No. 19-56417

Court of Appeals for the Ninth Circuit

AL OTRO LADO, INC., *et al.*,

Plaintiffs-Appellees,

v.

CHAD WOLF, Acting Secretary of Homeland Security, *et al.*,

Defendants-Appellants

On Appeal from a Preliminary Injunction Issued by
the U.S. District Court for the Southern District of California,
Civil Action No. 17-cv-02366-BAS-KSC

BRIEF OF EIGHTEEN ORGANIZATIONS REPRESENTING ASYLUM SEEKERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES URGING AFFIRMANCE OF THE DISTRICT COURT

HARRISON J. FRAHN
Simpson Thacher & Bartlett LLP
2475 Hanover Street
Palo Alto, CA 94304
Telephone: (650) 251-5065
Facsimile: (650) 251-5002

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

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

Dated: February 11, 2020

By: /s/ Harrison J. Frahn

HARRISON J. FRAHN
Simpson Thacher & Bartlett LLP
2475 Hanover Street
Palo Alto, CA 94304
Telephone: (650) 251-5065
Facsimile: (650) 251-5002

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. THE METERING POLICY RUNS COUNTER TO CONGRESS' ASYLUM PROVISIONS AS ENACTED IN THE INA 4

II. THE APPELLANTS' JUSTIFICATIONS FOR THE METERING POLICY ARE NOT LEGITIMATE 6

A. Metering was not instituted as the result of a bona fide lack of capacity or personnel. 6

B. Despite Appellants' assertions, there is no "overwhelming surge" of immigrants to justify the implementation of the metering policy. 10

III. THE TRUE REASON FOR THE METERING POLICY IS HOSTILITY TOWARD IMMIGRANT GROUPS 12

A. Appellants' portrayal of immigrants as violent invaders is unsupported. 12

B. Appellants and the Administration have expressed particular hostility toward asylum seekers. 17

C. Appellants have a long history of anti-immigrant policies and practices. 19

IV. THE POLICIES IMPLEMENTED BY APPELLANTS HAVE CAUSED A SEVERE HUMANITARIAN CRISIS 21

CONCLUSION 24

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases

Matter of A-B-,
27 I&N Dec. 316 (A.G. 2018) 24

Statutes

8 U.S.C. § 1225 (2016) 4

Fed. R. App. P. 29(a) 1

Legislative Materials

Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934, 55,947 (Nov. 9, 2018).....21

Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,830 (July 16, 2019) 22

S. Rep. No. 96-256 (1979).....26

S. Rep. No. 96-590 (1980).....26

Other Authorities

'Angel Families', Trump Aides Rally Against Illegal Immigrant Crime, Fox News (Sept. 7, 2018) https://www.foxnews.com/politics/angel-families-trump-aides-rally-against-illegal-immigrant-crime.....20

American Immigration Council, Policies Affecting Asylum Seekers at the Border: The Migrant Protection Protocols, Prompt Asylum Claim Review, Humanitarian Asylum Review Process, Metering, Asylum Transit Ban, and How They Interact 1-2 (Jan. 29, 2020), https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border 29

American Immigration Council, The Cost of Immigration Enforcement and Border Security 2 (Oct. 2019), https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security 13

Amnesty International, USA: "You Don't Have Any Rights Here": Illegal Pushbacks, Arbitrary Detention & Ill-Treatment of Asylum-Seekers in the United States 15 (Oct. 2018), https://www.amnesty.org/download/Documents/AMR5191012018ENGLISH.PDF 10

Anna Flagg, *Is There a Connection Between Undocumented Immigrants and Crime?*, The Marshall Project, (May 13, 2019, 5:00 AM), https://www.themarshallproject.org/2019/05/13/is-there-a-connection-between-undocumented-immigrants-and-crime 18

Associated Press, *White House Aide Stephen Miller Pushed Racist Immigration Coverage in Leaked Emails*, L.A. Times (Nov. 12, 2019), https://www.latimes.com/politics/story/2019-11-12/stephen-miller-white-house-racist-immigration-emails 15

Congressional Research Service, Recent Migration to the United States from Central America: Frequently Asked Questions 2 (Jill H. Wilson, Jan. 29, 2019), https://crsreports.congress.gov/product/pdf/R/R45489/1 11

Cora Currier, *Prosecuting Parents–and Separating Families–Was Meant to Deter Migration, Signed Memo Confirms*, The Intercept (Sept. 25, 2018), https://theintercept.com/2018/09/25/family-separation-border-crossings-zero-tolerance/ 20

Daniella Silva, *Federal Appeals Court Upholds Bar on Trump's Public Charge Rule*, NBC News (Jan. 8,

2020), https://www.nbcnews.com/news/latino/federal-appeals-court-upholds-bar-trump-s-public-charge-rule-n1112666 26

Dara Lind, *The US Has Made Migrants at the Border Wait Months to Apply for Asylum. Now the Dam is Breaking*, Vox (Nov. 28, 2018), https://www.vox.com/2018/11/28/18089048/border-asylum-trump-metering-legally-ports 7

David Bier, *Despite More Staff, CBP Says "No Resources" To Process Asylum Applicants At Port*, Cato Institute (Dec. 5, 2019), https://www.cato.org/blog/despite-more-staff-cbp-says-no-resources-process-asylum-applicants-ports 9, 13

David Bier, *Obama Tripled Migrant Processing at Legal Ports—Trump Halved It*, Cato Institute (Feb. 8, 2019, 9:01 AM), https://www.cato.org/blog/obama-tripled-migrant-processing-legal-ports-trump-halved-it 14

Dep't of Homeland Security, Office of Inspector General, Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy 7 (Sept. 27, 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf 10

Dep't of Homeland Security, *Ombudsman Alert: Recent Updates to USCIS Form Instructions* (Jan. 23, 2020), https://www.dhs.gov/blog/2020/01/23/ombudsman-alert-recent-updates-uscis-form-instructions 25

Deported to Danger, Human Rights Watch (Feb. 5, 2020), https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and 28

Doctors Without Borders, Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis 4 (May 2017), https://www.doctorswithoutborders.ca/sites/default/files/msf_forced-to-flee-central-americas-northern-triangle_0.pdf 27

Donald J. Trump, *Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States*, The White House (Nov. 9, 2018), https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/ 24

Donald J. Trump, *Remarks by President Trump at a Roundtable Discussion on Immigration, Bethpage, NY*, The White House (May 23, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-roundtable-discussion-immigration-bethpage-ny 16

Donald J. Trump, *Remarks by President Trump in State of the Union Address*, The White House (Feb. 4, 2020), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-state-union-address-3/ 6

Donald J. Trump, *Remarks by President Trump in State of the Union Address*, The White House (Feb. 5, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-state-union-address-2/ 6

Donald Trump (@realDonaldTrump), Twitter (Jun. 24, 2018), https://twitter.com/realdonaldtrump/status/1010900865602019329?s=21 16

Donald Trump (@realDonaldTrump), Twitter (Nov. 26, 2018),

https://twitter.com/realDonaldTrump/status/10670
15026995879937?s=20.....16

Donald Trump (@realDonaldTrump), Twitter (Oct. 29, 2018), https://twitter.com/realdonaldtrump/status/105691
9064906469376?lang=en.....15

Donald Trump (@realDonaldTrump), Twitter (Oct. 31, 2018), https://twitter.com/realDonaldTrump/status/10576
12657665171457?s=20.....15

Donald Trump (@realDonaldTrump), Twitter (Oct. 31, 2018), https://twitter.com/realDonaldTrump/status/10576
14564639019009?s=20.....16

Donald Trump, *Immigration Principles and Policies*, The White House (Oct. 8, 2017), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-letter-house-senate-leaders-immigration-principles-policies/; *see also* Donald Trump, *President Donald J. Trump's State of the Union Address*, The White House (Jan. 30, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/ 21

Donald Trump, *Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border*, The White House (Feb. 15, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border 17

Donald Trump, *Statement From the President Regarding Emergency Measures to Address the Border Crisis*, The White House (May 30, 2019), https://www.whitehouse.gov/briefings-

statements/statement-president-regarding-emergency-measures-address-border-crisis 17

El Salvador 2019 Crime & Safety Report, OSAC (Apr. 25, 2019), https://www.osac.gov/Country/ElSalvador/Content/Detail/Report/d1222be6-4e5d-461f-912c-15f4aec90b02.....27

Elizabeth Trovall, *'Metering' Policy at the Southern Border Faces Renewed Scrutiny*, NPR (Jul. 3, 2019), https://www.npr.org/2019/07/03/738586876/metering-policy-at-the-southern-border-faces-renewed-scrutiny.....8

Foreign Travel Advice: Guatemala, Gov.UK, https://www.gov.uk/foreign-travel-advice/guatemala/safety-and-security (last visited Feb. 11, 2020).....27

Hamed Aleaziz, *The Trump Administration is Slowing the Asylum Process to Discourage Applicants, An Official Told Congress*, Buzzfeed (Dec. 17, 2018, 5:58 PM), https://www.buzzfeednews.com/article/hamedaleaziz/the-trump-administration-is-slowing-the-asylum-process-to..... 22, 23

Here's Donald Trump's Presidential Announcement Speech, Time (Jun. 16, 2015), http://time.com/3923128/donald-trump-announcement-speech/.....19

Human Rights Watch, *US: Unaccompanied Children Turned Back at Border* (Dec. 24, 2018), https://www.hrw.org/news/2018/12/24/us-unaccompanied-children-turned-back-border 5

Ibram X. Kendi, *The Day* Shithole *Entered the Presidential Lexicon*, The Atlantic (Jan. 13, 2019),

https://www.theatlantic.com/politics/archive/2019/01/shithole-countries/580054/ 19

Is an Immigration Loophole Allowing MS-13 Gang Members to Go Free?, Fox News (Jan. 15, 2019), https://video.foxnews.com/v/5989437509001#sp=show-clips.....22

Jacey Fortin, *'Huddled Masses' in Statue of Liberty Poem Are European, Trump Official Says*, N.Y. Times (Aug. 14, 2019), https://www.nytimes.com/2019/08/14/us/cuccinelli-statue-liberty-poem.html 20

Jason Kau and Denise Lu, *How Trump's Policies Are Leaving Thousands of Asylum Seekers Waiting in Mexico*, N.Y. Times (Aug. 18, 2019), https://www.nytimes.com/interactive/2019/08/18/us/mexico-immigration-asylum.html 9

Jeffrey B. Sessions III, *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review*, DOJ (Oct. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review.....21

Jeffrey S. Passel & D'vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, Pew Research Center (Nov. 27, 2018), https://www.pewresearch.org/hispanic/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade/ 12

Jonathan Blitzer, *The Long Wait for Tijuana's Migrants to Process Their Own Asylum Claims*, The New Yorker (Nov. 29, 2018), https://www.newyorker.com/news/dispatch/the-long-wait-for-tijuanas-migrants-to-process-their-own-asylum-claims.....7

Jonathan Blitzer, *The Trump Administration's Sustained Attack on the Rights of Immigrant Children*, The New Yorker (Aug. 22, 2019), https://www.newyorker.com/news/news-desk/the-trump-administrations-sustained-attack-on-flores-agreement-rights-of-immigrant-children 22

Julia Ainsley, *Stephen Miller Wants Border Patrol, Not Asylum Officers, to Determine Migrant Asylum Claims*, NBC News (Jul. 29, 2019, 7:31 PM), https://www.nbcnews.com/politics/immigration/stephen-miller-wants-use-border-agents-screen-migrants-cut-number-n1035831 (emphasis added).....23

Kavitha Surana, *Authorities Can Now Deny Visa and Green Card Applications Without Giving Applicants a Chance to Fix Errors*, ProPublica (Sept. 11, 2018, 12:52 PM), https://www.propublica.org/article/authorities-can-now-deny-visa-and-green-card-applications-without-giving-applicants-a-chance-to-fix-errors 25

Michael T. Light, *Does Undocumented Immigration Increase Violent Crime?*, 56 Criminology 370, 384 (2018).....18

Michelangelo Landgrave & Alex Nowrasteh, *Criminal Immigrants in 2017: Their Numbers, Demographics, and Countries of Origin*, Immigr. Res. & Pol'y Brief, no. 11, Mar. 4, 2019, at 1 18

Miriam Jordan, *Trump Administration Ends Protected Status for Thousands of Hondurans*, N.Y. Times (May 4, 2018), https://www.nytimes.com/2018/05/04/us/honduras-temporary-protected-status.html 25

Nicole Narea, *Arrests of Migrants at the US-Mexico Border Dropped Again in November*, Vox (Dec. 10, 2019), https://www.vox.com/2019/12/10/21004735/migra

nt-asylum-seeker-arrest-border-november-cbp-customs-border-protection-drop-remain-in-mexico-mpp 11

Nidia Bautista, *Murder of Honduran Teens Highlight Dangers for Refugees at Border*, Al Jazeera (Dec. 20, 2018), https://www.aljazeera.com/news/2018/12/murder-honduran-teens-highlight-dangers-refugees-border-181220212804745.html 5

Press Release, Human Rights First, Human Rights First Publishes Running Database of Attacks on Asylum Seekers Under MPP (Nov. 21, 2019), https://www.humanrightsfirst.org/press-release/human-rights-first-publishes-running-database-attacks-asylum-seekers-under-mpp 29

Priscilla Alvarez, *US Sets a Refugee Cap of 18,000 For Next Year–A New Historic Low*, CNN (Sept. 26, 2019), https://www.cnn.com/2019/09/26/politics/refugee-cap-historic-low/index.html 24

Richard Gonzales, *DHS Chief Visits U.S.-Mexico Border, Defends Administration's Asylum Rules*, NPR (Nov. 20, 2018), https://www.npr.org/2018/11/20/669826023/dhs-chief-visits-u-s-mexico-border-defends-administrations-asylum-rules 15

Strauss Center, Metering Update 1 (Nov. 2019), https://www.strausscenter.org/images/strauss/18-19/MSI/MeteringUpdate_191107.pdf 9, 28

U.S. Customs & Border Patrol, *At Ports of Entry*, https://www.cbp.gov/border-security/ports-entry (last modified Apr. 2, 2018) 8

U.S. Customs & Border Protection, CBP Border Security Report FY 2017 1 (Dec. 5, 2017), https://www.cbp.gov/sites/default/files/assets/docu

ments/2017-Dec/cbp-border-security-report-fy2017.pdf.....12

U.S. Customs & Border Protection, Southwest Border Migration FY 2020, https://www.cbp.gov/newsroom/stats/sw-border-migration (last visited Feb. 11, 2020)..... 12, 13

U.S. Dep't of State, El Salvador Country Reports on Human Rights Practices 16 (2017).....26

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Bet Tzedek; Catholic Charities Community Services, Archdiocese of New York Division of Immigrant & Refugee Services; Catholic Legal Immigration Network, Inc.; Central American Legal Assistance; City Bar Justice Center; HIAS and Council Migration Services, Inc. of Philadelphia, d/b/a HIAS Pennsylvania; Immigrant Defense Project; Immigrant Justice Corps; International Refugee Assistance Project; LatinoJustice PRLDEF; Legal Aid Society of New York; The Legal Project; Make the Road New York; Michigan Immigrant Rights Center; Pangea Legal Services; UnLocal, Inc.; Public Law Center; and Safe Passage Project ("*Amici*").

Amici are eighteen non-profit organizations dedicated to ensuring the equitable treatment of immigrants and asylum seekers. In this capacity, all *Amici* advocate for asylum seekers, and many focus specifically on asylum claims, serving people who enter the United States through the U.S.-Mexico border. By impermissibly restricting the availability of asylum for those who enter the United States through the U.S.-Mexico border, the metering policy needlessly places the lives of countless refugees at risk. *Amici* have seen, often firsthand, the devastating

[1] *Amici Curiae* affirm that no counsel of any party to this proceeding authored any part of this brief in whole or in part, and no person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(a). All parties have consented to the filing of this brief.

consequences of Appellants' and the Administration's anti-asylum policies at the border, including the concrete danger and violence visited on vulnerable populations forced to wait in precarious conditions on the Mexican side of the U.S.-Mexico border. *Amici* seek to protect the humanitarian policy of asylum and have a strong interest in ensuring federal laws are interpreted to afford asylum protection as Congress intended and the United States' international obligations require. A complete list of *Amici* is contained in the Appendix.

SUMMARY OF THE ARGUMENT

Appellants have sought to limit or foreclose access to the asylum process through a variety of practices, including through the metering policy, which has forced people fleeing persecution to wait in dangerous conditions on the Mexican side of the southern border. This policy is not consistent with the asylum laws Congress created, nor is it warranted by the justifications offered by Appellants. Such justifications include a purported "unprecedented" surge of immigrants at the southern border, limited capacity at ports of entry, and the alleged danger posed by immigrants.

At issue before the Court is, among other things, the likelihood of success on the merits for Appellees' claim that metering is unlawful, as well as whether Appellee's will suffer irreparable harm without an injunction. The Appellants' stated interest in preserving their limited capacity for asylum seekers is pretextual. As discussed below, the evidence reveals that there is not an unprecedented surge of immigrants at the southern border, and ports of entry are not encountering immigration at levels beyond recent historical norms. In reality, Appellants' policies are motivated by clear animus toward immigrants, particularly those from Latin America, and by a desire to deter current and future asylum seekers from the United States. *Amici* seek to support the claim that the metering policy is unlawful and agree that, absent an injunction, class members face irreparable harm.

ARGUMENT

I. THE METERING POLICY RUNS COUNTER TO CONGRESS' ASYLUM PROVISIONS AS ENACTED IN THE INA

The Immigration and Nationality Act ("INA") unambiguously allows people who arrive at the United States border to be inspected and to seek asylum. 8 U.S.C. § 1225(a)(3) (2016) (providing that "*[a]ll aliens* . . . who are applicants for admission or *otherwise seeking admission* . . . shall be inspected by immigration officers") (emphasis added); *id.* § 1225(b)(1). But U.S. Customs and Border Protection ("CBP") officials have employed a number of tactics—including the metering policy—to impose artificial barriers in order to restrict the number of asylum seekers who are inspected and processed at ports of entry.

The metering policy represents an evasion of the clear language and congressional intent of the INA. The law requires CBP to inspect and process asylum seekers when they present themselves at ports of entry. This is not what is happening. Instead, through the application of a strict metering policy, CBP leaves asylum seekers waiting indefinitely to gain access to the preliminary stage of the asylum process, if they are ever given the chance to have their claims heard at all, in conditions rife with violence, gangs, and other risks to health and safety.[2] Asylum

[2] *See* Human Rights Watch, *US: Unaccompanied Children Turned Back at Border* (Dec. 24, 2018), https://www.hrw.org/news/2018/12/24/us-unaccompanied-children-turned-back-border; *see also* Nidia Bautista, *Murder of Honduran Teens Highlight Dangers for Refugees at Border*, Al Jazeera (Dec. 20, 2018),

seekers thus are forced to endure a terrible, potentially months-long wait in the hope that Mexican authorities (in coordination with CBP) may, *someday* in the distant future, call their names from the "list" maintained by Mexican officials, all the while exposed to dangerous and desperate conditions on the Mexican side of the U.S.-Mexico border. They are left this way because the Appellants and the Administration they work for want asylum seekers to give up and go home without ever having the chance to seek asylum.

In support of the metering policy, Appellants cite an "overwhelming surge" of immigration and a lack of sufficient personnel and holding space at ports of entry. These excuses are without basis in fact. In reality, there is no "surge" in immigration relative to historical rates. The real motivation for the implementation of the metering policy is anti-immigrant animus, particularly focused on Latin American asylum seekers, who the Appellants and the Administration for which they work have called "stone cold criminals," "thugs," and "rapists." Indeed, during President Trump's 2019 State of the Union Address, he described the United States' southern border as "dangerous" and blamed immigrants for "increased crime" and a "depleted social safety net."[3] He reiterated those sentiments again in his 2020 State of the

---

https://www.aljazeera.com/news/2018/12/murder-honduran-teens-highlight-dangers-refugees-border-181220212804745.html.

[3] Donald J. Trump, *Remarks by President Trump in State of the Union Address*, The White House (Feb. 5, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-state-union-address-2/.

Union Address when he accused "criminal aliens" of mass burglary, sexual assault, and murder.[4] The metering policy is designed to keep asylum seekers away from the asylum process.

II. THE APPELLANTS' JUSTIFICATIONS FOR THE METERING POLICY ARE NOT LEGITIMATE

A. Metering was not instituted as the result of a bona fide lack of capacity or personnel.

The metering policy enforced by Appellants caps the number of asylum seekers processed at ports of entry along the U.S.-Mexico Border, in contravention of the United States' obligations to asylum seekers under national and international law. As reported by non-governmental organizations like the *Amici* and confirmed by Appellants, CBP officers turn away asylum seekers at ports of entry, forcing thousands of vulnerable migrants, including unaccompanied children, to wait indefinitely at the border.[5]

---

[4] Donald J. Trump, *Remarks by President Trump in State of the Union Address*, The White House (Feb. 4, 2020), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-state-union-address-3/.

[5] *See, e.g.*, Dara Lind, *The US Has Made Migrants at the Border Wait Months to Apply for Asylum. Now the Dam is Breaking*, Vox (Nov. 28, 2018), https://www.vox.com/2018/11/28/18089048/border-asylum-trump-metering-legally-ports; Jonathan Blitzer, *The Long Wait for Tijuana's Migrants to Process Their Own Asylum Claims*, The New Yorker (Nov. 29, 2018), https://www.newyorker.com/news/dispatch/the-long-wait-for-tijuanas-migrants-to-process-their-own-asylum-claims .

Asylum seekers are forced to wait in squalid, inhumane conditions. Families often lack shelter, bathrooms, and food, and while they wait to be processed, they risk being kidnapped, robbed, extorted, or murdered. The port of entry at the U.S.-Mexico border between Matamoros and Brownsville is illustrative. At that port, relatively small compared to other ports of entry, hundreds of asylum seekers are kept on a waiting list—in a handwritten book—maintained by Mexican immigration officials, and forced to wait for months in Mexico before CBP permits them to cross the bridge into the United States to seek asylum.[6] But only around *seven* asylum seekers are called each week.

Appellants claim this situation is necessary, because ports of entry are overwhelmed by "an unprecedented and unsustainable surge in migration" and don't have the capacity to hold and process the asylum seekers currently waiting. Notably, Appellants sometimes entirely refuse to process any asylum seekers at ports of entry. As confirmed by CBP officers, when they told asylum seekers the port of entry was at capacity and turned them back, the port was *not* at capacity and CBP officers were instructed to lie to asylum seekers.[7]

---

[6] Elizabeth Trovall, *'Metering' Policy at the Southern Border Faces Renewed Scrutiny*, NPR (Jul. 3, 2019), https://www.npr.org/2019/07/03/738586876/metering-policy-at-the-southern-border-faces-renewed-scrutiny.

[7] *See* Class Certification Motion, Ex. 3, Deposition of Brandon Gibbons, at 100:22-101:6.

What is more, even when CBP does process asylum seekers, it is at only a minority of ports of entry. There are a total of 328 ports of entry[8]—including dozens of Class A ports along the U.S.-Mexico border—and while CBP maintains that all ports of entry process asylum seekers, in reality, they are only processed at select locations. This is not due to a lack of staff. In total, the number of permanently assigned CBP officers is higher than at any time since 2012, and yet the number of migrants processed at ports of entry has only decreased.[9]

In Tijuana, the largest land port of entry, there were an estimated 8,836 asylum seekers on the wait list in Mexico as of November 6, 2019 but only 20-40 people are processed each day,[10] and the wait time is estimated to be over half a year.[11] In Nogales, the second largest port of entry, CBP processes only 8-15 people a day, while an estimated 1,759 asylum seekers were waitlisted as of November 6, 2019;

---

[8] *See* U.S. Customs & Border Patrol, *At Ports of Entry*, https://www.cbp.gov/border-security/ports-entry (last modified Apr. 2, 2018).
[9] *See* David Bier, *Despite More Staff, CBP Says "No Resources" To Process Asylum Applicants At Port*, Cato Institute (Dec. 5, 2019), https://www.cato.org/blog/despite-more-staff-cbp-says-no-resources-process-asylum-applicants-ports.
[10] Strauss Center, Metering Update 1 (Nov. 2019), https://www.strausscenter.org/images/strauss/18-19/MSI/MeteringUpdate_191107.pdf.
[11] Jason Kau and Denise Lu, *How Trump's Policies Are Leaving Thousands of Asylum Seekers Waiting in Mexico*, N.Y. Times (Aug. 18, 2019), https://www.nytimes.com/interactive/2019/08/18/us/mexico-immigration-asylum.html.

and in San Luis Rio Colorado, the third largest port of entry, only 6 people a day are processed, while an estimated 1,361 asylum seekers were waitlisted in Mexico.

Even though "metering" has been in effect at the U.S.-Mexico border since 2016,[12] and was allegedly instituted due to capacity constraints, senior CBP and U.S. Immigration and Customs Enforcement officials at the San Ysidro port of entry stated in 2018 that "CBP has only actually reached its detention capacity a couple of times per year and during a 'very short period' in 2017."[13] Similarly, during its investigation of the Administration's "zero-tolerance policy," which directed U.S. Attorney's Offices along the southern border to prosecute all cases of illegal entry and attempted illegal entry, the Office of Inspector General "did not observe severe overcrowding at the ports of entry it visited."[14] Thus, despite a temporary increase in immigration in early 2019—which has since declined by over 70%[15]—capacity

[12] *See* Gov't Br. 7, ER367-68 ("In 2016 . . . CBP instituted an informal 'metering' or 'queue management' system at some ports of entry.").
[13] Amnesty International, USA: "You Don't Have Any Rights Here": Illegal Pushbacks, Arbitrary Detention & Ill-Treatment of Asylum-Seekers in the United States 15 (Oct. 2018), https://www.amnesty.org/download/Documents/AMR5191012018ENGLISH.PDF.
[14] Dep't of Homeland Security, Office of Inspector General, Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy 7 (Sept. 27, 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf.
[15] Nicole Narea, *Arrests of Migrants at the US-Mexico Border Dropped Again in November*, Vox (Dec. 10, 2019), https://www.vox.com/2019/12/10/21004735/migrant-asylum-seeker-arrest-border-november-cbp-customs-border-protection-drop-remain-in-mexico-mpp ("The

was not seriously constrained when Appellants instituted the metering policy in 2016.

B. Despite Appellants' assertions, there is no "overwhelming surge" of immigrants to justify the implementation of the metering policy.

There is not a "surge" in immigration at ports of entry—and there was no such surge when the metering policy was initiated—that would necessitate metering. CBP's own data demonstrates low numbers of apprehensions at the border in the past several years. In fact, in prior years, rates of migration at the border have been far higher than those now occurring.[16] Border patrol agents apprehended approximately 1.7 million people in FY 2000 alone,[17] which pales in comparison to the 977,509 people apprehended in FY 2019, just 58% as many.[18] CBP itself emphasized that FY 2017 had the "lowest level of illegal-cross border migration on

---

number of migrants arriving at the southern border fell again in November, marking a more than 70 percent decline since the peak in May.").

[16] *See* Congressional Research Service, Recent Migration to the United States from Central America: Frequently Asked Questions 2 (Jill H. Wilson, Jan. 29, 2019), https://crsreports.congress.gov/product/pdf/R/R45489/1 (showing that apprehension rate average between 2009-2018 was 401,000 individuals, compared to a high of 1.62 million in 1986, and 1.64 million in 2000).

[17] *See* Jeffrey S. Passel & D'vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, Pew Research Center (Nov. 27, 2018), https://www.pewresearch.org/hispanic/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade/.

[18] *See* U.S. Customs & Border Protection, Southwest Border Migration FY 2020, https://www.cbp.gov/newsroom/stats/sw-border-migration (last visited Feb. 11, 2020).

record."[19] While these figures do not refer specifically to the number of migrants entering at ports of entry, they do demonstrate that no surge of immigration existed in general.

Moreover, CBP today has substantially more resources to address far lower rates of migration. Between FY 2003 to FY 2019, CBP's annual budget has nearly tripled, from $5.9 billion to $17.1 billion.[20] Neither Appellants' assertion of a burgeoning border crisis nor CBP's purported lack of capacity are supported by the available data.

Further, despite an increase in migrants arriving at the U.S.-Mexico border in the early half of 2019, in recent months the number of migrants apprehended crossing the U.S.-Mexico border has dropped by around 75% between May 2019 and December 2019, according to CBP.[21] Nor are ports of entry processing more migrants than they have in the past. In October of 2016 alone, CBP processed 20,524 individuals at ports of entry.[22] By contrast, CBP processed only 9,733 individuals

---

[19] U.S. Customs & Border Protection, CBP Border Security Report FY 2017 1 (Dec. 5, 2017), https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/cbp-border-security-report-fy2017.pdf.

[20] *See* American Immigration Council, The Cost of Immigration Enforcement and Border Security 2 (Oct. 2019), https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security.

[21] Southwest Border Migration FY 2020, *supra* note 18.

[22] *See* Bier, *supra* note 9.

in October 2019, three years later.[23] This phenomenon is consistent across all regions, as the number of migrants processed from October 2016 to October 2019 fell by 57% in San Diego, 38% in Tucson, 44% in El Paso, and 56% in Laredo, despite every location except for El Paso having hundreds more officers under CBP employ in 2019 than in 2016.[24]

III. THE TRUE REASON FOR THE METERING POLICY IS HOSTILITY TOWARD IMMIGRANT GROUPS

A. Appellants' portrayal of immigrants as violent invaders is unsupported.

Appellants and the Administration for which they work seek to justify the anti-immigrant policies they rigorously enforce, including the metering policy, by portraying immigrants as a violent, criminal group. They are not. The repeated, baseless insistence that immigrants are criminal invaders demonstrates the animus motivating Appellants and the Administration's policies.

Stephen Miller—now President Trump's chief advisor on immigration matters and the architect of the "zero-tolerance" policy—has a long history of linking immigration with crime, and has been reported to have cited anti-immigrant

---

[23] *Id.*

[24] David Bier, *Obama Tripled Migrant Processing at Legal Ports—Trump Halved It*, Cato Institute (Feb. 8, 2019, 9:01 AM), https://www.cato.org/blog/obama-tripled-migrant-processing-legal-ports-trump-halved-it ("Since October 2016, Tucson, Arizona is down 37 percent; El Paso is down 41 percent; San Diego is down 49 percent; and Laredo—where the most migrants arrived in October 2016—is down 60 percent.").

publications such as VDARE and American Renaissance approvingly in emails and conversations with Breitbart News in the past.[25] Former Secretary of Homeland Security Kirstjen Nielsen criticized media reports for portraying the 2018 migrant caravan as a sympathetic group made up mostly of women and children, and she instead alleged that the caravan includes "500 criminals" and "known gang members."[26]

For his part, President Trump stated that the Central American caravan consisted of "[m]any Gang Members,"[27] "very tough fighters and people,"[28] "bad thugs and gang members,"[29] and "stone cold criminals."[30] The President in May 2018, when speaking of unaccompanied minors, said "[t]hey look so innocent;

---

[25] Associated Press, *White House Aide Stephen Miller Pushed Racist Immigration Coverage in Leaked Emails*, L.A. Times (Nov. 12, 2019), https://www.latimes.com/politics/story/2019-11-12/stephen-miller-white-house-racist-immigration-emails.

[26] Richard Gonzales, *DHS Chief Visits U.S.-Mexico Border, Defends Administration's Asylum Rules*, NPR (Nov. 20, 2018), https://www.npr.org/2018/11/20/669826023/dhs-chief-visits-u-s-mexico-border-defends-administrations-asylum-rules.

[27] Donald Trump (@realDonaldTrump), Twitter (Oct. 29, 2018), https://twitter.com/realdonaldtrump/status/1056919064906469376?lang=en

[28] Donald Trump (@realDonaldTrump), Twitter (Oct. 31, 2018), https://twitter.com/realDonaldTrump/status/1057612657665171457?s=20.

[29] Donald Trump (@realDonaldTrump), Twitter (Oct. 31, 2018), https://twitter.com/realDonaldTrump/status/1057614564639019009?s=20.

[30] Donald Trump (@realDonaldTrump), Twitter (Nov. 26, 2018), https://twitter.com/realDonaldTrump/status/1067015026995879937?s=20.

they're not innocent."[31] He has also likened immigrants to dangerous criminal invaders on numerous occasions, stating:

- "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."[32]

- "We're talking about an invasion of our country with drugs, with human traffickers, with all types of criminals and gangs."[33]

- "As everyone knows, the United States of America has been invaded by hundreds of thousands of people coming through Mexico . . . . Gang members, smugglers, human traffickers, and illegal drugs and narcotics of all kinds are pouring across the Southern Border and directly into our communities. Thousands of innocent lives are taken every year as a result of this lawless chaos. It must end NOW!"[34]

The Administration's characterization of immigrants and asylum seekers as violent, hardened criminals is unsupported. Study after study has shown that immigrants are *not* associated with increases in violent crime. A preliminary study

---

[31] Donald J. Trump, *Remarks by President Trump at a Roundtable Discussion on Immigration, Bethpage, NY*, The White House (May 23, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-roundtable-discussion-immigration-bethpage-ny.

[32] Donald Trump (@realDonaldTrump), Twitter (Jun. 24, 2018), https://twitter.com/realdonaldtrump/status/1010900865602019329?s=21.

[33] Donald Trump, *Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border*, The White House (Feb. 15, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border.

[34] Donald Trump, *Statement From the President Regarding Emergency Measures to Address the Border Crisis*, The White House (May 30, 2019), https://www.whitehouse.gov/briefings-statements/statement-president-regarding-emergency-measures-address-border-crisis.

comparing populations of undocumented immigrants against FBI data on local crime rates found that "unauthorized immigration has no effect on violent crime."[35] And a study in the journal *Criminology* found undocumented immigration did not increase violent crime and was in fact associated with significant decreases in it,[36] and another Cato Institute study found that unauthorized immigrants are less likely to be incarcerated than native-born Americans.[37]

Appellants' justifications for their efforts to meter asylum seekers at ports of entry are consistent with the Administration's pattern of hostility toward immigrant groups, as expressed from the earliest days of the presidential campaign to the present. Animus toward vulnerable immigrants is the true justification for the metering policy and for other policies designed to prevent and deter asylum seekers. This has never been well concealed. President Trump famously kicked off his presidential campaign with a speech in which he exclaimed:

> When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that

---

[35] Anna Flagg, *Is There a Connection Between Undocumented Immigrants and Crime?*, The Marshall Project, (May 13, 2019, 5:00 AM), https://www.themarshallproject.org/2019/05/13/is-there-a-connection-between-undocumented-immigrants-and-crime.

[36] Michael T. Light, *Does Undocumented Immigration Increase Violent Crime?*, 56 Criminology 370, 384 (2018).

[37] Michelangelo Landgrave & Alex Nowrasteh, *Criminal Immigrants in 2017: Their Numbers, Demographics, and Countries of Origin*, Immigr. Res. & Pol'y Brief, no. 11, Mar. 4, 2019, at 1 ("The data show that all immigrants—legal and illegal—are less likely to be incarcerated than native-born Americans relative to their shares of the population.").

> have lots of problems, and they're bringing those problems with us. *They're bringing drugs. They're bringing crime. They're rapists.*[38]

Since then, the President and his Administration have not tempered their language whatsoever; instead, they have laid bare for all to see the hostile and discriminatory reasoning for their anti-asylum seeker policies. The President in 2018 criticized immigrants from "shithole countries" for seeking refuge in the United States,[39] and Administration officials have stated "open borders leads to massive crime."[40] Official documents show that the true motives behind the cruel family separation policy was to deter asylum seekers at the U.S.-Mexico border; and Former Secretary Nielsen signed off on the policy after receiving a memo observing that such a policy would "have the greatest impact on current flows."[41] Ken Cuccinelli, the acting director of the United States Citizenship and Immigration

---

[38] *Here's Donald Trump's Presidential Announcement Speech*, Time (Jun. 16, 2015), http://time.com/3923128/donald-trump-announcement-speech/ (emphasis added).

[39] Ibram X. Kendi, *The Day* Shithole *Entered the Presidential Lexicon*, The Atlantic (Jan. 13, 2019), https://www.theatlantic.com/politics/archive/2019/01/shithole-countries/580054/ (referring to Haiti, El Salvador and certain African countries).

[40] *'Angel Families', Trump Aides Rally Against Illegal Immigrant Crime*, Fox News (Sept. 7, 2018) https://www.foxnews.com/politics/angel-families-trump-aides-rally-against-illegal-immigrant-crime.

[41] Cora Currier, *Prosecuting Parents–and Separating Families–Was Meant to Deter Migration, Signed Memo Confirms*, The Intercept (Sept. 25, 2018), https://theintercept.com/2018/09/25/family-separation-border-crossings-zero-tolerance/ (containing excerpts of the Department of Homeland Security memo).

Services ("USCIS"), made this plainer: the poem inscribed on the Statue of Liberty "was referring back to people coming from Europe."[42]

B. Appellants and the Administration have expressed particular hostility toward asylum seekers.

In light of the metering policy and other recently enacted immigration policies, it is clear that metering is part of Appellants' overarching goal of deterring migrants from seeking asylum at all.

Appellants have specifically attacked asylum as "an easy ticket to illegal entry into the United States," swamped with "vague, insubstantial, and subjective claims."[43] And the Administration has consistently referred to important protections for unaccompanied minors as "dangerous loopholes" that have been exploited by gang members posing as vulnerable children.[44] In August 2019, the Administration

---

[42] Jacey Fortin, *'Huddled Masses' in Statue of Liberty Poem Are European, Trump Official Says*, N.Y. Times (Aug. 14, 2019), https://www.nytimes.com/2019/08/14/us/cuccinelli-statue-liberty-poem.html.

[43] Jeffrey B. Sessions III, *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review*, DOJ (Oct. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review.

[44] Donald Trump, *Immigration Principles and Policies*, The White House (Oct. 8, 2017), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-letter-house-senate-leaders-immigration-principles-policies/; *see also* Donald Trump, *President Donald J. Trump's State of the Union Address*, The White House (Jan. 30, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/ (as prepared for delivery) (asking Congress to close the "deadly loopholes" that allow for MS-13 members to enter the U.S.). For example, the Former Chief of CBP, Mark Morgan, said during an interview on Fox News, "I've been to detention facilities

removed these protections and subjected certain children to expedited removal proceedings.[45]

What is more, Jud Murdock, CBP's Acting Assistant Commissioner stated in December 2018 that processing asylum seekers would only encourage more asylum seekers to come—an outcome that Murdock viewed as unfavorable.[46] He emphasized that "[t]he more we process, the more will come."[47] Since then, the National Security Council and Stephen Miller have laid out a persistent strategy to deny asylum seekers even when processed: in July 2019 a National Security Council official told CBP officials that "My mantra has persistently been presenting aliens with *multiple unsolvable dilemmas* to impact their calculus for choosing to make the arduous journey to begin with."[48] And more tellingly, USCIS began training Border

---

where I've walked up to these individuals that are so-called minors, 17 or under. I've looked at them and I've looked at their eyes . . . and I've said that is a soon-to-be MS-13 gang member. It's unequivocal." *Is an Immigration Loophole Allowing MS-13 Gang Members to Go Free?*, Fox News (Jan. 15, 2019), https://video.foxnews.com/v/5989437509001#sp=show-clips.

[45] Jonathan Blitzer, *The Trump Administration's Sustained Attack on the Rights of Immigrant Children*, The New Yorker (Aug. 22, 2019), https://www.newyorker.com/news/news-desk/the-trump-administrations-sustained-attack-on-flores-agreement-rights-of-immigrant-children.

[46] *See* Hamed Aleaziz, *The Trump Administration is Slowing the Asylum Process to Discourage Applicants, An Official Told Congress*, Buzzfeed (Dec. 17, 2018, 5:58 PM), https://www.buzzfeednews.com/article/hamedaleaziz/the-trump-administration-is-slowing-the-asylum-process-to.

[47] *Id.*

[48] Julia Ainsley, *Stephen Miller Wants Border Patrol, Not Asylum Officers, to Determine Migrant Asylum Claims*, NBC News (Jul. 29, 2019, 7:31 PM),

Patrol agents to conduct initial asylum screenings (*i.e.*, credible fear interviews, an initial step in the asylum process), purportedly because of a lack of capacity and manpower due to the supposed surge of immigrants. However, in reality, members of the Administration indicated that they hoped Border Patrol agents would be more likely to make negative credible fear determinations, thereby reducing asylum claims.[49]

C. Appellants have a long history of anti-immigrant policies and practices.

Appellants' current attempts to limit asylum claims are just a part of an overarching anti-immigrant stance, including the policy barring asylum for anyone who crosses the U.S.-Mexico border outside a port of entry;[50] capping the refugee resettlement program at an historic low of 18,000;[51] attempting to deny asylum to

---

https://www.nbcnews.com/politics/immigration/stephen-miller-wants-use-border-agents-screen-migrants-cut-number-n1035831 (emphasis added).

[49] *Id.* ("One current and one former DHS official, both speaking on the condition of anonymity, said Miller has long seen asylum officers as soft and believes border agents would be tougher critics of asylum seekers.").

[50] Donald J. Trump, *Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States*, The White House (Nov. 9, 2018), https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/; *see also* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934, 55,947 (Nov. 9, 2018).

[51] Priscilla Alvarez, *US Sets a Refugee Cap of 18,000 For Next Year–A New Historic Low*, CNN (Sept. 26, 2019), https://www.cnn.com/2019/09/26/politics/refugee-cap-historic-low/index.html.

domestic violence victims and victims of gang violence;[52] instituting a "Travel Ban;" implementing a policy allowing USCIS officers to deny any visa or green card application that is missing evidence or containing an error without providing any opportunity to correct;[53] separating parents from their children at the border as a deterrent to migration; revoking Temporary Protected Status for over 300,000 people;[54] rejecting Forms I-918 (U-Nonimmigrant Status) and I-589 (Asylum and Withholding of Removal) if any field is left blank;[55] banning noncitizens who pass through another country before reaching the U.S.-Mexico border from seeking asylum in the United States unless first denied asylum in Mexico or another third country;[56] and instituting the public charge rule, set to go into effect on February 24,

[52] *See Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).
[53] Kavitha Surana, *Authorities Can Now Deny Visa and Green Card Applications Without Giving Applicants a Chance to Fix Errors*, ProPublica (Sept. 11, 2018, 12:52 PM), https://www.propublica.org/article/authorities-can-now-deny-visa-and-green-card-applications-without-giving-applicants-a-chance-to-fix-errors.
[54] *See* Miriam Jordan, *Trump Administration Ends Protected Status for Thousands of Hondurans*, N.Y. Times (May 4, 2018), https://www.nytimes.com/2018/05/04/us/honduras-temporary-protected-status.html.
[55] Dep't of Homeland Security, *Ombudsman Alert: Recent Updates to USCIS Form Instructions* (Jan. 23, 2020), https://www.dhs.gov/blog/2020/01/23/ombudsman-alert-recent-updates-uscis-form-instructions.
[56] Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,830 (July 16, 2019).

2020, to deny green cards, visas and other forms of legal immigration status to low income households.[57]

Amici respectfully request that the Court recognize the Administration's actions for what they are—a misbegotten effort to functionally eliminate the availability of asylum to vulnerable immigrants in service of an unfounded animus toward asylum seekers.

IV. THE POLICIES IMPLEMENTED BY APPELLANTS HAVE CAUSED A SEVERE HUMANITARIAN CRISIS

The humanitarian crisis facing Central American refugees, particularly those from the Northern Triangle, is well documented. The U.S. State Department has noted the "climate of fear"[58] that pervades this region, which is characterized by frequent homicides, kidnappings, rapes, and other human rights abuses perpetrated by organized criminals as well as governmental bodies and security forces.[59] A 2017 report by Doctors Without Borders "documented a pattern of violent displacement,

---

[57] Daniella Silva, *Federal Appeals Court Upholds Bar on Trump's Public Charge Rule*, NBC News (Jan. 8, 2020), https://www.nbcnews.com/news/latino/federal-appeals-court-upholds-bar-trump-s-public-charge-rule-n1112666.

[58] U.S. Dep't of State, El Salvador Country Reports on Human Rights Practices 16 (2017).

[59] *See, e.g.*, *Foreign Travel Advice: Guatemala*, Gov.UK, https://www.gov.uk/foreign-travel-advice/guatemala/safety-and-security (last visited Feb. 11, 2020) ("Guatemala has one of the highest violent crime rates in Latin America; there were 4,914 violent deaths in 2018."); *El Salvador 2019 Crime & Safety Report*, OSAC (Apr. 25, 2019), https://www.osac.gov/Country/ElSalvador/Content/Detail/Report/d1222be6-4e5d-461f-912c-15f4aec90b02.

persecution, sexual violence, and forced repatriation akin to the conditions found in the deadliest armed conflicts in the world today."[60]

In decades of serving refugees, *Amici* have become intimately acquainted with the tragic circumstances that compel people to flee their homes. Asylum seekers arrive here scared, tired, and in dire need of the protections the asylum laws were so carefully crafted to provide. It is the experience of *Amici* that asylum seekers who continue to seek asylum access through the U.S.-Mexico border are in more dire need than ever. Many of these asylum seekers have suffered brutal violence, including rape, abuse, assault, murder of friends and family, extortion, and countless other traumatic experiences. They have a profound fear of being forced to return to their home countries, a fear so great that they had no other option than to flee and travel thousands of miles to the United States.[61]

Because CBP is only letting a small trickle of asylum seekers into the U.S., in the hopes of deterring those left waiting in Mexico from arriving for inspection when

---

[60] Doctors Without Borders, Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis 4 (May 2017), https://www.doctorswithoutborders.ca/sites/default/files/msf_forced-to-flee-central-americas-northern-triangle_0.pdf.

[61] And upon being deported, many asylum seekers are sent directly to life-threatening danger. *See Deported to Danger*, Human Rights Watch (Feb. 5, 2020), https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and (noting that Human Rights Watch "identified or investigated 138 cases of Salvadorans killed since 2013 after deportation from the US").

their name finally is called, many thousands of migrants have been sent back to Mexico to await asylum decisions or to begin the asylum process. As of November 2019, more than 21,000 asylum seekers are estimated to be waiting along the U.S.-Mexico border.[62] Wait times for those asylum seekers who are metered before even being given the opportunity to start the asylum process may be forced to wait for *months*, without adequate shelter or basic necessities[63] and exposed to tremendous danger while forced to wait on the Mexican side of the border.[64]

Congress drafted the asylum laws with a clear understanding of the needs of asylum seekers, knowing that "[t]he refugees of tomorrow, like the refugees of today, [would] continue to look to the United States for safe haven and resettlement

---

[62] Metering Update, *supra* note 10.

[63] American Immigration Council, Policies Affecting Asylum Seekers at the Border: The Migrant Protection Protocols, Prompt Asylum Claim Review, Humanitarian Asylum Review Process, Metering, Asylum Transit Ban, and How They Interact 1-2 (Jan. 29, 2020), https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border.

[64] Human Rights First has identified *more than 400 cases* of "rape, torture, kidnapping and other violence against asylum seekers and migrants whom the United States is forcing to wait in some of the most dangerous cities in the Western Hemisphere" under the M.P.P. program (which is a separate program from metering but nonetheless illustrates the dangers inherent in being left to wait in Mexico), and the real number is undoubtedly far higher as "the vast majority of asylum seekers have not been interviewed by journalists or human rights monitors . . . ." Press Release, Human Rights First, Human Rights First Publishes Running Database of Attacks on Asylum Seekers Under MPP (Nov. 21, 2019), https://www.humanrightsfirst.org/press-release/human-rights-first-publishes-running-database-attacks-asylum-seekers-under-mpp (emphasis added).

opportunities – and our government [would] continue to be called upon to help." S. Rep. No. 96-256, at 3 (1979). Indeed, Congress sought to "establish a national policy of *welcome* to refugees." S. Rep. No. 96-590, at 82 (1980) (Conf. Rep.) (emphasis added). This is particularly true for unaccompanied children, who have special asylum protections created by Congress, which Appellants blatantly ignore.

It is Congress's considered judgment on the importance of providing an opportunity for safe haven, which reflects humanitarian protection enshrined in domestic and international law, that must guide the Court, and not Appellants' unsound statements that do little to mask an underlying disdain for refugees.

CONCLUSION

The justifications offered by Appellants for their disregard of the clear text of the INA, international law, and the principles on which the aforementioned are based do not stem from legitimate concerns about capacity or ability to accommodate asylum seekers at the U.S.-Mexico border, but rather they are pretext for a policy animated by hostility to immigrants, particularly those from Latin America, and a desire to limit migration to the United States. For the foregoing reasons, the Court should affirm the decision below.

Dated: February 11, 2020

Respectfully submitted,

By: /s/ Harrison J. Frahn
HARRISON J. FRAHN
Simpson Thacher & Bartlett LLP
2475 Hanover Street
Palo Alto, CA 94304
Telephone: (650) 251-5065
Facsimile: (650) 251-5002

Counsel for Amici Curiae

Appendix A

APPENDIX A

Bet Tzedek, Hebrew for "House of Justice," has for nearly forty-five years provided free legal services and counsel in a comprehensive range of practice areas. Today, Bet Tzedek represents unaccompanied immigrant children who qualify for asylum, Special Immigrant Juvenile Status, and other forms of relief.

Catholic Charities Community Services, Archdiocese of New York Division of Immigrant & Refugee Services provides immigration legal assistance in New York City and the Lower Hudson Valley to adults, children, and families seeking protection from violence, abuse, and persecution, and to those seeking family reunification, employment authorization, release from detention, or residence and citizenship; we also provide resettlement support to newly arrived refugees and asylees, job development and employment prep to vulnerable newcomers, integration and ESL assistance to adults and children, and hotline and information services to over 65,000 people each year.

Catholic Legal Immigration Network, Inc. is the largest network of nonprofit immigration programs in the United States, with approximately 380 affiliates in 47 states and the District of Columbia that collectively serve hundreds of thousands of low-income immigrants each year. CLINIC's Estamos Unidos Asylum Project educates asylum seekers in Ciudad Juárez, Mexico about the United States asylum process. CLINIC has encountered scores of immigrants facing unsafe

conditions in Ciudad Juárez due to the metering of asylum seekers at the El Paso Port of Entry.

Central American Legal Assistance has been representing asylum seekers from Central & South America since the mid-1980's. The current policy of forcing people to wait in Mexico and then try to re-enter the U.S. to seek asylum is causing immigrants with worthy asylum claims to default and miss hearings.

City Bar Justice Center, a nonprofit affiliate of the New York City Bar Association, provides free legal services to those in need; mobilizes pro bono lawyers, law firms, and corporate legal departments; educates the public on legal issues; and impacts public policy. CBJC serves more than 20,000 low-income New Yorkers annually, including those seeking asylum and other humanitarian immigration relief.

HIAS and Council Migration Services, Inc. of Philadelphia, d/b/a HIAS Pennsylvania ("HIAS Pennsylvania") is a non-profit 501(c)(3) organization that was founded in 1882 to assist Jewish immigrants fleeing persecution in Europe. Today it provides legal and supportive services to immigrants, refugees and asylum seekers from all backgrounds in order to assure their fair treatment and full integration into American society.

Immigrant Defense Project is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants having contact

with the criminal justice system, immigration detention, and removal proceedings. IDP provides attorneys, immigrants, and judges with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP seeks to improve the quality of justice for immigrants accused of crimes and therefore has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizens the full benefit of their constitutional and statutory rights.

Immigrant Justice Corps is the country's first immigration legal fellowship program. IJC Fellows regularly represent clients from Honduras, El Salvador, and Guatemala. Through this representation, IJC Fellows have extensive knowledge of the dire and violent circumstances that force individuals to flee their countries of origin to seek asylum in the United States.

International Refugee Assistance Project is a legal advocacy organization for refugees and displaced people in need of a safe place to call home. IRAP works with clients to identify and navigate pathways to safety through free direct representation, policy advocacy, and litigation.

LatinoJustice PRLDEF is a national non-profit civil rights legal defense fund that has advocated for and defended the constitutional rights of all Latinos to ensure their equal protection under the law since 1972. LatinoJustice has engaged in and supported law reform litigation opposing expanded federal immigration

enforcement and challenging government policies and practices seeking to arbitrarily curtail and limit immigrants' rights.

Legal Aid Society of New York is the nation's oldest and largest program providing direct legal services to low-income families and individuals. The Immigration Law Unit of LAS comprises a staff of over sixty who represent immigrants at all stages of affirmative and defensive immigration proceedings. As part of its asylum practice, LAS represents immigrants who presented their asylum claims at ports of entry, or from within the country after lawful admission, or after entry without inspection.

The Legal Project is a private non-profit in Albany, NY that provides legal representation and advice to both documented and undocumented individuals, including non-detained asylum applicants. TLP has represented and continues to represent asylum seekers who have crossed the southern border into the U.S. both at and outside of a port of entry.

Make the Road New York is a nonprofit, membership-based community organization that integrates adult and youth education, legal and survival services, and community and civic engagement, in a holistic approach to help low-income New Yorkers improve their lives and neighborhoods. MRNY has over 200 staff, over 24,000 members, and five offices spread throughout New York City, Long Island, and Westchester.

Michigan Immigrant Rights Center is a statewide legal resource center for Michigan's immigrant communities, including Michigan's large and diverse Arab American community.

Pangea Legal Services is a non-profit organization that provides low-cost and free legal services to immigrants in removal proceedings. In addition to direct legal services, Pangea also advocates on behalf of the immigrant community through policy advocacy, education, and legal empowerment efforts. Pangea has provided legal orientation to asylum seekers at the US-Mexico border, is committed to advocating for clients who have been unlawfully denied their right to seek refuge in the United States.

The Public Law Center is a non-profit legal services organization located in Santa Ana, California, serving low-income residents of Orange County, California for over thirty-five years. Over the past year, PLC's immigration program has directly served over 1,600 individuals, including in the area of asylum. Over 40% of PLC's asylum seeking clients are from Central America.

Safe Passage Project is a nonprofit immigration legal services organization that provides free lawyers to 823 child refugees who are being deported. More than 2,000 other children living in the New York area are currently facing immigration court without a lawyer. The Safe Passage Project's mission is to get that number to zero.

UnLocal, Inc. is a non-profit organization that provides direct immigration legal representation, legal consultations, and community education to New York City's undocumented immigrant communities. UnLocal attorneys currently represent more than 200 asylum seekers. The majority of these individuals are from Honduras, Guatemala, and El Salvador.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 19-56417

I am the attorney or self-represented party.

This brief contains 6,409 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[x] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Harrison J. Frahn **Date** Feburary 11, 2020
(use "s/[typed name]" to sign electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

By: /s/ Harrison J. Frahn
HARRISON J. FRAHN
Simpson Thacher & Bartlett LLP
2475 Hanover Street
Palo Alto, CA 94304
Telephone: (650) 251-5065
Facsimile: (650) 251-5002

Counsel for Amici Curiae