

**EXHIBIT**

**Amicus Curiae Brief of Amnesty International  
in Opposition to Defendant's  
Motion to Dismiss**

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11 UNITED STATES DISTRICT COURT  
12 SOUTHERN DISTRICT OF CALIFORNIA

13 AL OTRO LADO, INC., a California  
14 corporation; ABIGAIL DOE, BEATRICE  
15 DOE, CAROLINA DOE, DINORA DOE,  
16 INGRID DOE, ROBERTO DOE, MARIA  
17 DOE, JUAN DOE, ÚRSULA DOE,  
18 VICTORIA DOE, BIANCA DOE,  
19 EMILIANA DOE, AND CÉSAR DOE,  
20 individually and on behalf of all others  
21 similarly situated,

22 Plaintiffs,

23 v.

24 KIRSTJEN M. NIELSEN, Secretary,  
25 United States Department of Homeland  
26 Security, in her official capacity;  
27 KEVIN K. MCALEENAN,  
28 Commissioner, United States Customs and  
Border Protection, in his official capacity;  
TODD C. OWEN, Executive Assistant  
Commissioner, Office of Field Operations,  
United States Customs and Border  
Protection, in his official capacity; and  
DOES 1-25, inclusive,

Defendants.

Case No.: No. 3:17-cv-02366-BAS-KSC

**BRIEF OF AMICUS CURIAE  
AMNESTY INTERNATIONAL IN  
OPPOSITION TO DEFENDANTS'  
MOTION TO DISMISS**

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**Statutes**

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*Asylum Processes (Fair and Efficient Asylum Procedures)*, UNHCR (May  
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*Asylum-seekers overwhelming US processing in San Diego ports*, SAN  
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Cindy Carmaco, *For many waiting in Tijuana, a mysterious notebook is the  
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*Facing Walls: USA and Mexico’s Violation of the Rights of Asylum-Seekers*,  
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## INTEREST OF AMICUS CURIAE

Amnesty International is a non-governmental, non-profit organization with a global support base of more than seven million members, supporters and activists in more than 150 countries and territories, and domestic entities set up in more than seventy countries and territories. Amnesty International's vision is of a world in which every person enjoys all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments. Amnesty International works independently and impartially to promote respect for human rights. It monitors domestic law and practices in countries throughout the world for 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 has particular expertise in international law and policies concerning the rights of refugees and asylum-seekers.

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## SUMMARY OF ARGUMENT

The Trump Administration has created a humanitarian crisis at the US–Mexico border by unlawfully turning back asylum-seekers, leaving them in squalor and in danger of both direct and indirect harm.<sup>1</sup> Amnesty International has documented the misconduct of US border officials over the past two years as they implemented policies that violate US and international law. Those laws are intended to protect individuals fleeing their countries of origin and seeking refuge in the United States. International law prohibits states from turning individuals away to any place where they would be at real risk of serious human

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<sup>1</sup> *Overlooked, Under-Protected: Mexico's Deadly Refoulement of Central Americans Seeking Asylum*, AMNESTY INT'L (Jan. 2018), <https://www.amnestyusa.org/wp-content/uploads/2018/01/AMR4176022018-ENGLISH-05.pdf>. Amnesty International conducted a survey of 500 migrants and people seeking asylum, finding that the Mexican government is routinely failing in its obligations under international law to protect those who are in need of international protection, as well as repeatedly violating the non-refoulement principle. These failures by the Mexican government in many cases can cost the lives of those returned to the country from which they fled.

1 rights violations, and the United States expressly incorporated these protections in the  
2 passage of the Refugee Act of 1980. The U.S. government, as well as its operative  
3 administrative agencies, has publicly acknowledged and affirmed its obligations to  
4 refugees and asylum-seekers on several occasions. However, in recent years, the United  
5 States has fallen egregiously short of meeting these obligations.

6 In 2017 and 2018, Amnesty International began receiving a dramatic increase of  
7 reports regarding asylum-seekers being turned away by the Customs and Border Protection  
8 (“CBP”) at U.S. ports-of-entry. In an apparent attempt to justify these “turnbacks,” the  
9 CBP has cited amorphous—and, in Amnesty International’s view, fictional—“capacity”  
10 constraints without any corroborative support. As a consequence, asylum-seekers are  
11 being turned away at unprecedented rates and without any cognizable justification. This is  
12 in direct contravention of domestic and international law, as documented in Amnesty  
13 International’s October 2018 report entitled, ““You Don’t Have Any Rights Here’: Illegal  
14 Pushbacks, Arbitrary Detention & Ill-Treatment of Asylum-Seekers in the United States.”<sup>2</sup>

15 The United States has an obligation to receive and process these individuals’ claims  
16 without discrimination or undue delay and, as evidenced by the treatment of Plaintiffs in  
17 this action, it has fallen short of this obligation. For this reason, Amnesty International  
18 supports Plaintiffs’ Opposition to Defendants’ Motion to Dismiss.

## 19 ARGUMENT

### 20 **A. The Refugee Act of 1980 incorporates the protections of international** 21 **law afforded to refugees and asylum-seekers.**

22 The principle of *non-refoulement*, which prohibits returning or turning away *any*  
23 person to a place where they would be at real risk of serious human rights violations, is  
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27 <sup>2</sup> *You Don’t Have Any Rights Here: Illegal Pushbacks, Arbitrary Detention & Ill-*  
28 *Treatment of Asylum-Seekers in the United States*, AMNESTY INT’L (Oct. 2018),  
<https://www.amnesty.org/download/Documents/AMR5191012018ENGLISH.PDF>.

1 well settled in international law and has acquired customary character.<sup>3</sup> The principle  
2 originates in international refugee law: the 1951 Convention Relating to the Rights of  
3 Refugees codifies the principle of *non-refoulement* as it applies to asylum-seekers and  
4 refugees.<sup>4</sup> Over the past few decades, the principle has further developed in other areas of  
5 international human rights law and now applies to all individuals subjected to a transfer of  
6 jurisdiction, whether or not they claim or are entitled to international protection. Several  
7 international and regional human rights instruments explicitly codify the principle of *non-*  
8 *refoulement*.<sup>5</sup>

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11 <sup>3</sup> UN High Commissioner for Refugees (UNHCR), *The Principle of Non-Refoulement as*  
12 *a Norm of Customary International Law. Response to the Questions Posed to UNHCR by*  
13 *the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR*  
14 *1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994, available at:  
<https://www.refworld.org/docid/437b6db64.html> [accessed 30 January 2019]

15 <sup>4</sup> UN General Assembly, Convention Relating to the Status of Refugees (July 28, 1951),  
16 United Nations, Treaty Series, vol. 189, p. 137 (codifying the principle of non-  
17 refoulement by prohibiting returning a refugee “in any manner whatsoever to the frontiers  
18 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.”)  
[hereinafter, the “1951 Convention”].

19 <sup>5</sup> The Convention Against Torture prohibits *refoulement* to torture at Article 3(1): “No  
20 State Party shall expel, return (“refouler”) or extradite a person to another State where  
21 there are substantial grounds for believing that he would be in danger of being subjected  
22 to torture.” G.A. Res. 39/46, Convention against Torture and Other Cruel, Inhuman or  
23 Degrading Treatment or Punishment, Art. 3 (Dec. 10, 1984). Article 16(1) of the  
24 International Convention for the Protection for All Persons from Enforced Disappearance  
25 includes a similar provision: “No State Party shall expel, return (“refouler”), surrender or  
26 extradite a person to another State where there are substantial grounds for believing that  
27 he or she would be in danger of being subjected to enforced disappearance.” G.A. Res.  
28 61/177, International Convention for the Protection of All Persons from Enforced  
Disappearance, Art. 16(1) (Dec. 20, 2006). The American Convention on Human Rights,  
signed by the United States on June 1, 1977, includes a prohibition against *refoulement* to  
violations of the right to life or personal freedom on grounds of race, nationality, religion,  
social status, or political opinions. American Convention on Human Rights, June 1,  
1977, 1144 U.N.T.S. 123, Art. 22(8)).



1 The UN Refugee Agency (“UNHCR”) has described *non-refoulement* as  
2 encompassing “any measure attributable to a State which could have the effect of returning  
3 an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom  
4 would be threatened,” or where he or she would risk persecution. This includes rejection  
5 at the frontier, interception and indirect *refoulement*, whether of an individual seeking  
6 asylum or in situations of mass influx.<sup>6</sup>

7 In an authoritative advisory opinion regarding state obligations created by  
8 international refugee law,<sup>7</sup> the UNHCR held that the principle of *non-refoulement* is  
9 violated in instances where refugees and asylum-seekers are denied admission at the border  
10 and returned not only to their countries of origin, but also to “any other place” where they  
11 have reason to fear for their lives.<sup>8</sup> Accordingly, a state must not only *prevent* an asylum-  
12 seeker’s return to danger—it must take *affirmative measures* to prevent a risk of harm by  
13 “adopt[ing] a course that does not result in [asylum-seekers’] removal, directly or  
14 indirectly, to a place where their lives or freedom would be in danger.”<sup>9</sup>

15 The protections afforded to refugees and asylum-seekers under the 1951 Convention  
16 also include access to “*fair and efficient* asylum procedures.”<sup>10</sup> The right to fair and  
17 efficient procedures is “an essential element in the full and inclusive application of the  
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21 <sup>6</sup> UN General Assembly, *Note on International Protection*, ¶ 16, Un Doc. A/AC.96/951  
22 (Sep. 13, 2001).

23 <sup>7</sup> The legal status of Advisory Opinions of the UNHCR is explained in the Statute of the  
24 Office of the UNHCR, *available at* <http://www.unhcr.org/4d944e589.pdf>. These are  
generally seen as guidance for compliance with the 1951 Convention.

25 <sup>8</sup> UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement*  
26 *Obligations under the 1951 Convention relating to the Status of Refugees and its 1967*  
Protocol ¶ 7 (Jan. 26, 2007), <https://www.unhcr.org/4d9486929.pdf>.

27 <sup>9</sup> *See* 1951 Convention, *supra* note 3.

28 <sup>10</sup> *Advisory Opinion*, *supra* note 7, at ¶ 8 (emphasis added).

1 1951 Convention.”<sup>11</sup> In order to effectuate an asylum-seeker’s right to *non-refoulement*,  
2 the United States is obligated to implement and follow procedures to ensure that his or her  
3 request for asylum is duly and efficiently received and considered. In practice, this  
4 obligation requires U.S. officials to allow those seeking protection in the U.S. to present a  
5 claim for asylum and not to deny or unreasonably delay their access to a fair and efficient  
6 asylum determination process.

7 The binding principle of *non-refoulement* under international refugee law is  
8 complemented by other *non-refoulement* obligations under international human rights law.  
9 Most notably, the Convention against Torture and Other Cruel, Inhuman or Degrading  
10 Treatment or Punishment (“CAT”), which the United States has expressly ratified and  
11 incorporated into US law, similarly forbids *refoulement*.<sup>12</sup> In describing states’ obligations  
12 of *non-refoulement* under the CAT, the UN Committee Against Torture emphasized that  
13 this obligation includes a prohibition on policies and practices that dissuade people from  
14 seeking protection (also known as “constructive *refoulement*”):

15 “States parties should not adopt dissuasive measures or policies,  
16 such as detention in poor conditions for indefinite periods,  
17 refusing to process claims for asylum or unduly prolong them . .  
18 . which would compel persons in need of protection under Article  
19 3 of the Convention to return to their country-of-origin in spite  
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24 <sup>11</sup> *Asylum Processes (Fair and Efficient Asylum Procedures)*, UNHCR (May 31, 2001),  
25 <https://www.unhcr.org/protection/globalconsult/3b389254a/asylum-processes-fair-efficient-asylum-procedures.html>.

26 <sup>12</sup> G.A. Res. 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading  
27 Treatment or Punishment, Art. 3 (Dec. 10, 1984) (“No State Party shall expel, return  
28 (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”).

1 of their personal risk of being subjected there to torture and other  
2 cruel, inhuman or degrading treatment or punishment.”<sup>13</sup>

3 Congress passed the Refugee Act in 1980 in a sweeping effort to bring the United  
4 States’ domestic laws in line with these international principles and thereby to provide  
5 additional assurances and protections to asylum-seekers and refugees.<sup>14</sup> More specifically,  
6 Congress expressed an intent to bring US laws into compliance with the United Nations  
7 Protocol Relating to the Status of Refugees (the “Protocol”).<sup>15</sup> In keeping with this intent,  
8 federal courts have consistently looked to international standards when confronting legal  
9 issues regarding refugees and asylum-seekers.<sup>16</sup> For instance, the U.S. District Court for  
10 the District of Columbia recently blocked a June 2018 policy adopted by the Trump  
11 Administration that effectively gutted asylum protections for refugees fleeing domestic  
12 violence and gang activity as being in direct contravention of both domestic and  
13 international law.<sup>17</sup> The Board of Immigration Appeals (“BIA”) has similarly  
14 acknowledged that Congress’ intent in passing the Refugee Act was to align domestic  
15 refugee law with the United States’ obligations under the Protocol, to give statutory  
16 meaning to “our national commitment to human rights and humanitarian concerns,” and  
17 “to afford a generous standard for protection in cases of doubt.”<sup>18</sup>

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21 <sup>13</sup> UN Committee Against Torture, General Comment No. 4 (2017) on the implementation  
22 of Article 3 of the Convention in the context of Article 22 (Feb. 9, 2018),  
[http://www.ohchr.org/Documents/HRBodies/CAT/CAT-C-GC-4\\_EN.pdf](http://www.ohchr.org/Documents/HRBodies/CAT/CAT-C-GC-4_EN.pdf).

23 <sup>14</sup> Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102 (1980); *see Grace v.*  
24 *Whitaker*, No. 18-cv-01853, 2018 U.S. Dist. LEXIS 213105 (D.D.C. Dec. 17, 2018).

25 <sup>15</sup> *See Grace*, 2018 U.S. Dist. LEXIS 213105, at \*6 (citing *INS v. Cardoza-Fonseca*, 480  
26 U.S. 421, 424 (1987)).

27 <sup>16</sup> *See id.*

28 <sup>17</sup> *See generally Grace*, 2018 U.S. Dist. LEXIS 213105.

<sup>18</sup> *In re S-P-*, 21 I&N Dec. 486, 492 (B.I.A. 1998)).

1 The principle of *non-refoulement* is specific, universal, and obligatory.<sup>19</sup> Indeed, in  
 2 1996, the United Nations Executive Committee on the International Protection of Refugees  
 3 explicitly stated that the principle had achieved the status of a norm not subject to  
 4 derogation and customary under international law.<sup>20</sup> Thus, there can be no doubt that all  
 5 persons, including but not limited to refugees and asylum-seekers, are afforded robust  
 6 protections from *refoulement* in the United States by operation of both domestic and  
 7 international law.

8 **B. CBP’s policies with regard to asylum-seekers are in direct violation of**  
 9 **both US and international law.**

10 1. State of the US-Mexico border

11 As recently as August 2018, CBP has claimed to employ more than 60,000 personnel  
 12 in the United States.<sup>21</sup> The Department of Homeland Security (“DHS”), under which CBP  
 13 is organized, also maintains one of the largest immigration detention systems worldwide,  
 14 with 211 places of detention<sup>22</sup> and the capacity to incarcerate roughly 40,000 people per  
 15 day (despite there being viable alternatives to detention).<sup>23</sup>

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 18 <sup>19</sup> UNHCR Executive Committee Conclusion No. 79, *General Conclusion on*  
 19 *International Protection* (Oct. 11, 1996),  
 20 <https://www.refworld.org/docid/3ae68c430.html>; *see also* Advisory Opinion, *supra* note  
 21 7.

22 <sup>20</sup> G.A. Res. 51/75, ¶ 3 (Feb. 12, 1997); G.A. Res. 52/132, preamble ¶ 12 (Dec. 12, 1997);  
 UNHCR Executive Committee Conclusion No. 25, *General Conclusion on International*  
 23 *Protection* (Oct. 20, 1982).

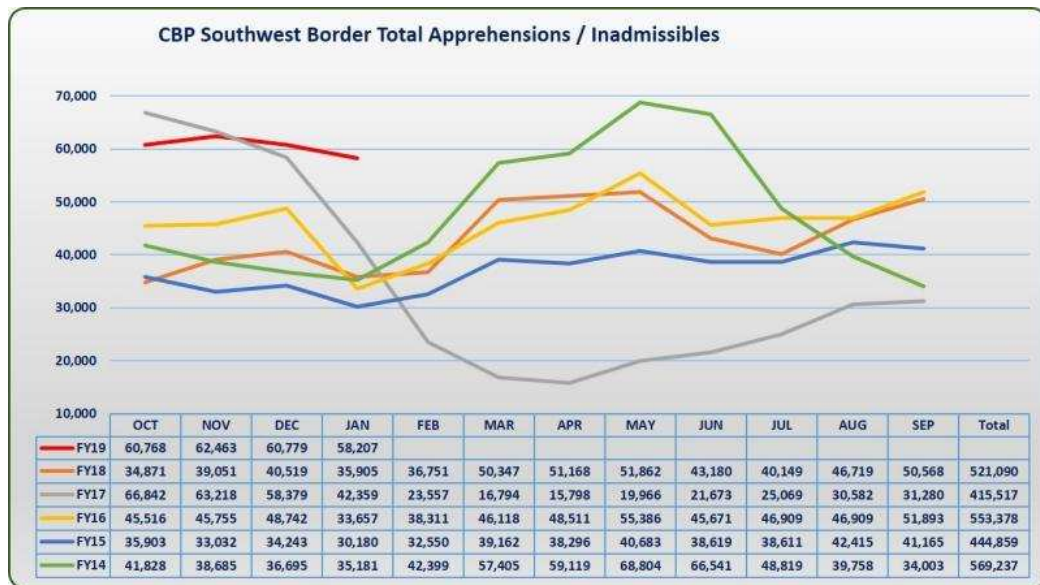
24 <sup>21</sup> *The Life Saving Missions of CBP, DEP’T HOMELAND SECURITY* (Aug. 20, 2018),  
 25 <https://www.dhs.gov/news/2018/08/20/life-saving-missions-cbp>.

26 <sup>22</sup> *ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained*  
 27 *Compliance or Systemic Improvements, DEP’T HOMELAND SECURITY* (June 26, 2018),  
 28 <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>.

<sup>23</sup> *Budget Overview FY 2019, DEP’T HOMELAND SECURITY*,  
<https://www.dhs.gov/sites/default/files/publications/ICE%20FY19%20CJ.pdf> (last visited  
 Jan. 4, 2019).

1 Even so, the current administration has presented a false narrative of overwhelming  
 2 numbers of asylum-seekers at the US–Mexico border in order to justify its increasingly  
 3 frequent denials of access to the asylum process. According to available statistics, the  
 4 supposedly unmanageable number of asylum-seekers appears to be a complete fabrication.  
 5 In reality, as of October 2018, the actual monthly rate of people without legal status  
 6 attempting to enter the United States from Mexico—including asylum-seekers—has  
 7 remained at roughly the same level as that reported in the previous five years:

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18 Throughout those years, US authorities regularly received and processed asylum claims  
 19 without undue delays—what is different today is less so the number of asylum-seekers than  
 20 the systems of processing those seeking protection that CBP systematically imposed at the  
 21 border as early as 2016. Indeed, President Trump publicly acknowledged in April 2018 the  
 22 46-year low in rates of people seeking to enter the United States between ports-of-entry,  
 23 and yet still called those numbers “unacceptable.”<sup>25</sup>

25 <sup>24</sup> U.S. Border Patrol Southwest Border Apprehensions FY 2019, U.S. Customs & Border  
 26 Protection (last modified Feb. 8, 2019), <https://www.cbp.gov/newsroom/stats/sw-border-migration>.

27 <sup>25</sup> President Donald Trump (@RealDonaldTrump), TWITTER (Apr. 5, 2018),  
 28 <https://twitter.com/realdonaldtrump/status/981859214380462081>.

1 Current flows of asylum-seekers do not present a demonstrably different landscape  
2 than has been documented in recent years. Yet, in spite of its purportedly well-staffed ranks  
3 and historically average influx of immigrants, CBP has recently and repeatedly cited a lack  
4 of capacity in its dealings with asylum-seekers.

5 2. Refusal to accept asylum-seekers

6 In recent years, the U.S. government has significantly increased its efforts to  
7 implement a systematic and dangerous practice of illegally turning away asylum-seekers  
8 in order to prevent them from requesting protection at official United States ports-of-entry.  
9 Government officials refer to this practice as the “metering” of asylum claims. DHS  
10 Secretary Kirstjen Nielsen confirmed in a May 2018 interview that this practice is now a  
11 de facto policy at United States borders, denouncing her agency’s legal obligation to  
12 receive and protect asylum-seekers as a mere “loophole.”<sup>26</sup> Nielsen explained the policy  
13 of turning away asylum-seekers as follows:

14 We are “metering,” which means that if we don’t have the  
15 resources to let them [asylum-seekers] in on a particular day, they  
16 are going to have to come back. They will have to wait their turn  
17 and we will process them as we can, but that’s the way that the  
18 law works. Once they come into the United States, we process  
19 them. We have asked Congress to fix this loophole. It’s a huge  
20 gaping loophole that we need to fix because it is so abused.<sup>27</sup>

21 Notably, CBP’s policy of turning away asylum-seekers is directly contrary to public  
22 statements from the US government that its official policy remains to receive all asylum-  
23 seekers at U.S. ports-of-entry.<sup>28</sup> Congress has acknowledged the illegality of the Trump  
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25 <sup>26</sup> Interview by Fox News with Kirstjen Nielsen, Sec’y, Homeland Sec. (May 15, 2018).

26 <sup>27</sup> *Id.*

27 <sup>28</sup> Sec’y Kirstjen Nielson (@SecNielsen), TWITTER (June 17, 2017),  
28 <https://twitter.com/SecNielsen/status/1008467318744240128>; *see also* Attorney Gen. Jeff Sessions, Remarks at National Sheriffs’ Association Annual Conference (June 18, 2018).



1 administration’s ongoing pushbacks of asylum-seekers at the border. In July 2018, while  
2 proposing over \$58 billion in federal funding for DHS agencies, the House Appropriations  
3 Committee called on DHS to “ensure that the United States is meeting its legal obligations,  
4 to include reminding field officers and agents about CBP’s legal responsibilities to ensure  
5 that asylum-seekers can enter at POEs [ports-of-entry].”<sup>29</sup>

6 In spite of the government’s public stance on this issue, in 2017 and early 2018,  
7 Amnesty International began receiving reports of CBP illegally turning away asylum-  
8 seekers all along the US–Mexico border. While some such reports were isolated instances  
9 of abuse of authority, CBP has increasingly shut its doors to asylum-seekers entirely, citing  
10 usually unspecified “capacity” constraints as preventing their processing of asylum claims  
11 on any given day.<sup>30</sup>

12 For instance, a shelter coordinator in Tijuana informed Amnesty International that  
13 CBP personnel at the San Ysidro port-of-entry had in 2017 turned away about 20  
14 unaccompanied minors whom his shelter hosted, without allowing them to claim asylum.  
15 From January to April 2018, CBP turned back at least five more children who were seeking  
16 asylum at the San Ysidro port-of-entry.<sup>31</sup> The shelter coordinator said that most of those  
17 unaccompanied minors were Mexican nationals who had fled from targeted violence in  
18 Guerrero and Michoacán, which the United States recognizes to be two of Mexico’s most  
19 violent states.<sup>32</sup>

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22 <sup>29</sup> H.R. REP. NO. 115-948, at 4, 26.

23 <sup>30</sup> While Amnesty International acknowledges that there may be times during which a  
24 state is genuinely unable to accept and process all asylum-seekers at its border, repeated  
25 instances would certainly constitute a failure to recognize and implement the resources  
26 necessary to fulfill that state’s obligations in view of the UN Convention.

26 <sup>31</sup> Interview with Anonymous Source in Tijuana, Mex. (May 1, 2018).

27 <sup>32</sup> *Mexico Travel Advisory*, U.S. DEP’T STATE (Aug. 22, 2018),  
28 <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html>.

1 In January 2018, Amnesty International spoke briefly with a 17-year-old girl from  
2 Michoacán at the shelter who had fled for her life after cartels killed several of her relatives.  
3 She confirmed that CBP had turned her away at the San Ysidro port-of-entry, and said that  
4 Mexican immigration officials then informed her that Mexican asylum-seekers were not  
5 being accepted at that time. The officials gave her a piece of paper with contacts for a local  
6 shelter and told her to return and try again another time before transporting her to the  
7 shelter. The shelter coordinator informed Amnesty International that CBP only later  
8 processed the girl's asylum claim when she returned to the port-of-entry accompanied by  
9 a US immigration lawyer, who helped her exercise her right to seek asylum in the United  
10 States. However, even this second attempt was unsuccessful.

11 Three shelters in Tijuana separately informed Amnesty International that Mexican  
12 nationals were turned away by CBP more frequently than other nationalities when they  
13 requested asylum at a port-of-entry. One shelter coordinator, who referred to this process  
14 of turnbacks as the "revolving door system," noted that Mexican women with children were  
15 those most frequently turned away, and suggested that it might be due to their lack of  
16 knowledge of the asylum system, or potentially to CBP's disinclination to process families.

17 According to a women's shelter in Tijuana, CBP turned away about twenty-five  
18 Mexican women who were seeking asylum at the San Ysidro port-of-entry on April 27,  
19 2018.<sup>33</sup> The shelter staff indicated to Amnesty International that CBP personnel at San  
20 Ysidro had similarly declined to receive any asylum-seekers at all on several Sundays in  
21 2018.

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24 <sup>33</sup> Interview with Anonymous Shelter Staffer in San Ysidro, Mex. (Apr. 30, 2018). The  
25 shelter staffer witnessed approximately 50 Mexican women leave her shelter on April 27  
26 with the intention of seeking asylum at the San Ysidro Port-of-Entry. She informed  
27 Amnesty International that, from her understanding, only 25 of these 50 women appeared  
28 to have successfully presented themselves at the port-of-entry and were processed for  
asylum by CBP. Half of the women who left the shelter that morning to present  
themselves came back unsuccessful that day.



1 In late December 2017, CBP turned away dozens of asylum-seekers—primarily  
2 from Africa and Mexico—at the San Ysidro port-of-entry. When roughly twenty-five to  
3 thirty of the African asylum-seekers began sleeping in line in a plaza on the Mexican side  
4 of the border crossing, Mexican municipal police cleared the plaza and arrested those  
5 remaining asylum-seekers.<sup>34</sup> Some stayed in shelters as they waited to request asylum in  
6 the United States, according to shelter coordinators who met with Amnesty International  
7 the following week.<sup>35</sup> These are a mere handful of anecdotes out of thousands of similar  
8 instances that arguably beile a widespread practice.

9 In a meeting with Amnesty International on January 5, 2018, the CBP Field Office  
10 Director in charge of the San Ysidro port-of-entry defended those pushbacks by citing  
11 capacity constraints: “So they weren’t being allowed into the port-of-entry. We said, ‘we’re  
12 at capacity, so wait here.’ It’s because of our detention space limitation, we were at  
13 capacity.”<sup>36</sup> He added that CBP was not involved in or aware of the Mexican police’s  
14 rationale for sweeping the plaza and detaining some of the asylum-seekers. While CBP  
15 has consistently maintained that they rarely exceeded their capacity to receive asylum-  
16 seekers, it has nonetheless CBP’s been most frequent justification for regularly reported  
17 illegal pushbacks at the border.

18 The San Diego CBP Field Office Director told Amnesty International that a process  
19 exists to investigate and sanction CBP officials if they deny asylum-seekers the opportunity  
20 to present their claims. However, the official did not consider CBP pushbacks due to  
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22 <sup>34</sup> *Asylum-seekers overwhelming US processing in San Diego ports*, SAN DIEGO UNION  
23 TRIB. (Dec. 26, 2017, 7:40 PM),  
24 [http://www.sandiegouniontribune.com/news/immigration/sd-me-asylum-backlog-  
20171226-story.html](http://www.sandiegouniontribune.com/news/immigration/sd-me-asylum-backlog-20171226-story.html).

25 <sup>35</sup> One staffer recalled their shelter having hosted 21 African asylum-seekers after the  
26 release of those arrested by municipal police, including men from Eritrea, Cameroon,  
27 DRC, Gambia, Ghana, Kenya, Sierra Leone, and Togo.

28 <sup>36</sup> Interview with CBP Field Office Director at CBP Field Office, San Diego, CA (Jan. 5,  
2018).

1 alleged capacity constraints to constitute such an offense, and declined to share with  
2 Amnesty International how many—if any—CBP personnel were sanctioned for illegal  
3 pushbacks in 2017.<sup>37</sup>

4 Turnbacks are not an entirely new phenomenon at the US–Mexico border—CBP  
5 officials are vested with broad discretion and Amnesty International has documented  
6 abuses of that discretion, resulting in turnbacks, since at least 2015. But the scale of these  
7 turnbacks has escalated within the past year, resulting from what is clearly a policy by the  
8 Trump Administration to encourage CBP officers to limit the number of asylum-seekers,  
9 and otherwise to deter migrants from seeking protection at the US border. As discussed  
10 above, the principle of *non-refoulement* mandates that states take affirmative measures to  
11 “adopt a course that does not result in [asylum-seekers’] removal, directly or indirectly, to  
12 a place where their lives or freedom would be in danger.”<sup>38</sup> The flagrant violation of this  
13 obligation cannot be permitted to continue.<sup>39</sup>

### 14 3. Delay in processing

15 DHS Secretary Nielsen indicated in her statement regarding metering that, “[o]nce  
16 [asylum-seekers] come into the United States, we process them.”<sup>40</sup> This is a gross  
17 oversimplification of the process experienced by those asylum-seekers who have  
18 successfully crossed at points-of-entry in recent months. According to the aid organization  
19 Kino Border Initiative (“KBI”), from May 20 to June 22, 2018, CBP processed an average  
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21 <sup>37</sup> *Id.* (“Where we substantiate the fact that somebody was denied or turned around once  
22 they made a credible fear case, then we have internal actions that we take during the  
23 disciplinary process and review. So there is a process for it. . . . I wouldn’t be able to tell  
24 you that statistic, and it’s probably not something that we would release at this point as  
25 far as numbers. Those are internal numbers of what we’re doing with staff. That’s not  
26 something our officers should be doing, turning people away.”).

25 <sup>38</sup> See 1951 Convention, *supra* note 3.

26 <sup>39</sup> *Facing Walls: USA and Mexico’s Violation of the Rights of Asylum-Seekers*, AMNESTY  
27 INT’L (June 2017), [https://www.amnestyusa.org/wp-content/uploads/2017/06/USA-](https://www.amnestyusa.org/wp-content/uploads/2017/06/USA-Mexico-Facing-Walls-REPORT-ENG.pdf)  
28 [Mexico-Facing-Walls-REPORT-ENG.pdf](https://www.amnestyusa.org/wp-content/uploads/2017/06/USA-Mexico-Facing-Walls-REPORT-ENG.pdf).

28 <sup>40</sup> Nielsen, *supra* note 26.

1 of only five to ten asylum applications per day, and forced asylum-seekers to wait in lines  
2 ranging from fifty to 120 people on the Mexico side of the Nogales border crossing while  
3 they awaited processing. Those waiting in line were subjected to temperatures exceeding  
4 100 degrees, in addition to threats of deportation and potential exploitation or violence by  
5 criminal gangs and smugglers, often for periods lasting from several days to more than two  
6 weeks. Consequently, the overall number of people without legal status to enter the United  
7 States who were processed at the port-of-entry dropped from May to June, and was  
8 certainly no higher than other months<sup>41</sup>—contrary to the representations of the current  
9 administration.

10 This delayed processing has become a consistent practice across ports-of-entry,  
11 including San Ysidro, where CBP received and processed a maximum of only twenty to  
12 forty asylum-seekers per day in May and June 2018, according to NGOs active at the  
13 California–Mexico border. Similar to those at the Nogales border, asylum-seekers at the  
14 San Ysidro port-of-entry were forced to queue in Tijuana, despite the fact that the city is  
15 neither safe for asylum-seekers nor recognized as such by US authorities. On May 8, 2018,  
16 the list of those waiting for their asylum claims to be processed at the San Ysidro port-of-  
17 entry was roughly 350 people.<sup>42</sup> By June 10, 2018, that number had grown to 1,200.<sup>43</sup> On  
18 July 5, 2018, the Los Angeles Times reported that the list of asylum-seekers waiting in  
19 Tijuana has grown to nearly 2,000 people.<sup>44</sup> When Amnesty International reviewed the list

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21 <sup>41</sup> *Southwest Border Inadmissibles by Field Office FY2018*, U.S. CUSTOMS & BORDER  
22 PROTECTION, <https://www.cbp.gov/newsroom/stats/oyo-sw-border-inadmissibles> (last  
updated Dec. 21, 2018).

23 <sup>42</sup> Text Message from Caravan Organizer to Amnesty International, Tijuana, Mex. (May  
24 8, 2018).

25 <sup>43</sup> E-mail from Caravan Organizer to Amnesty International, Tijuana, Mex. (June 10,  
2018).

26 <sup>44</sup> Cindy Carmaco, *For many waiting in Tijuana, a mysterious notebook is the key to*  
27 *seeking asylum*, Los Angeles Times (July 5, 2018, 4:10 AM),  
28 [https://www.latimes.com/local/california/la-me-asylum-seekers-notebook-holds-key-to-](https://www.latimes.com/local/california/la-me-asylum-seekers-notebook-holds-key-to-entry-20180705-story.html)  
[entry-20180705-story.html](https://www.latimes.com/local/california/la-me-asylum-seekers-notebook-holds-key-to-entry-20180705-story.html).

1 again on November 21, 2018, it contained the names of around 4,320 people, including  
2 roughly 2,000 caravan members—mostly from Honduras—who had arrived since  
3 November 15.<sup>45</sup> Those already on the list prior to the caravan’s arrival had reportedly been  
4 waiting about five weeks in Tijuana before US officials started processing their asylum  
5 claims.<sup>46</sup>

6 Processing delays are similarly dire at the Texas–Mexico border where, in 2018, US  
7 authorities temporarily stopped receiving any asylum claims at two ports-of-entry for  
8 substantial periods of time. On July 17, 2018, CBP officers stationed at the center of the  
9 Roma–Miguel Aleman international bridge informed US immigration lawyer Jennifer  
10 Harbury that CBP no longer accepted asylum-seekers at the Roma port-of-entry. CBP  
11 instructed asylum-seekers to travel to the Reynosa bridge—more than 60 miles away, and  
12 potentially through dangerous cartel-controlled territory on the Mexican side of the border.  
13 On August 17, 2018, KBI informed Amnesty International that CBP and the Mexican  
14 government’s National Institute of Migration (“INM”) officials had closed the Laredo port-  
15 of-entry to asylum-seekers and redirected them to the Eagle Pass port-of-entry, where they  
16 were told to sign up on a waitlist managed by the municipal government. CBP was only  
17 reportedly processing six to seven people per day, as over 100 asylum-seekers waited in  
18 makeshift migrant shelters in Piedras Negras—some of whom were not allowed by  
19 municipal authorities to join the waitlist. Among them were families with small children,  
20 some of whom were sick and required medical attention at the local hospital. KBI reported  
21 that many of those asylum-seekers left Piedras Negras after being deterred by CBP and  
22 municipal authorities from requesting asylum at the port-of-entry.

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25 <sup>45</sup> *Americas: US government endangers asylum seekers with unlawful policies*, AMNESTY  
26 INT’L (Nov. 26, 2018, 4:07 PM),  
27 [https://www.amnesty.org/en/latest/news/2018/11/americas-us-government-endangers-  
28 asylum-seekers-with-unlawful-policies/](https://www.amnesty.org/en/latest/news/2018/11/americas-us-government-endangers-asylum-seekers-with-unlawful-policies/).

<sup>46</sup> *Id.*

1 Clearly, these delays in processing have dire consequences. Asylum-seekers are  
2 forced to wait in intolerable, and oftentimes life-threatening, conditions, without any  
3 guarantee that CBP officials at their port-of-entry will ultimately receive and process their  
4 requests. Regrettably, the effect of these delays is often the effective turning away of  
5 asylum-seekers. And, once turned away to Mexico, asylum-seekers are often further  
6 subjected to systematic *refoulement* to their countries of origin.<sup>47</sup> In spite of this fact, the  
7 Trump administration continues its attempts to designate Mexico as a “safe third country,”  
8 as evidenced in part through the Department of Justice/DHS memorandum leaked in  
9 January 2018 by Senator Jeff Merkley, which belies the administration’s full knowledge  
10 that its continued efforts to do so may be unlawful under both domestic and international  
11 law.<sup>48</sup>

12 Not only are these turnbacks and delays unjustified, as CBP officials continue to cite  
13 vague claims of “capacity” restraints, but they are in further violation of domestic and  
14 international laws that expressly prohibit states from “refusing to process claims for asylum  
15 or unduly prolong them”<sup>49</sup> and mandate “access to the territory and to *fair and efficient*  
16 *asylum procedures.*”<sup>50</sup> This contravention of asylum-seekers’ right to an efficient, lawful  
17 process cannot be permitted to continue.

### 18 CONCLUSION

19 Regardless of the current administration’s public acknowledgement and affirmation  
20 of its obligations under domestic and international law to accept and promptly process  
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22 <sup>47</sup> *Overlooked, Under-Protected: Mexico’s Deadly Refoulement of Central Americans*  
23 *Seeking Asylum*, AMNESTY INT’L (Jan. 2018), [https://www.amnestyusa.org/wp-](https://www.amnestyusa.org/wp-content/uploads/2018/01/AMR4176022018-ENGLISH-05.pdf)  
24 [content/uploads/2018/01/AMR4176022018-ENGLISH-05.pdf](https://www.amnestyusa.org/wp-content/uploads/2018/01/AMR4176022018-ENGLISH-05.pdf).

25 <sup>48</sup> See Julia Ainsley, *Trump admin weighed targeting migrant families, speeding up*  
26 *deportation of children*, NBC (Jan. 17, 2019, 7:37 PM),  
27 [https://www.nbcnews.com/politics/immigration/trump-admin-weighed-targeting-migrant-](https://www.nbcnews.com/politics/immigration/trump-admin-weighed-targeting-migrant-families-speeding-deportation-children-n958811)  
28 [families-speeding-deportation-children-n958811](https://www.nbcnews.com/politics/immigration/trump-admin-weighed-targeting-migrant-families-speeding-deportation-children-n958811).

<sup>49</sup> UN Committee Against Torture, *supra* note 12.

<sup>50</sup> Advisory Opinion, *supra* note 7, at ¶ 8 (emphasis added).

1 asylum-seekers, the actions by its agents at the border tell a very different story. According  
2 to Amnesty International’s research, CBP’s actions have been clear, consistent, and  
3 synchronized at widely dispersed ports-of-entry, and the effect of these actions has been to  
4 stifle the number of asylum-seekers permitted entry into the United States. Emboldened  
5 by DHS Secretary Nielsen’s public denouncement of the asylum process as a “huge gaping  
6 loophole,”<sup>51</sup> border officials have instituted insidious practices that effectively boil down  
7 to false claims of a lack of capacity as a justification for turning away asylum-seekers.  
8 Even those ports-of-entry that do not expressly turn away asylum-seekers subject them to  
9 significant delays that result in their waiting—oftentimes in dangerous territories or  
10 intolerable conditions—for unspecified periods as they await processing. In many  
11 accounts, this amounts to effective denial for asylum-seekers.

12 These practices are not only morally repugnant but also in flagrant violation of  
13 domestic and international law. The United States has an obligation by virtue of the  
14 principle of *non-refoulement* to “grant individuals seeking international protection across  
15 to the territory and to fair and efficient asylum procedures,”<sup>52</sup> and is similarly prohibited  
16 from “refusing to process claims for asylum or unduly prolong them.”<sup>53</sup> Border officials’  
17 practices of metering and delayed processing violate both of these principles and  
18 effectively force asylum-seekers to return to those same territories where their “life or  
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26 <sup>51</sup> Nielsen, *supra* note 26.

27 <sup>52</sup> UNHCR, *supra* note 8.

28 <sup>53</sup> UN Committee Against Torture, *supra* note 12.

1 freedom” would be threatened.<sup>54</sup> For these reasons, Amnesty International respectfully  
2 supports the request that this Court deny Defendants’ Motion to Dismiss.

3  
4 Dated: February 21, 2019

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<sup>54</sup> 1951 Convention, *supra* note 3.