by the forced return policy. Returnees tend to settle in border cities to await their U.S. immigration proceedings. Reports of overcrowding at shelters in these border cities abound.⁴⁶ A 250-bed shelter in Ciudad Juárez, for example, currently houses almost double its capacity: 480 migrants and asylum-seekers, 60 percent of them forced returnees, most of whom are only allowed to stay in the

⁴⁶ Molly Hennessy-Fiske, *Pregnant Women, Other Vulnerable Asylum Seekers are Returned to Mexico to Await Hearings*, Los Angeles Times (May 19, 2019), <https://www.latimes.com/nation/la-na-migrant-remain-in-mexico-20190519-story.html>.

shelter for 16 days.⁴⁷ A patchwork of ad hoc church shelters have sprung up in response to the growing numbers of migrants because of the lack of shelter space. Access to food, proper hygiene, clothing, and healthcare is a constant and pressing concern.⁴⁸

Some individuals cannot even find respite in an overcrowded shelter, thereby facing homelessness and even greater exposure to crime. On April 17, 2019, Amnesty International interviewed a Guatemalan woman and child who were crossing from Ciudad Juárez to El Paso for their immigration hearings. They had fled the killing of the woman's husband and threats to their lives. According to this woman, "[w]hen they returned us [to Mexico], we were supposed to go to a shelter, but there was no space."⁴⁹ These problems will magnify over time, particularly since Mexico, as part of recent tariff negotiations with the United States, agreed to significantly expand the forced return

⁴⁷ *Id.*

⁴⁸ International Rescue Committee, *Needs Assessment Report Mexico: Northern Border*, at 6–7 (Mar. 25, 2019), <https://www.rescue.org/sites/default/files/document/3733/ircmexicoassessmentreport.pdf>; Peter Orsi & Christopher Sherman, *Mexico-US Tariff Deal: Questions, Concerns for Migration*, PBS (June 9, 2019), <https://www.pbs.org/newshour/world/mexico-us-tariff-deal-questions-concerns-for-migration>.

⁴⁹ Interview by Amnesty International with Forced Returnee, in Ciudad Juárez, Mexico (April 17, 2019).

policy to accommodate an estimated 60,000 to 100,000 people by the end of 2019.⁵⁰

Under the foregoing circumstances, access to valid identity documentation and a work permit is critical for returnees, to ensure their survival in Mexico and prevent their unlawful deportation to their home countries. Indeed, a linchpin of this Court’s decision staying the district court’s injunction was that “the likelihood of harm [to Plaintiffs] is reduced somewhat by the Mexican government’s commitment to . . . grant humanitarian status and work permits to individuals [who are] returned” to Mexico. 924 F.3d at 510.⁵¹ Yet that commitment has been effectively nonexistent in practice.

Returnees are emphatically not receiving the humanitarian visas that serve as legal identification in Mexico and confer the right to work. The numbers speak for themselves: Even though more and more people are being returned to Mexico under the forced return policy, fewer and fewer

⁵⁰ Alejandro Lazo, *Mexican Shelters Strained by Migrants Struggle with U.S. Returnees*, Wall St. J. (June 17, 2019), <https://www.wsj.com/articles/mexican-shelters-strained-by-migrants-struggle-with-u-s-returnees-11560763802>.

⁵¹ Dep’t of Homeland Security, *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration* (Dec. 20, 2018), <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration> (U.S. “expects [that] affected migrants would receive humanitarian visas to stay on Mexican soil, the ability to apply for work, and other protections while they await a U.S. legal determination.”).

humanitarian visas are being issued. As of this writing, there have been approximately 15,000 individuals returned to Mexico under the forced return policy.⁵² These individuals have primarily been returned through the San Ysidro, Calexico, and Paso del Norte ports of entry, which border the Mexican cities of Tijuana, Mexicali, and Ciudad Juárez.⁵³ Yet the state of Baja California, home to Tijuana and Mexicali, shows an inexplicable decline in humanitarian visas, from 176 in January 2019 to just 69 in March 2019.⁵⁴ In the state of Chihuahua, which includes Ciudad Juárez, just 44 humanitarian visas had been issued as of April 2019.⁵⁵

Amnesty International's reporting further illustrates this trend. Amnesty International recently spoke to eight returnees staying at a Ciudad Juárez parish. Each stated that DHS had confiscated their country-of-origin

⁵² Camila Montoya-Galvez & Angel Canales, *More Than 15,000 Asylum Seekers Returned to Mexico as U.S. Ramps Up Policy*, CBS News (June 25, 2019), <https://www.cbsnews.com/news/remain-in-mexico-more-than-15000-asylum-seekers-sent-back-to-mexico-as-us-ramps-up-policy/>.

⁵³ *9th Circuit to Hear Oral Arguments in 'Remain-in-Mexico' Case*, ABC 10News San Diego (Apr. 24, 2019), <https://www.10news.com/news/national/9th-circuit-to-hear-oral-arguments-in-remain-in-mexico-case> (describing mass use of tourist visas).

⁵⁴ Mexico Secretariat of the Interior, *Table 2.10 Visitor Cards for Humanitarian Reasons (TVRH) Issued, By State Entity* (2019), http://segob.gob.mx/es_mx/SEGOB/Documentacion_y_condicion_estancia.

⁵⁵ *Id.*

identity documents, but none had received humanitarian visas or work permits from Mexico.⁵⁶ All these individuals had were visitor visas, which appeared to be pieces of paper filled out by hand, without photos, and which were valid only until the date listed for those returnees on their next hearing notices. Amnesty International later received confirmation from Mexican authorities that returnees are receiving visitor visas (*formas migratorias múltiples*), which are not proper identity documents and do not confer the right to work.⁵⁷

As a result, an overwhelming number of forced returnees have been left to fend for themselves, without access to basic legal documentation critical to ensure their survival in Mexico.

C. The Forced Return Policy Subjects Returnees To Chain *Refoulement*

The forced return policy also violates the principle of *non-refoulement* because the transfer of asylum-seekers to Mexico exposes them to significant risk of eventual removal to their home countries, where they may face persecution or serious harm.

The obligation to safeguard *non-refoulement* applies to “any measure attributable to a State which could have the effect of returning an asylum-

⁵⁶ Interview by Amnesty International with Forced Returnees, in Ciudad Juárez, Mexico (Apr. 18, 2019).

⁵⁷ Flores, *supra* n. 23.

seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened.” U.N. General Assembly, *Note on International Protection*, ¶ 16, U.N. Doc. A/AC.96/951 (Sept. 13, 2001). This obligation includes measures that could result in chain *refoulement*: i.e., when a country returns an asylum-seeker to a third country, which turns around and returns the asylum-seeker to an unsafe country. Third countries cannot act as a way station for breaking the law. But the forced return policy risks doing precisely that.

Even before rollout of the forced return policy, *refoulement* from Mexico was rife. Between May and September of 2017, Amnesty International surveyed migrants and asylum-seekers in Mexico to determine whether Mexican officials were implementing *non-refoulement* obligations for those seeking asylum in Mexico. Amnesty International found that the National Institute of Migration (“INM”), the body responsible for regulating migration and policing borders in Mexico, systemically ignored the procedural safeguards under Mexican law to protect the legal rights of asylum-seekers. Amnesty International analyzed 500 survey responses and found 120 instances where *refoulement* had likely occurred—approximately 24 percent of total responses.⁵⁸ Many of those surveyed were deported to their country of origin

⁵⁸ Amnesty International, *Overlooked, Under-Protected: Mexico’s Deadly Refoulement of Central Americans Seeking Asylum*, at 8 (2018),

despite explicitly expressing a fear of return to the INM. Amnesty International also gathered 297 responses of people who had passed through migration detention centers.⁵⁹ Of those, 75 percent were never informed of their right to seek asylum in Mexico, and 69 percent stated that INM officers never asked their reasons for leaving their home country.⁶⁰ Both practices directly contravene Mexico's domestic and international legal obligations.

Furthermore, Amnesty International's reporting in 2017 found that Mexican authorities routinely detain and deport individuals without proper identity documentation—which, as noted above, would now encompass nearly all forced returnees given DHS's apparent practice of confiscating identity documents before returning individuals to Mexico. Based on Amnesty International's reporting, it was INM practice to load undocumented migrants into vans and take them to detention centers.⁶¹ Under Mexican law, these detainees would then have 15 days to present arguments and seek legal counsel.⁶² Yet INM often pressured (or coerced) detainees to sign papers accepting

<https://www.amnesty.org/download/Documents/AMR4176022018ENGLISH.PDF>.

⁵⁹ *Id.* at 9–12.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 14.

voluntary return to their country of origin, waiving rights to legal counsel, and foregoing the 15-day procedural safe harbor.⁶³ Individual requests for asylum were generally ignored.

These practices almost certainly continue to persist today. As recently as this month, INM engaged in the mass detention of 400 asylum-seekers on Mexico's southern border.⁶⁴ Such tactics reflect the rising tide of harsh responses to migrants and asylum-seekers apprehended in Mexico in recent weeks. Other measures have included expedited deportations, carried out without allowing migrants access to legal advice,⁶⁵ and the deployment of thousands of national guard troops, tasked with immigration enforcement responsibilities, throughout the country.⁶⁶

⁶³ *Id.*

⁶⁴ Amnesty International, *Asylum Seekers at Risk of Mass Detention* (June 7, 2019), <https://www.amnesty.org/download/Documents/AMR4104922019ENGLISH.pdf>. According to information received by Amnesty International, migrants and asylum-seekers were loaded onto buses and taken to the Siglo XXI Migration Detention Centre in Tapachula, Chiapas.

⁶⁵ *Id.*

⁶⁶ Tatiana Arias, *Mexico Sends Nearly 15,000 Troops to the US Border*, CNN (June 24, 2019), <https://www.cnn.com/2019/06/24/americas/mexico-sends-15000-troops-to-us-mexico-border-intl/index.html>.

Instead of addressing or allaying these concerns, Mexico’s foreign ministry has “boast[ed]” about its “robust detention and deportation figures.”⁶⁷ The new INM head, appointed just this month, is the former head of prisons and has vowed to take an enforcement-first approach to migration, pledging 2,500 deportations per day.⁶⁸ Given the government’s abysmal record of protecting asylum-seekers and its current enforcement-first approach, there is every reason to believe returnees are exposed to serious risks of wrongful return.

Concerns about chain *refoulement* are not merely academic or theoretical. On April 30, 2019, a 32-year-old Guatemalan woman subject to the forced return program was sent to Ciudad Juárez, and told to return to El Paso for a hearing in September.⁶⁹ While on the street with two other Guatemalan women in Ciudad Juárez, Mexican police approached her and attempted to

⁶⁷ David Agren, *Migrants Brave the “Beast” as Mexico Cracks Down Under US Pressure*, The Guardian (June 5, 2019), <https://www.theguardian.com/world/2019/jun/05/migrants-brave-the-beast-as-mexico-cracks-down-under-us-pressure>.

⁶⁸ Beatriz Cuevaz, *Instala INM 12 Puntos En Frontera Sur, Preve Deportar Dos Mil 500 Al Dia [INM Installs 12 Points on the Southern Border, Plans to Deport 2500 a Day]*, NoTimex (June 18, 2019), <http://www.notimex.gob.mx/ntxnotaLibre/714158/instala-inm-12-puntos-en-frontera-sur-prev%C3%A9-deportar-dos-mil-500-al-d%C3%ADa>.

⁶⁹ Interview with Forced Returnee (June 25, 2019).

extort her; when she refused to pay, the police took her and the other women to the airport. Although the woman expressed a fear of return to Guatemala and even showed the Mexican police her U.S. immigration court papers, she was nevertheless forcibly returned to Guatemala.⁷⁰

The lack of safeguards against wrongful deportation from Mexico is especially concerning given the dire situation faced by individuals fleeing the Northern Triangle of Guatemala, El Salvador, and Honduras. This Court is well-aware of the horrific violence and persecution that affects this region. *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1083 (9th Cir. 2013) (en banc) (recognizing that “witnesses who testify against gang members” from El Salvador may be cognizable as a particular social group for the purposes of asylum); *Pirir-Boc v. Holder*, 750 F.3d 1077, 1080 (9th Cir. 2014) (recognizing similar Guatemala-based claim).

These dangers show no signs of abating. El Salvador, Guatemala, and Honduras continue to have homicide rates at four to eight times higher than

⁷⁰ The U.S. has no way of determining whether or when a returnee has been improperly deported. CBP does not appear to be tracking the whereabouts of returnees in Mexico in any meaningful way, and is not even attempting to register their addresses (if returnees have them) in Mexico, in some cases simply writing locations as vague as “Baja California” on returnee documents. The absence of official information effectively means that the United States has ceded supervisory responsibilities to Mexico’s government.

what the World Health Organization considers to be epidemic levels.⁷¹ In El Salvador, gangs “exercise extraordinary levels of social control over the population of their territories.”⁷² In Guatemala, “the government has lost effective control to gangs and other organized criminal groups and is unable to provide protection to inhabitants” in “certain parts of the country.”⁷³ Conditions are similar in Honduras.⁷⁴

Women and children face particularly acute harms. A 2015 study of 160 women from El Salvador, Guatemala, Honduras, and Mexico found that women “consistently stated that police and state law enforcement authorities were unable to provide sufficient protection from [] violence,” and that their children were subject to “direct and devastating attacks.”⁷⁵

⁷¹ Amnesty International, *Overlooked, Under-Protected: Mexico’s Deadly Refoulement of Central Americans Seeking Asylum*, at 5.

⁷² UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador*, at 12, U.N. Doc. HCR/EG/SLV/16/01 (Mar. 15, 2016).

⁷³ UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala*, at 34, U.N. Doc. HCR/EG/GTM/18/01 (Jan. 2018).

⁷⁴ UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras*, at 18–19, 38–39, U.N. Doc. HCR/EG/HND/16/03 (July 27, 2016).

⁷⁵ UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico*, at 4, 21 (Oct. 26, 2015),

* * *

The U.S. government's forced return policy dispenses with critical safeguards meant to ensure that asylum-seekers are not returned to danger, results in the transfer of asylum-seekers to a country where they face a real risk of serious harm, and exposes asylum-seekers to chain *refoulement*. As a result, the forced return policy violates the United States' domestic and international human rights commitments, and should be enjoined.

<https://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html>.

CONCLUSION

Accordingly, *amici* urge this Court to affirm the district court's order granting Plaintiffs-Appellees' motion for a preliminary injunction.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

I hereby certify:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 9th Cir. R. 32-1(a) because it contains 6,989 words excluding the parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font.

/s/ Xiao Wang

XIAO WANG

DATED: JUNE 26, 2019

CERTIFICATE OF SERVICE

I, Xiao Wang, counsel for *amici* and a member of the Bar of this Court, certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 26, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Xiao Wang
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DATED: JUNE 26, 2019