

No. 25-5

In the Supreme Court of the United States

KRISTI NOEM, SECRETARY OF HOMELAND SECURITY,
ET AL.,

Petitioners,

v.

AL OTRO LADO, A CALIFORNIA CORPORATION, ET AL.,

Respondents

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF OF AMNESTY INTERNATIONAL USA,
HUMAN RIGHTS FIRST, HUMAN RIGHTS WATCH,
AND PHYSICIANS FOR HUMAN RIGHTS AS
AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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TABLE OF CONTENTS

	Page
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. The Turnback Policy Resulted in Significant Physical and Psychological Harm to Individuals Seeking Access to Asylum Procedures	5
A. Relentless Violence, Assault, and Extortion	7
B. Credible Fear and Related Psychological Injury	10
C. Failure to Protect and Attacks by Law- Enforcement Authorities	12
D. Assaults Within Encampments and Shelters	13
E. Insufficient Access to Medical Care	14
II. The Turnback Policy Violated the United States’ Domestic and International Legal Obligations	15
A. The Turnback Policy Resulted in Violations of the Right to Seek Asylum	15
B. The Turnback Policy Resulted in Violations of the Principle of Non- Refoulement	22
CONCLUSION	26

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>A.R.E. v. Greece</i> , No. 15783/21, 80 Eur. Ct. H.R. 18 (Jan. 7, 2025).....	24
<i>Arizona v. Mayorkas</i> , 143 S. Ct. 478 (2022)	17
<i>Arizona v. Mayorkas</i> , 143 S. Ct. 1312 (2023)	7
<i>Biden v. Texas</i> , 597 U.S. 785 (2022)	7
<i>INS v. Aguirre-Aguirre</i> , 526 U.S. 415 (1999)	16, 20
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	16, 17, 20, 22
<i>INS v. Doherty</i> , 502 U.S. 314 (1992)	23
<i>INS v. Stevic</i> , 467 U.S. 407 (1984)	16, 20, 22
<i>Murray v. Schooner Charming Betsy</i> , 2 Cranch 64 (1804)	19
<i>Negusie v. Holder</i> , 555 U.S. 511 (2009)	16, 20
<i>Sale v. Haitian Ctrs. Council, Inc.</i> , 509 U.S. 155 (1993)	20, 21, 22, 24, 25
<i>Sosa v. Alvarez-Machain</i> , 542 U.S. 692 (2004)	23
<i>Weinberger v. Rossi</i> , 456 U.S. 25 (1982)	19
Statutes, treaties, and regulations:	
Act of Oct. 21, 1998, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-822.....	23

(III)

The Immigration and Nationality Act,	
8 U.S.C. 1101 <i>et seq.</i>	4, 15, 16, 18, 22, 23
8 U.S.C. 1101	16
8 U.S.C. 1158(a)(1).....	15, 18
8 U.S.C. 1225	15, 18
8 U.S.C. 1231	22, 23
Public Health Service Act, ch. 373, § 362, 58	
Stat. 82 (July 1, 1944) (codified at 42 U.S.C.	
265).....	7
Refugee Act of 1980, Pub. L. No. 96-212, 94	
Stat. 102.....	15, 16, 20
Code of Federal Regulations:	
8 C.F.R. § 208.16.....	23
8 C.F.R. § 208.17.....	23
8 C.F.R. § 235.....	15
8 C.F.R. § 235.1.....	18
8 C.F.R. § 1208.16.....	23
8 C.F.R. § 1208.17.....	23
United Nations Treaty Service:	
189 U.N.T.S. 137.....	16, 22
606 U.N.T.S. 267.....	15
999 U.N.T.S. 171.....	19
1465 U.N.T.S. 85.....	23
International authorities and guidance:	
Exec. Comm. of the High Comm'r's	
Programme, <i>Addendum to the Report of the</i>	
<i>United Nations High Commissioner for Refu-</i>	
<i>gees: Report of the 28th Session of the Execu-</i>	
<i>tive Committee of the High Commissioner's</i>	
<i>Programme, Geneva, 4-12 October 1977,</i>	
United Nations General Assembly, No. 12A,	
A/32/12/Add.1	24

(IV)

Exec. Comm. of the High Comm'r's Programme, <i>Conclusion No. 30 (XXXIV): The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum — Adopted by the Executive Committee, No. 30 (XXXIV) (Oct. 20, 1983)</i>	17
Exec. Comm. of the High Comm'r's Programme, <i>Determination of Refugee Status No. 8 (XXVIII) – 1977: Determination of Refugee Status – Adopted by the Executive Committee, No. 8 (XXVIII) (Oct. 12, 1977)</i>	17
Exec. Comm. of the High Comm'r's Programme, <i>General Conclusion on International Protection No. 81 (XLVIII): General – Adopted by the Executive Committee, No. 81 (XLVIII) (Oct. 17, 1997)</i>	17
Exec. Comm. of the High Comm'r's Programme, <i>Note on International Protection, A/AC.96/951 (Sep. 13, 2001)</i>	23
U.N. Comm. Against Torture, <i>General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, (Feb. 9, 2018)</i>	19
U.N. High Comm'r for Refugees, <i>Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (Jan. 26, 2007)</i>	17, 18
U.N. High Comm'r for Refugees, <i>Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response (Mar. 16, 2020),</i> https://www.refworld.org/policy/legalguidance/unhcr/2020/en/122898	18

(V)

U.N. Human Rights Comm., <i>General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant</i> , CCPR/C/21/Rev.1/Add.13 (May 26, 2004).....	19
Miscellaneous:	
Amnesty Int’l, <i>Americas: Pushback Practices and Their Impact on the Human Rights of Migrants and Refugees</i> (Feb. 2021), https://www.amnesty.org/es/wp-content/uploads/2021/05/AMR0136582021ENGLISH.pdf	6
Amnesty Int’l, <i>USA: ‘You Don’t Have Any Rights Here’: Illegal Pushbacks, Arbitrary Detention & Ill-Treatment of Asylum-Seekers in the United States</i> (Oct. 11, 2018), https://www.amnesty.org/en/documents/amr51/9101/2018/en/	11, 12, 21
Human Rights First, <i>Barred at the Border: Wait “Lists” Leave Asylum Seekers in Peril at Texas Ports of Entry</i> (Apr. 2019), https://humanrightsfirst.org/wp-content/uploads/2022/10/BARRED_AT_THE_BORDER.pdf	11, 12
Human Rights First, <i>Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers</i> (May 2017), https://humanrightsfirst.org/wp-content/uploads/2022/10/hrf-crossing-the-line-report.pdf	8, 9, 10, 12
Human Rights First, <i>Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers’ Lives and Denies Due Process</i> (Aug. 2019), https://humanrightsfirst.org/wp-content/uploads/2022/10/Delivered-to-Danger-August-2019-.pdf	7

(VI)

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Human Rights First, <i>U.S. Asylum and Border Policies Resulting in Human Rights Violations Human Rights First’s Submission for the Office of the High Commissioner for Human Rights (OHCHR) Special Rapporteur on the Human Rights of Migrants pursuant to Human Rights Council Resolution 43/6</i> (Feb. 2022), https://humanrightsfirst.org/wp-content/uploads/2022/03/HRF-Submission-on-Human-Rights-Violations-at-U.S.-Borders.pdf	6
Walter Kälin, Martina Caroni & Lukas Heim, <i>Administrative Measures: Article 33, 1951 Convention</i> , in THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY (Andreas Zimmerman & Terje Einarsen eds., 2d ed. 2024).....	19
Sir Elihu Lauterpacht & Sir Daniel Bethlehem, <i>The Scope and Content of the Principle of Non-Refoulement: Opinion</i> , in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION (Erika Feller, Volker Türk, & Frances Nicholson, eds., 2003).....	24
Theodor Meron, <i>Extraterritoriality of Human Rights Treaties</i> , 89 AM. J. INT’L L. 78 (Jan. 1995).....	19

(VII)

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Ari Sawyer, <i>Biden ‘Asylum Ban’ Rule Would Send Thousands to Danger</i> , HUMAN RIGHTS WATCH (Feb. 28, 2023), https://www.hrw.org/news/2023/02/28/biden-asylum-ban-rule-would-send-thousands-danger	8
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(VIII)

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are four non-profit, non-partisan human rights organizations with substantial expertise in the rights and well-being of asylum seekers and other migrants. These organizations engage in research, policy analysis, and legal and other advocacy efforts to reform laws, policies, and practices that infringe upon rights. They share a common goal of promoting human rights, including by calling for protection of the rights of refugees. *Amici* have interviewed and evaluated scores of individuals who were denied access to territory and full and fair asylum procedures as a result of the turnback policy at issue in this case.²

Amnesty International USA is the largest country section of Amnesty International, with more than one million members and activists. Amnesty International's mission is to undertake research and action focused on preventing and ending grave abuses of the human rights enshrined in

¹ Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part and no person or entity other than *amici* or their counsel made a monetary contribution to its preparation or submission.

² "Turnback policy" is used throughout this brief to describe the Customs and Border Protection (CBP) practice of turning away individuals seeking asylum at U.S. ports of entry in order to manage alleged capacity constraints. See Resp. Br. 11. The turnback policy was informally introduced in early 2016 in San Ysidro and was later implemented at all ports of entry. Pet. App. 5a; see *id.* at 365a-366a. In April 2018, CBP's Office of Field Operations issued a memorandum entitled "Metering Guidance" to the Directors of Field Operations overseeing operations at ports of entry on the U.S.-Mexico border, which provided guidance regarding the circumstances in which turnbacks could be used and how CBP officers should explain the policy to those waiting at the port. J.A. 122-123; see Pet. App. 5a-6a. The policy was formally rescinded on November 1, 2021. Pet. App. 10a; see J.A. 135; see generally Resp. Br. 10-14.

the Universal Declaration of Human Rights and other international human rights mechanisms. Amnesty International USA monitors domestic compliance with international human rights law and international humanitarian law and standards, and it 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 received the Nobel Peace Prize in 1977.

Human Rights First is a non-governmental organization established in 1978 that advocates for human rights globally and U.S. compliance domestically with this country's human rights commitments. Human Rights First operates one of the largest programs for pro bono legal representation of refugees, working in partnership with volunteer lawyers at leading law firms to provide legal representation without charge to thousands of indigent asylum applicants, including some detained in immigration detention facilities across the United States. Human Rights First has conducted research, issued reports, and provided recommendations to the United States government regarding compliance with its legal obligations under international law, including with respect to the government's rejection of asylum seekers who approach United States ports of entry.

Human Rights Watch, which shared in the Nobel Peace Prize in 1997, investigates and reports on violations of fundamental human rights in over 100 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon

offending governments and others and thus bring pressure on them to end abusive practices.

Physicians for Human Rights, which has also shared in the Nobel Peace Prize, uses science and medicine to document and call attention to severe human rights violations around the world. In the United States, Physicians for Human Rights mobilizes a network of more than 2,000 health professionals, including physicians, psychiatrists, and psychologists, to conduct rigorous forensic medical and psychological evaluations that assess evidence of torture, trauma, and other human rights abuses. Physicians for Human Rights utilizes its expertise to investigate and speak out in order to, among other things, prevent torture, document mass atrocities, and ensure accountability for human rights violations.

Amici have filed briefs as friends of the court before this Court, U.S. courts of appeals, and the Inter-American Commission on Human Rights, among other tribunals. They are well-suited to provide this Court with insights into both the types and extent of harm caused by the turnback policy and the ways in which the policy violates international human rights law.

SUMMARY OF ARGUMENT

The turnback policy at issue in this case caused significant physical and psychological harm to asylum seekers, and it violated the United States' international legal obligations codified by and recognized in domestic law.

I. Individuals and families subject to the turnback policy were turned away at ports of entry along the U.S. border and forced to wait—often for months—in Mexican border towns. There, they faced violence, kidnapping, extortion, sexual assault, robbery, food insecurity, and heinous living conditions that harmed their health. These individuals lived in constant fear of being attacked in Mexico

or being sent home to the country they were fleeing, both of which occurred with regularity.

As just one example, Lilia and Yasmin³ are Cuban asylum seekers who were unable to access a United States port of entry due to the turnback policy. While waiting in Mexico, they were kidnapped by armed men and imprisoned for a week. They were repeatedly raped by multiple men.

II. The turnback policy and the harm it perpetuated violated the United States' obligations under domestic and international law. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, codifies certain of the United States' obligations under international law, which protects the right to seek asylum and requires compliance with the principle of non-refoulement. Though separate doctrines, the right to seek asylum and the principle of non-refoulement are complementary. The right to seek asylum ensures that individuals arriving at a state's borders are provided access to territory and to fair and efficient status procedures. The principle of non-refoulement prohibits states from turning away those individuals and, in doing so, sending them to any place where they would be at real risk of persecution or torture, including their home country. Because the turnback policy violated these requirements, the Ninth Circuit's decision should be affirmed.

³ Unless indicated by an asterisk, all names used within this brief are pseudonyms.

ARGUMENT

I. THE TURNBACK POLICY RESULTED IN SIGNIFICANT PHYSICAL AND PSYCHOLOGICAL HARM TO INDIVIDUALS SEEKING ACCESS TO ASYLUM PROCEDURES

The turnback policy was introduced informally in 2016 and formalized by Customs and Border Protection (CBP) in April 2018. See generally Pet. App. 5a-6a. It was fully implemented across the U.S.-Mexico border in June 2018. *Ibid.*

The turnback policy caused asylum seekers who were stopped at the U.S.-Mexico border and turned back into Mexico to “accumulate on the Mexico side of the border.” Pet. App. 6a. Although “Mexican government officials and nonprofits made lists of people waiting to be processed[,]” there was no comprehensive list and United States officials “did not keep lists of their own.” *Ibid.* “Waitlists” were an ad hoc process that varied by port of entry. In some cases, Mexican government agencies created and tracked written lists⁴ managed by volunteers who were often themselves asylum seekers; those lists created some order, but were accompanied by allegations of discrimination and unequal access. For example, volunteers “refuse[d] to add [B]lack asylum seekers and unaccompanied minors” to the lists,⁵ and there were allegations of volunteers accepting bribes from asylum seekers “to be added to * * * or to advance on the list.”⁶ At other

⁴ Strauss Ctr. for Int’l Sec. and Law, *Asylum Processing and Waitlists at the U.S.-Mexico Border* 5 (Dec. 2018), <https://www.strauscenter.org/publications/asylum-processing-and-waitlists-at-the-u-s-mexico-border/>.

⁵ *Id.* at 11.

⁶ *Id.* at 18.

ports, there were no lists at all, which caused asylum seekers to physically queue in a line near the port of entry.⁷ Though the lack of documentation makes it difficult to quantify the impact of the turnback policy, by August 2019, unofficial “waitlists” exceeded 25,000 people and wait times were over seven months long.⁸ In August 2021, turnback “waitlists” included about 20,600 asylum seekers.⁹

While waiting to seek asylum, these individuals were vulnerable to violence and “without access to adequate accommodations, food, health care, legal representation, or physical security from abuses by State and non-State actors.”¹⁰ Based on survey data analyzed by Human Rights First, “[n]early 83 percent of all asylum seekers stranded in the Mexican states bordering the United States [between mid-June and mid-August 2021] reported that they had been the victim of an attack, attempted attack, or threats” in the prior month.¹¹ As the stories below make

⁷ *Id.* at 16-17.

⁸ Human Rights First, *U.S. Asylum and Border Policies Resulting in Human Rights Violations Human Rights First’s Submission for the Office of the High Commissioner for Human Rights (OHCHR) Special Rapporteur on the Human Rights of Migrants pursuant to Human Rights Council Resolution 43/6*, at 3 (Feb. 2022), <https://humanrightsfirst.org/wp-content/uploads/2022/03/HRF-Submission-on-Human-Rights-Violations-at-U.S.-Borders.pdf>.

⁹ Human Rights First, *Human Rights Travesty: Biden Administration Embrace of Trump Asylum Expulsion Policy Endangers Lives, Wreaks Havoc* 9 (Aug. 2021), https://humanrightsfirst.org/wp-content/uploads/2021/10/HumanRightsTravesty_FINAL-1.pdf (*Human Rights Travesty*).

¹⁰ Amnesty Int’l, *Americas: Pushback Practices and Their Impact on the Human Rights of Migrants and Refugees* 1 (Feb. 2021), <https://www.amnesty.org/es/wp-content/uploads/2021/05/AMR0136582021ENGLISH.pdf>.

¹¹ *Human Rights Travesty*, at 8.

clear, asylum seekers' experiences caused lasting physical and psychological harm.

Although many of the stories discussed in this brief are specifically attributable to the turnback policy, some asylum seekers were affected by other (or multiple) policies in place during the same time period that likewise sent them to Mexico, including the Migrant Protection Protocols (MPP), see generally *Biden v. Texas*, 597 U.S. 785, 790-793 (2022), and the Title 42 expulsion policy, see generally *Arizona v. Mayorkas*, 143 S. Ct. 1312, 1312 & n.1 (2023) (statement of Gorsuch, J.); Public Health Service Act, ch. 373, § 362, 58 Stat. 82, 704 (July 1, 1944) (codified at 42 U.S.C. 265). For example, after Lilia and Yasmin were released from their kidnappers, they returned to CBP officers to convey their fear of being turned away and sent again to Mexico. CBP officers responded that “whatever had happened in Mexico ‘did not matter,’” and that Lilia and Yasmin had no rights. One officer said, “[i]t’s better to give Cubans \$20 and send them back to Cuba.” Lilia and Yasmin were returned to Mexico, this time under MPP.¹² All asylum seekers’ experiences in Mexico discussed in this brief took place while the turnback policy was in effect.

A. Relentless Violence, Assault, and Extortion

When forced to wait in Mexico under the turnback policy, asylum seekers “face[d] serious harm at the hands of criminal organizations, including kidnapping, extortion,

¹² Human Rights First, *Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers’ Lives and Denies Due Process* 4, 7 (Aug. 2019), <https://humanrightsfirst.org/wp-content/uploads/2022/10/Delivered-to-Danger-August-2019-.pdf> (*Delivered to Danger*).

physical violence, and sexual assault.”¹³ As explained by the Washington Office on Latin America in comments to the Inter-American Commission on Human Rights, “[v]iolence and crimes against migrants in Mexico’s northern border states have long been documented to include cases of disappearances, kidnappings, rape, trafficking, extortion, executions, and sexual and labor exploitation by state and non-state actors.”¹⁴

While the turnback policy was in place, Physicians for Human Rights documented the violence that asylum seekers suffered while waiting in Mexico under various immigration policies. See p. 7, *supra*. One study evaluated 95 asylum seekers. Of them, “18 experienced physical violence, four experienced sexual violence, 15 witnessed violence, 16 were kidnapped, 24 were targeted for theft or extortion, and 32 were threatened with violence in Mexico.” The majority of people evaluated—58 out of 95—experienced at least one form of harm in Mexico, while others experienced more than one type of harm.¹⁵ Similarly, in 2017, “lawyers and shelter staff” in Reynosa,

¹³ Ari Sawyer, *Biden ‘Asylum Ban’ Rule Would Send Thousands to Danger*, HUMAN RIGHTS WATCH (Feb. 28, 2023), <https://www.hrw.org/news/2023/02/28/biden-asylum-ban-rule-would-send-thousands-danger>.

¹⁴ Human Rights First, *Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers* 16 (May 2017), <https://humanrightsfirst.org/wp-content/uploads/2022/10/hrf-crossing-the-line-report.pdf> (*Crossing the Line*) (internal quotation marks omitted).

¹⁵ Physicians for Human Rights, *Forced into Danger: Human Rights Violations Resulting from the U.S. Migrant Protection Protocols* 8-9 (Jan. 2021), https://phr.org/wp-content/uploads/2021/01/PHR-Report-Forced-into-Danger_Human-Rights-Violations-and-MPP-January-2021.pdf (*Forced into Danger*). Although this study focused on asylum seekers subject to MPP, its findings are telling regarding the state of affairs near the border during the relevant time period.

a city near the Hidalgo port of entry, “report[ed] that most—if not all—migrants they encounter[ed] who had been turned away from the port of entry [were] kidnapped and held for ransom.”¹⁶ Interviews *amici* conducted with asylum seekers in Mexico, stranded under the turnback policy and Title 42 orders, depict myriad rights violations.

A woman and her 13-year-old son were held “captive for three days without food” by armed men until family members paid a ransom. They remained in the same city where they were kidnapped, living in an encampment near the port of entry.¹⁷

A different woman and her 13-year-old son from Honduras were kidnapped for two months and forced to sleep on the floor with minimal food. The kidnappers held the family for a ransom and threatened to traffic the son if the ransom was not paid. The woman “suffered partial facial paralysis” after the kidnapping.¹⁸

Paola, a woman staying in Mexico after being subjected to the turnback policy, was raped in the presence of her child following three separate attempts to seek asylum and being turned away each time.¹⁹

A young family from the Garifuna afro-indigenous community, while waiting in Nuevo Laredo to access the Laredo port of entry, received numerous threats including “racial slurs and threat[s] to cut the family into pieces if their family members in the United States [did] not pay the cartel.”²⁰

Alma, a Honduran woman traveling with her three children, requested protection at a port of entry three

¹⁶ *Crossing the Line*, at 16.

¹⁷ *Human Rights Travesty*, at 11.

¹⁸ *Ibid.*

¹⁹ *Crossing the Line*, at 18.

²⁰ *Human Rights Travesty*, at 9.

times between December 2016 and February 2017. She had fled Honduras to seek asylum in the United States after gang members killed one of her other children. Under the turnback policy, she was turned away all three times. CBP officers claimed that “U.S. facilities were full and she would have to turn around and return to Mexico.” After she and her children were turned away, they were kidnapped in Reynosa.²¹

B. Credible Fear and Related Psychological Injury

Many individuals who wished to seek asylum emphasized their fear of the violence they had sought to escape, which in some cases had followed them to the U.S.-Mexico border. Asylum seekers had no opportunity to express their fear to CBP officials and the persistent terror—itsself a psychological injury—had physical manifestations as well.

A *Mexican asylum seeker* was turned away three times from the San Ysidro port of entry. He hid with his wife and child in Ensenada, Mexico. While in hiding, he suffered from “unrelenting terror” because he knew that his persecutors from Michoacán had found him and his family in Ensenada. He died of a heart attack there.²²

A *Guatemalan man* arrived at the international bridge to the Laredo port of entry in June 2021. He was covered in blood after being tortured by cartel members who abducted him because he was unable to give them the phone number of a family member in the United States to extort. Despite the physical evidence of the violent beatings he faced, CBP officers turned the man away. He later explained: “If I return to my country, I’ll be killed.

²¹ *Crossing the Line*, at 18.

²² *Human Rights Travesty*, at 26.

If I stay here, I'll be killed. I want an opportunity, for someone to consider my case.”²³

A *Honduran woman* left her country because she received death threats from gang members. Subject to the turnback policy and waiting in Mexico, she feared that the gang had found her after being beaten by an unknown Honduran man who cut her ear, injured her head, and knocked her unconscious in the street.²⁴

Children were not spared the adverse effects of the turnback policy. For example, a *17-year-old girl* interviewed in January 2018 told Amnesty International that she had arrived at the San Ysidro port of entry after cartels in Michoacán killed several of her relatives. Immigration officers told her that “Mexican asylum-seekers were not being accepted at that time[,]” and she was sent to a local shelter in Mexico.²⁵

Those examples are not unique, and they had serious psychological effects. In one of several studies, Physicians for Human Rights evaluated 95 asylum seekers of varying ages and from eight different countries. The harms they had suffered ranged widely, including physical and sexual violence, kidnapping, death threats and extortion. Of the 95 asylum seekers stranded in Mexico, clinicians diagnosed 84 people with post-traumatic stress

²³ *Id.* at 13.

²⁴ Human Rights First, *Barred at the Border: Wait “Lists” Leave Asylum Seekers in Peril at Texas Ports of Entry* 9 (Apr. 2019), https://humanrightsfirst.org/wp-content/uploads/2022/10/BARRED_AT_THE_BORDER.pdf (*Barred at the Border*).

²⁵ Amnesty Int’l, *USA: ‘You Don’t Have Any Rights Here’: Illegal Pushbacks, Arbitrary Detention & Ill-Treatment of Asylum-Seekers in the United States* 15 (Oct. 11, 2018), <https://www.amnesty.org/en/documents/amr51/9101/2018/en/> (*USA: ‘You Don’t Have Any Rights Here’*).

disorder, 44 with major depressive disorder, and 14 with generalized anxiety disorder.²⁶

C. Failure To Protect And Attacks By Law-Enforcement Authorities

As discussed above, many asylum seekers waiting in Mexico “were subject to persecution and crime.” Pet. App. 6a. “Mexican authorities provide[d] no protection for migrants” and in fact were often responsible for mistreatment.²⁷ Physicians for Human Rights evaluated 28 asylum seekers waiting in Mexico in May 2021. “[A]ll but one of the asylum seekers interviewed said that they did not feel safe” in Mexico. Asylum seekers reported that authorities not only failed to offer them protection—authorities had in fact robbed or extorted them.²⁸ Although this study focused on the Title 42 policy, it is indicative of the conditions in Mexico during the relevant period.

A *university student* from Honduras was “beaten” and “threatened” by Mexican state police “because he was an undocumented migrant in Mexico.”²⁹

Two *Guatemalan transgender women* were detained by municipal police after being turned away from the San Ysidro port of entry as part of a larger caravan. One of the women, *Maritza*,* explained that the other woman with her was “beaten by the municipal police when detained, and had a wound on her neck in detention.” Both women were held in jail for over a day.³⁰

²⁶ *Forced Into Danger*, at 13.

²⁷ *Crossing the Line*, at 17.

²⁸ Physicians for Human Rights, *Neither Safety nor Health: How Title 42 Expulsions Harm Health and Violate Rights* 4 (July 28, 2021), <https://phr.org/our-work/resources/neither-safety-nor-health/>.

²⁹ *Barred at the Border*, at 9.

³⁰ *USA: ‘You Don’t Have Any Rights Here,’* at 23.

D. Assaults Within Encampments And Shelters

Asylum seekers were attacked and assaulted while living in irregular encampment tents close to the ports of entry. As just one among many examples *amici* identified, a teenage girl was assaulted by a group of men in the Tijuana tent encampment after she and her family were turned away by immigration officers at the San Ysidro port of entry. The girl and her family had fled their home in Michoacán after receiving death threats.³¹

Those within migrant shelters were also at risk, often fearing that their abductors or attackers would find them within the shelters.³² The aforementioned family from the Garifuna community stated that the cartel that threatened them claimed to know which shelter they were in, leaving the family terrified as they awaited an opportunity to seek asylum.³³ Likewise, *amici* gathered reports of individuals being forced from their shelter rooms and attacked³⁴ and break-ins where attackers stole from and assaulted asylum seekers.³⁵

Four armed men broke into a shelter in Tijuana looking for two people. Despite the shelter director activating an emergency system set up by the Mexican government, the Mexican National Guard did not respond to the emergency request for four days.³⁶

An 18-year-old asylum seeker fled from southern Mexico due to gang members who “attacked, raped, and tried to enslave him.” The gang members were able to

³¹ *Human Rights Travesty*, at 10.

³² *Id.* at 14-15.

³³ *Id.* at 9.

³⁴ *Id.* at 14-15.

³⁵ *Id.* at 15.

³⁶ *Id.* at 14.

locate him at the shelter, and he was forced to go into hiding.³⁷

E. Insufficient Access To Medical Care

Harms and dangerous conditions were exacerbated because asylum seekers were often not able to access medical care. Asylum seekers' narratives varied in terms of the policy under which they were turned away, but all occurred while the turnback policy was in place and reflect conditions in Mexico during the relevant time period.

In July 2021, *Maily Martinez*,* her husband, and her two-year-old son attempted to cross the border and seek emergency obstetric treatment for Martinez, who was eight-and-a-half months pregnant. CBP officials refused her admission or medical attention and sent her to Mexico, where she miscarried her twins.³⁸ Martinez's story is one of many in which asylum seekers suffered unnecessary medical complications or pain due to the inability to access medical care under turnback and similar policies.³⁹

An eight-year-old child, severely ill with leukemia, tried to cross the border with his mother, twin, and older sister in July 2021. The mother explained the boy's serious illness to a CBP officer, who told her: "That is a problem that needs to be solved in your country." The boy, mother, and his twin were turned away without medical treatment, while his sister's asylum application was processed.⁴⁰

Asylum seekers often had difficulty getting care in Mexican hospitals or emergency rooms despite the "require[ment that they] treat migrants under Mexican

³⁷ *Id.* at 15.

³⁸ *Id.* at 31.

³⁹ *Id.* at 29-32 (discussing many examples of asylum seekers having negative experiences with obtaining medical attention).

⁴⁰ *Id.* at 29-30.

law.”⁴¹ For example, a *Honduran family* was denied emergency medical attention for their baby at a public Mexican hospital in spring 2021. The baby, who has Down’s Syndrome and a heart murmur, had temporarily stopped breathing. The hospital staff explained the denial of medical service on the ground that the facility would not treat foreigners.⁴²

II. THE TURNBACK POLICY VIOLATED THE UNITED STATES’ DOMESTIC AND INTERNATIONAL LEGAL OBLIGATIONS

As established above, the turnback policy caused significant physical and psychological harm. It also violated domestic and international law.

A. The Turnback Policy Resulted in Violations of the Right to Seek Asylum

1. This case concerns several provisions of the Immigration and Nationality Act (INA), as amended by the Refugee Act of 1980 (the Refugee Act), Pub. L. No. 96-212, 94 Stat. 102. The relevant provisions state that any noncitizen who “arrives in the United States * * * at a designated port of arrival” has a right to apply for asylum, 8 U.S.C. 1158(a)(1), and all such arriving noncitizens “shall be inspected by immigration officers,” 8 U.S.C. 1225(a)(3); see 8 C.F.R. § 235.

Those domestic legal provisions codify the United States’ obligations under international law—specifically, the 1951 Convention Relating to the Status of Refugees (1951 Convention), as incorporated when the United States acceded to the 1967 Protocol.⁴³ As this Court has

⁴¹ *Id.* at 29.

⁴² *Id.* at 32.

⁴³ Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267 (incorporating articles 2-34 of the Convention Relating to the Status of

explained, “[t]he principal motivation for the enactment of the Refugee Act of 1980 was a desire to revise and regularize the procedures governing the admission of refugees into the United States,” and to make “U.S. statutory law clearly reflect[] * * * [U.S.] legal obligations under international agreements.” *INS v. Stevic*, 467 U.S. 407, 425, 426 n.20 (1984); see *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) (“If one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.”); *Negusie v. Holder*, 555 U.S. 511, 520 (2009) (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999)); *Aguirre-Aguirre*, 526 U.S. at 427 (quoting *Cardoza-Fonseca*, 480 U.S. at 436).

To that end, the INA’s definition of “refugee” is “virtually identical to the [definition of ‘refugee’] prescribed by Article 1(2) of the [1951] Convention.” *Cardoza-Fonseca*, 480 U.S. at 437. It includes any person outside of his own country who is “unable or unwilling to return to * * * that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. 1101(a)(42).

Individuals who fall within this definition are afforded the protections of the 1951 Convention. Though international law recognizes states’ broad sovereign authority to regulate the entry of migrants, states have imposed on themselves, by treaty, limitations on categorical turnback at the border. “As a general rule, in order to give effect to their obligations under the 1951 Convention and/or

Refugees, 189 U.N.T.S. 137); see Convention Relating to the Status of Refugees, 189 U.N.T.S. 137.

1967 Protocol, States [are] required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures.”⁴⁴ This imposes an affirmative obligation from which the parties, including the United States, have covenanted not to derogate, even in emergencies.⁴⁵ So, “in[] conformance with the 1967 United Nations Protocol,” *Cardoza-Fonseca*, 480 U.S. at 436, the INA guarantees that any noncitizen “who

⁴⁴ U.N. High Comm’r for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, para. 8 (Jan. 26, 2007) (*Advisory Opinion*).

Governments—including the United States—have repeatedly reaffirmed these principles through resolutions. Exec. Comm. of the High Comm’r’s Programme, *General Conclusion on International Protection No. 81 (XLVIII): General – Adopted by the Executive Committee*, No. 81 (XLVIII) (Oct. 17, 1997); Exec. Comm. of the High Comm’r’s Programme, *Determination of Refugee Status No. 8 (XXVIII) – 1977: Determination of Refugee Status – Adopted by the Executive Committee*, No. 8 (XXVIII) (Oct. 12, 1977); Exec. Comm. of the High Comm’r’s Programme, *Conclusion No. 30 (XXXIV): The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum — Adopted by the Executive Committee*, No. 30 (XXXIV) (Oct. 20, 1983) (“[A]s in the case of all requests for the determination of refugee status or the grant of asylum, the applicant should be given a complete personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status.”).

⁴⁵ See, e.g., 1967 Protocol (containing no provision permitting exception or derogation). Even in the midst of the COVID-19 pandemic, multiple U.S. treaty partners that had imposed restrictions on entry also took steps to ensure refugee protection by preserving access to territory and fair and efficient status determination procedures. See UNCHR Amicus Br. at 14 & n.11, *Arizona v. Mayorkas*, 143 S. Ct. 478 (2022) (No. 22-592) (noting that the United Kingdom “never prohibited asylum seekers from seeking refuge within its borders” and that Bulgaria, Austria, Sweden, and Norway exempted asylum seekers from applicable border restrictions).

is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) * * * may apply for asylum,” 8 U.S.C. 1158(a)(1). And it requires that an immigration officer “inspect[]” each “arriving” noncitizen and refer those who indicate either an intention to apply for asylum or a fear of persecution for further processing. 8 U.S.C. 1225(a)(1), (a)(3), (b); 8 C.F.R. § 235.1(f)(1).

2. As respondents explain, the INA’s right to seek asylum applies to those who present themselves at the U.S. border—and thus domestic law prohibits CBP officers from physically blocking those who present themselves at ports of entry along the southern border. See Resp. Br. 20-34. That understanding is consistent with case law, which explains that “[a]liens arriving at the border * * * are subject to an exclusion hearing,” now termed a removal proceeding, where they “may seek asylum.” *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 159 (1993).

The understanding that the law regulates immigration officers’ encounters with asylum seekers at the border is also consistent with the weight of international authority. For example, the United Nations High Commissioner for Human Rights has explained that States must provide “an effective opportunity to seek asylum,” and they “have a duty vis-à-vis persons who have arrived at their borders, to [examine] the persons’ need for international protection.”⁴⁶ The United Nations Human Rights Committee

⁴⁶ U.N. High Comm’r for Refugees, *Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response*, paras. 3, 8 (Mar. 16, 2020), <https://www.refworld.org/policy/legalguidance/unhcr/2020/en/122898>; see *Advisory Opinion*, para. 9 n.16 (noting that such obligation applies extraterritorially to all acts or omissions of

has also stipulated with respect to the International Covenant on Civil and Political Rights (ICCPR)⁴⁷ that “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party.”⁴⁸ The Committee Against Torture holds a similar view.⁴⁹

3. To the extent the text of the INA is ambiguous, the statute should be construed to be consistent with the United States’ international legal obligations. See, *e.g.*, *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (“It has been a maxim of statutory construction since the decision in *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804) that ‘an act of congress ought never to be construed to violate the law of nations, if any other possible construc-

state agents); see also Walter Kälin, Martina Caroni & Lukas Heim, *Administrative Measures: Article 33, 1951 Convention*, in *THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY* 1525, para. 106 (Andreas Zimmerman & Terje Einarsen eds., 2d ed. 2024) (“A refugee who has approached a border guard at the frontier of the country of refuge is under the effective power and control of the country of refuge.”).

⁴⁷ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (ratified by United States June 8, 1992).

⁴⁸ Human Rights Comm., General Comment No. 31: *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 10 CCPR/C/21/Rev.1/Add.13 (May 26, 2004); see Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78, 82 (Jan. 1995) (“Narrow territorial interpretation of human rights treaties is anathema to the basic idea of human rights, which is to ensure that a state should respect human rights of persons over whom it exercises jurisdiction.”).

⁴⁹ U.N. Comm. Against Torture, *General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22*, para. 10 (Feb. 9, 2018).

tion remains.”); Restatement (Third) of Foreign Relations Law § 114 (1987) (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”). Indeed, although the applicable international law duties may not have provided a private right of action, they nonetheless constitute an obligation of the federal government. See Restatement (Fourth) of Foreign Relations Law § 310 n.12 (2018) (“A treaty’s lack of judicial enforceability is not inconsistent with a status of ‘Law of the Land’ under the Supremacy Clause.”).

That principle is especially applicable here for two reasons. *First*, this Court has repeatedly recognized that “one of Congress’ primary purposes in passing the Refugee Act was to implement the principles agreed to in the 1967 [Protocol] as well as the [1951 Convention].” *Negusie*, 555 U.S. at 520 (quoting *Aguirre–Aguirre*, 526 U.S. at 427); see *Stevic*, 467 U.S. at 425; *Cardoza–Fonseca*, 480 U.S. at 436–37.

Second, construing the statute in accord with international law is necessary to avoid circumvention of the domestic legal requirement. The turnback policy authorized immigration officers to “establish and operate physical access controls at the borderline, including *as close to the U.S.-Mexico border as operationally feasible*.” J.A. 122 (emphasis added). Permitting immigration officers to stand at the border and stop individuals just over the line from crossing the border to seek asylum guts the domestic and international obligations to provide for an opportunity to seek asylum in the first place.⁵⁰

⁵⁰ The holding of *Sale* is certainly not to the contrary. There, this Court addressed the interdiction of Haitian migrants on the high seas—in the open ocean, away from the U.S. border. This Court distinguished those interdicted on the high seas without “reaching our shores” from “[a]llies arriving at the border,” who “are subject to an

4. As the examples above demonstrate, that is precisely what the turnback policy caused: many individuals were denied the right to seek asylum. For example, several individuals discussed above—including *Paola*, *Alma*, and *Lilia and Yasmin*, see pp. 7-10, *supra*—all told *amici* they intended to apply for asylum in the United States. Although they had already suffered significant harms in their home countries, they were turned away by immigration officers at ports of entry and denied any opportunity to explain their fear.

Additional information *amici* gathered confirms the regularity of this experience. For example, a women’s shelter in Tijuana reported that 25 women were turned away in a single day in April 2018 after attempting to present themselves for asylum at the San Ysidro port of entry. The shelter also observed several Sundays in 2018 where immigration officers rejected all asylum seekers who presented themselves at San Ysidro.⁵¹

Similarly, in December 2017, immigration officers at the San Ysidro port of entry rejected dozens of asylum seekers including those who had arrived from multiple countries in Africa. In response, 25 to 30 African asylum seekers created a line in a plaza on the Mexican side of the border to wait for immigration officers to allow them to present themselves to seek asylum. However, Mexican police “cleared the plaza and arrested those remaining asylum-seekers.”⁵² The turnback policy thus led to many

exclusion hearing * * * [where they] may seek asylum.” *Sale*, 509 U.S. at 159-60; see *ibid.* (“The INA offers these statutory protections * * * to aliens who * * * have arrived at the border of the United States.”).

⁵¹ *USA: ‘You Don’t Have Any Rights Here,’* at 16.

⁵² *Ibid.*

violations of the right to seek asylum under both international and domestic law.

B. The Turnback Policy Resulted in Violations of the Principle of Non-Refoulement

Closely related to the affirmative duty of states to provide asylum seekers access to territory and to fair and efficient status determination proceedings is the negative duty to not “refoul” those same individuals. The international law principle of non-refoulement—also reflected in domestic law—prohibits returning any individual to a jurisdiction where they would be at risk of persecution or torture, or to a country which might return them to such violations. As the stories above make clear, the turnback policy led to violations of this obligation as well.

1. As a matter of international law, the principle of non-refoulement is most notably codified in Article 33 of the 1951 Convention. Article 33 provides: “No Contracting State shall expel or return (*‘refouler’*) a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁵³

The United States also recognizes the non-refoulement principle as a matter of domestic law. As this Court has explained, withholding of removal in what is now 8 U.S.C. 1231(b)(3) “corresponds to Article 33.1 of the Convention.” *Cardoza-Fonseca*, 480 U.S. at 440; see *id.* (explaining that in *Stevic*, the issue was “withholding of deportation, or *nonrefoulement*, under § 243(h) [now § 241(b)(3)]”); see *Sale*, 509 U.S. at 189 (Blackmun, J., dissenting) (explaining that “the nondiscretionary duty imposed by § 243(h) parallels the United States’ mandatory

⁵³ Convention Relating to the Status of Refugees, 189 U.N.T.S. 137, art. 33.1 (July 28, 1951) (emphasis added).

non-refoulement obligations” (quoting *INS v. Doherty*, 502 U.S. 314, 331 (1992) (Scalia, J., concurring)).

In addition to the 1951 Convention, other international agreements that the United States has ratified further recognize particular aspects of the non-refoulement principle. Article 3 of the Convention Against Torture (ratified in 1994 and implemented in 1998) forbids the United States from “expel[ing], return[ing] * * * or extradit[ing] a person to another State where there are substantial grounds for believing that [the person] would be in danger of being subjected to torture.”⁵⁴ The United States has implemented this obligation through regulations. 8 C.F.R. §§ 208.16-17, 1208.16-17; see Act of Oct. 21, 1998, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-2822 (codified as 8 U.S.C. 1231 note) (“It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, *regardless of whether the person is physically present in the United States.*”) (emphasis added). Finally, the principle of non-refoulement has acquired customary international law status.⁵⁵ Cf. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-725 (2004) (recognizing that customary international

⁵⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85.

⁵⁵ Ministerial Meeting of Parties to the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, *Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/MMSP/2001/09, Diplomatic Conference (Jan. 16, 2002), para. 4; Exec. Comm. of the High Comm’r’s Programme, *Note on International Protection*, A/AC.96/951, U.N. High Comm’r for Refugees (UNHCR) (Sep. 13, 2001), para. 16 (obligation of non-refoulement “has come to be considered a rule of customary international law binding on all States”).

law obligations, when defined with appropriate specificity, can give rise to a cause of action in federal courts).

2. Under Article 33 and customary international law, a state is not free to reject individuals at the border without an individualized determination of the risks upon return. The United Nations has affirmed “the fundamental importance of the observance of the principle of non-refoulement—both *at the border* and within the territory of a State.”⁵⁶ As UNHCR has explained in this Court, “Article 33 guarantees refugees a specific, fundamental protection, irrespective of the grant of asylum. The benefit of this protection extends to refugees the moment they satisfy the criteria for refugee status” and “[t]hus, elimination of a formal screening process * * * does not absolve the United States of its obligation not to return [any] refugees.” UNHCR Amicus Br. at 7-8, *Sale*, 509 U.S. 155 (No. 92-344).

International courts have made similar observations. See, *e.g.*, *A.R.E. v. Greece*, No. 15783/21, 80 Eur. Ct. H.R. 18 (Jan. 7, 2025) (“[W]hen persons *at the border* are returned without individual identification or procedure, they are prevented from putting forward reasons why such returns would violate their rights * * * in violation of, for example * * * the refoulement prohibition in the UN Refugee Convention.”) (emphasis added).⁵⁷

⁵⁶ Exec. Comm. of the High Comm’r’s Programme, *Addendum to the Report of the United Nations High Commissioner for Refugees: Report of the 28th Session of the Executive Committee of the High Commissioner’s Programme, Geneva, 4-12 October 1977*, United Nations General Assembly, No. 12A, A/32/12/Add.1 (emphasis added).

⁵⁷ As have scholars. See Sir Elihu Lauterpacht & Sir Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 113 (Erika Feller, Volker Türk, & Frances Nicholson, eds., 2003) (“As regards rejection or non-admittance at the frontier,

3. As discussed above with respect to asylum, see p. 20, *supra*, the INA provisions at issue in this case should be construed so as not to permit violations of international law, including the principle of non-refoulement. Indeed, all Justices in *Sale* agreed that international law obligations to protect refugees from refoulement were operative at the border. Compare *Sale*, 509 U.S. at 181-182 (construing non-refoulement as operative, in translation, to prohibit “return” via “exclusion at a border”), with *id.* at 191-192 (Blackmun, J., dissenting) (construing non-refoulement to preclude exclusion of those on the threshold of initial entry).

As the stories documented above make clear, however, the turnback policy led to numerous violations of the non-refoulement principle. Many asylum seekers were turned away at ports of entry and sent directly to face persecution and unimaginable harm. Because the Ninth Circuit correctly rejected a construction of domestic law that would permit such widespread legal violations, its decision should be affirmed.

* * * where States are not prepared to grant asylum to persons who have a well-founded fear of persecution, they must adopt a course that does not amount to *refoulement*.”).

CONCLUSION

This Court should affirm the decision of the Ninth Circuit.

Respectfully submitted.

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