

No. 19A230

IN THE
Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.,
Petitioners/Applicants,
v.
EAST BAY SANCTUARY COVENANT, ET AL.,
Respondents.

**On Application for Stay Pending Appeal to the United
States Court of Appeals for the Ninth Circuit**

**MOTION FOR LEAVE TO FILE AND BRIEF OF NON-
PROFIT ORGANIZATIONS AND LAW SCHOOL
CLINICS AS *AMICI CURIAE* IN SUPPORT OF
RESPONDENTS AND THEIR OPPOSITION TO STAY**

CHRISTINE LIN
CGRS-CALIFORNIA
200 MCALLISTER STREET
SAN FRANCISCO, CA 94102

KAREN MUSALO
Counsel of Record
BLAINE BOOKEY
NEELA CHAKRAVARTULA
KATE JASTRAM
ANNE PETERSON
CENTER FOR GENDER & REFUGEE
STUDIES
200 MCALLISTER STREET
SAN FRANCISCO, CA 94102
(415) 565-4877
MUSALOK@UCHASTINGS.EDU

Counsel for Amici Curiae

MOTION FOR LEAVE TO FILE¹

Amici respectfully move for leave to file a short brief as *amici curiae* in support of Respondents and their opposition to the stay application. The parties have consented to the filing of the enclosed *amicus* brief in opposition to Applicants' stay application.

Amici respectfully request that the Court consider the arguments herein and in the enclosed *amicus* brief in opposition to the Applicants' stay application in *William P. Barr, et al. v. East Bay Sanctuary Covenant, et al.*, No. 19-16487. The attached *amicus* brief demonstrates that the Administration's unprecedented policy of rendering ineligible for asylum individuals who transited through a third country before seeking protection at the United States' southern border is inconsistent with asylum laws that have existed for four decades and would have severe, life or death consequences for people long recognized as meriting protection. *Amici's* unique perspective on the public interest in protecting refugees this rule undermines "may be of considerable help to the Court." Sup. Ct. R. 37.1.

¹ No counsel for any party authored the *amicus* brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to its preparation or submission. Applicants and Respondents have consented to the filing of the *amicus* brief.

I. Statement of Movant's Interest.

Amici include twenty-eight non-profit organizations and law school clinics that represent asylum seekers across the country. *See* Appendix A. Together these organizations, made up of recognized experts in the field, have engaged in asylum work and research for several decades. Of the thousands of asylum seekers they represent, a substantial portion of them sought safe haven at the U.S.-Mexico border and would be barred from protection from having transited through a third country under the Administration's latest asylum ban. *Amici* thus have a strong interest in seeing the proper application of federal laws to ensure they are applied uniformly and afford the right to asylum protection as widely as Congress intended and the United States' international obligations require.

II. Statement Regarding Brief Form and Timing.

Given the expedited briefing of the stay application, *amici* respectfully request leave to file the enclosed brief supporting Respondents and their opposition to the Applicants' stay application without 10 days' advance notice to the parties of intent to file. *See* Sup. Ct. R. 37.2(a). The application for stay was filed on August 26, 2019. The next day, this Court ordered a response by September 4, 2019. On September 3, 2019, counsel for *amici* gave notice to all parties of the intent to file an *amicus* brief in

opposition to the applications for stays. Respondents gave their consent on September 3, 2019. Applicants gave their consent on September 4, 2019. The above justifies the request to file the enclosed *amicus* brief supporting Respondents without 10 days' advance notice to the parties of intent to file.

CONCLUSION

The Court should grant *amici curiae* leave to file the enclosed brief in support of Respondents and their opposition to the stay application.

Respectfully submitted,

Karen Musalo
Counsel of Record
Blaine Bookey
Neela Chakravartula
Kate Jastram
Anne Peterson
Center for Gender & Refugee Studies
200 McAllister Street
San Francisco, CA 94102
(415) 565-4877
musalok@uchastings.edu

Christine Lin
CGRS-California
200 McAllister Street
San Francisco, CA 94102

DATED: September 4, 2019

TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE..... i

TABLE OF AUTHORITIES..... v

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT..... 1

ARGUMENT 3

I. The Third Country Asylum Rule Would Virtually Eliminate Asylum in the United States and Result in Refoulement of Bona Fide Refugees..... 3

 A. The new rule upends asylum law and leaves few to benefit from this critical protection..... 3

 B. The new rule will cause untold suffering including even death. 6

CONCLUSION 10

APPENDIX (List of *Amici Curiae*).....1a

v
TABLE OF AUTHORITIES

| | Page(s) |
|---|---------|
| Cases | |
| <i>Al-Harbi v. INS</i> , 242 F.3d 882 (9th Cir. 2001)..... | 7 |
| <i>Bringas-Rodriguez v. Sessions</i> , 850 F.3d 1051 (9th Cir. 2017)..... | 8 |
| <i>East Bay Sanctuary Covenant v. Barr</i> , 385 F. Supp. 3d 922 (N.D. Cal. 2019)..... | 2 |
| <i>East Bay Sanctuary Covenant v. Trump</i> , 932 F.3d 742 (9th Cir. 2018)..... | 8 |
| <i>Gulla v. Gonzales</i> , 498 F.3d 911 (9th Cir. 2007)..... | 3 |
| <i>Matter of Pula</i> , 19 I&N Dec. 467 (B.I.A. 1987)..... | 3 |
| Statutes | |
| 8 U.S.C. § 1101(a)(42) | 3 |
| 8 U.S.C. § 1158 | 3 |
| 8 U.S.C. § 1158(b)(3) | 8 |
| 8 U.S.C. § 1231(b)(3) | 7 |

Other Authorities

| | |
|---|------|
| 8 C.F.R. § 208.13(c)(4) | 4 |
| 8 C.F.R. § 209.2 | 8 |
| 8 C.F.R. § 1208.16(c)(2) | 7 |
| 8 C.F.R. § 1208.16(e) | 8 |
| Convention Relating to the Status of Refugees, art. 33, ¶ 1, 198 U.N.T.S. 150 (July 28, 1951) | 2, 6 |
| DHS Office of Immigration Statistics, Annual Flow Report, Refugees and Asylees: 2017 (March 2019) | 5 |
| Gramlich and Noe-Bustamante, <i>What’s happening at the U.S.-Mexico border in 6 charts</i> , Pew Research Center (April 10, 2019) | 5 |
| Ley sobre Refugiados, Protección Complementaria y Asilo Político [Refugee Law] [Statute on Refugees, Complementary Protection, and Political Asylum], art. 18, Diario Oficial de la Federación [DO], 01/27/2011, (Mx) | 6 |
| UNHCR, <i>UNHCR deeply concerned about new U.S. asylum restrictions</i> (July 19, 2019) | 6, 7 |

UNHCR, *Guidance Note on bilateral
and/or multilateral transfer
arrangements of asylum-seekers*
(2013)7

INTEREST OF *AMICI CURIAE*¹

Amici are twenty-eight non-profit organizations and law school clinics that represent asylum seekers across the country and, therefore, have a strong interest in the proper application of federal laws to ensure they afford the right to this fundamental protection widely as Congress intended and the United States' international obligations require. A complete list of *amici* is contained in the Appendix.

SUMMARY OF ARGUMENT

The current asylum ban would effectively end all asylum at the southern land border, upending four decades of uniform practice. This momentous change is not consistent with the asylum laws Congress created and not factually justified by the administrative record. A change of this magnitude should not be permitted to go into effect at the stay stage.

The Administration's latest attempt to change the asylum laws thwarts the will of Congress by eliminating asylum for individuals who transit through a third country before seeking protection at the southern border, and slams the United States' doors on the persecuted, unilaterally ending asylum

¹ No counsel for any party authored the brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to its preparation or submission. Applicants and Respondents have consented to the filing of this brief.

as we know it. The district court correctly enjoined the rule as inconsistent with existing asylum laws that only authorize sending asylum seekers to third countries in limited circumstances—where a Safe Third Country Agreement exists or the applicant is firmly resettled—to ensure “we do not deliver aliens into the hands of their persecutors.” *East Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922 (N.D. Cal. 2019).²

The Administration has offered no justification warranting a stay of the district court’s injunction, upheld in part by the Ninth Circuit, that “merely restore[s] the law to what it has been for many years.” *Id.* Where permitted to take effect, the rule will have severe consequences, eliminating a critical form of life-or-death protection for people long recognized as meriting asylum and violating the United States’ treaty obligations to administer protection without discrimination and to avoid “in any manner whatsoever” returning individuals to danger. Convention Relating to the Status of Refugees, art. 33, ¶ 1, 198 U.N.T.S. 150, 176 (July 28, 1951). The Court should decline the government’s request for a stay.

² *Amici* agree with Respondents’ arguments, not repeated in this brief, regarding the inconsistency between the rule and the Safe Third Country and firm resettlement statutory provisions.

ARGUMENT

I. The Third Country Asylum Rule Would Virtually Eliminate Asylum in the United States and Result in Refoulement of Bona Fide Refugees.

A. The new rule upends asylum law and leaves few to benefit from this critical protection.

Individuals seeking asylum at the United States' southern border are fleeing gender-based violence, violence perpetrated by gangs, and politically, racially and religiously motivated persecution, among other heinous acts. *See, e.g.*, Administrative Record ("AR") 293-95. There are many reasons asylum seekers fleeing this sort of violence are unable to take a direct route to the United States that do not undermine the merit of their claims, including the exigent circumstances of their flight and the lack of visas that would permit them to board a plane to the United States to seek asylum. The immigration agency and the courts have recognized this reality—that asylum seekers may pass through multiple countries while searching for refuge but continue on to the United States because they cannot find safety in the transited countries, or because they wish to reunify with family. *See, e.g., Gulla v. Gonzales*, 498 F.3d 911, 917 (9th Cir. 2007) (finding the agency abused its discretion in denying asylum based on petitioner's failure to apply for asylum in transit countries where he had valid reasons not to seek refuge there); *Matter of Pula*, 19 I&N Dec. 467, 474 (B.I.A. 1987) (recognizing an

asylum seeker “may not have found a safe haven even though he has escaped to another country” and family reunification or other “personal ties” may “motivate[] him to seek asylum here rather than elsewhere”).

Since passage of the Refugee Act in 1980, these individuals have been eligible for asylum so long as they satisfy the stringent burden of establishing they meet the definition of a refugee. *See* 8 U.S.C. §§ 1101(a)(42), 1158. Take the case of sixteen-year-old *Jose*, who fled El Salvador after cooperating with police in a sting operation to identify a Mara 18 gang member who had threatened him.³ He traveled through Guatemala and Mexico, suffering a violent attack from the infamous drug cartel Los Zetas during the journey. After arriving in the United States as an unaccompanied child, he learned that the Salvadoran government summoned him as a witness to testify in court against the gang member and feared he would be killed if returned. U.S. Citizenship and Immigration Services (“USCIS”) granted Jose’s claim. USCIS also recently granted asylum to *Martha*, a transgender woman from El Salvador who fled after being beaten and raped due to her gender identity. She feared applying for asylum in Guatemala and Mexico where it is well documented that transgender individuals face rampant violence and discrimination.

³ The brief uses pseudonyms to protect the confidentiality of individuals. Documentation of the facts of the case examples are on file with *amici*.

The Administration aims to uproot Congress' long held and unambiguous intent regarding the scope of the United States' asylum laws. Under the new rule, asylum seekers like Jose and Martha who fail to apply for protection from persecution or torture in at least one country before coming to the United States "shall be found ineligible for asylum," subject to only limited exceptions. 8 C.F.R. § 208.13(c)(4). One such exception includes having applied for and been denied protection in a transit country. *Id.* 208.13(c)(4)(i). However, as set forth below, this provides little solace for asylum seekers traveling through Mexico or many other countries that simply do not have the infrastructure to adjudicate their claims in a safe, fair, and timely manner. This complete ban would eviscerate the U.S. asylum system, stripping this life saving protection for all non-Mexican asylum seekers entering at the southern border, who necessarily will have transited through a third country.

The Administration's new rule effectively ends the U.S. asylum program for the huge proportion of applicants who enter at the southern border. Mexicans make up a shrinking percentage of asylum seekers in the United States, as epidemic levels of violence in Central America and other countries around the world force individuals to flee for their lives. *See, e.g.*, DHS Office of Immigration Statistics, Annual Flow Report, Refugees and Asylees: 2017

(March 2019)⁴; Gramlich and Noe-Bustamante, *What's happening at the U.S.-Mexico border in 6 charts*, Pew Research Center (April 10, 2019).⁵ While the rule purportedly channels asylum seekers to other countries to apply, as explained more below, even if they are aware of the protections available to them, those systems are wholly inadequate for ensuring they have meaningful access to protection.

B. The new rule will cause untold suffering including even death.

The practical effect of this rule would be to send asylum seekers who have not sought protection in Mexico or Guatemala back to those countries, which will undoubtedly result in U.S. violations of the duty of nonrefoulement—the centerpiece of U.S. asylum law. Refugee Convention, art. 33.1. News outlets, human rights organizations, the U.N. High Commissioner for Refugees (“UNHCR”), and the U.S. government have all documented the extreme dangers for migrants and shortcomings of the asylum processes in both countries. *See, e.g.*, AR 636-37 (Wall Street Journal article); 700 (Reuters article), 703

⁴ Available at https://www.dhs.gov/sites/default/files/publications/Refugees_Asylyes_2017.pdf.

⁵ Available at <https://www.pewresearch.org/fact-tank/2019/04/10/whats-happening-at-the-u-s-mexico-border-in-6-charts/>.

(Human Rights First Factsheet), 721-24 (Amnesty International report).

Consistent with *amicus*'s expertise on these issues, the government's own submissions in this case demonstrate that the Mexican system is woefully underfunded and, worse, that Mexico has a pattern of abusing asylum seekers and unlawfully refouling them to danger. *See, e.g.*, AR 700 (Reuters article), 703 (Human Rights First Factsheet); AR 721-24 (Amnesty International report). Moreover, for some individuals it may be too late, as Mexican law requires migrants to apply within thirty days. Ley sobre Refugiados, Protección Complementaria y Asilo Político [Refugee Law] [Statute on Refugees, Complementary Protection, and Political Asylum], art. 18, Diario Oficial de la Federación [DO], 01/27/2011, (Mx).

The government's citation to a similar transit rule in the European Union to support the legality of the rule at issue here is completely inapposite. Stay Motion at 13-14. Unlike the EU context, UNHCR has publicly expressed it is "deeply concerned" that the United States' latest asylum ban "will endanger vulnerable people in need of international protection." *UNHCR deeply concerned about new U.S. asylum restrictions* (July 19, 2019).⁶ UNHCR has repeatedly

⁶ Available at <https://www.unhcr.org/en-us/news/press/2019/7/5d2cdf114/unhcr-deeply-concerned-new-asylum-restrictions.html>.

and unequivocally stated that reviewing countries' actual practice and compliance with human rights instruments is an essential part of assessing the adequacy of any transfer arrangement of asylum seekers between countries. *See, e.g.,* UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers* (2013).⁷ Even a cursory review of human rights conditions in Mexico, Guatemala, and other common transit countries to this country shows they do not provide a safe or adequate system of asylum adjudication.

The continued availability of withholding of removal ("withholding") under 8 U.S.C. § 1231(b)(3) and protection under the U.N. Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") implemented at 8 C.F.R. §§ 1208.16-1208.18, does not cure the illegality of this policy or the devastating impacts it would have. These forms of relief are simply no substitute for asylum. Both withholding and CAT require applicants to demonstrate a much higher likelihood of harm in order to obtain protection. *See, e.g., Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (stating that the "clear probability" of harm standard for withholding is "more stringent" than the "well-founded fear" standard for asylum); 8 C.F.R. § 1208.16(c)(2) ("more likely than not" standard for CAT relief). Such a standard poses a nearly insurmountable hurdle, especially for unaccompanied

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

children like Jose and other vulnerable groups. Even if applicants are able to meet the higher standard, unlike those granted asylum, recipients of withholding or CAT cannot petition for family members to join them. *Compare* 8 C.F.R. § 1208.16(e) *with* 8 U.S.C. § 1158(b)(3); *see also East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 766 (9th Cir. 2018). Denying bona fide refugees asylum protection thus violates the Refugee Convention, which speaks of refugees’ essential right to family unity. In addition, unlike asylees, recipients of withholding and CAT protection are not eligible to adjust status to permanent residence, leaving them with precarious and unsettled futures. *See* 8 C.F.R. § 209.2 (adjustment of status for asylees).

Finally, the rule violates the principle of non-discrimination found in Article 3 of the Refugee Convention and the U.S. refugee protection system by precluding from asylum protection any non-Mexican fleeing persecution who is unable to enter by air, or sea, and therefore arrives at a land port of entry. *See Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1059-60 (9th Cir. 2017) (en banc) (examining history of the Refugee Act leading to the “nondiscriminatory definition of refugee”). In doing so, it clearly places cruel and manifestly unsafe obstacles in front of asylum seekers traveling by land from non-contiguous countries. The Administration’s new rule is patently unlawful in flagrant violation of the United States’ bedrock domestic and international obligations to protect the persecuted.

CONCLUSION

For the foregoing reasons, the application for stay should be denied.

Respectfully submitted,

Karen Musalo
Counsel of Record
Blaine Bookey
Neela Chakravartula
Kate Jastram
Anne Peterson
Center for Gender & Refugee Studies
200 McAllister Street
San Francisco, CA 94102
(415) 565-4877
musalok@uchastings.edu

Christine Lin
CGRS-California
200 McAllister Street
San Francisco, CA 94102

DATED: September 4, 2019

LIST OF *AMICI CURIAE*

Amnesty International
New York, New York

Asylum Seeker Advocacy Project
New York, New York

Asylum Seeker Assistance Project
Washington, D.C.

Catholic Charities, Immigrant and Refugee
Services
New York, New York

Center for Gender & Refugee Studies
San Francisco, California

Centro Legal de La Raza
Oakland, California

CGRS-California
San Francisco, California

Community Justice Alliance
Sacramento, California

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

2a

Dolores Street Community Services
San Francisco, California

HIAS
Silver Spring, Maryland

Human Rights Initiative of North Texas
Dallas, Texas

Immigrant Legal Defense
Oakland, California

Immigrant Legal Resource Center
San Francisco, California

Immigration and Human Rights Clinic,
University of the District of Columbia Law
School
Washington, D.C.

International Refugee Assistance Project, Inc.
New York, New York

International Rescue Committee
New York, New York

Kids in Need of Defense
Washington, D.C.

Legal Services for Children
San Francisco, California

3a

Loyola Immigrant Justice Clinic
Los Angeles, California

National Justice For Our Neighbors
Annandale, Virginia

National Survivor Network
Los Angeles, California

Pangea Legal Services
San Francisco, California

Program for Torture Victims
Los Angeles, California

Public Counsel
Los Angeles, California

Sanctuary for Families
New York, New York

The Advocates for Human Rights
Minneapolis, Minnesota

UC Davis Immigration Law Clinic
Davis, California