

IN THE SUPREME COURT OF THE UNITED STATES

U.S. DEPARTMENT OF HOMELAND SECURITY ET AL., *Applicants*,

v.

D.V.D. ET AL., *Respondents*.

On Application for Stay of the Injunction Issued by the
United States District Court for the District of Massachusetts
and Request for an Immediate Administrative Stay

BRIEF OF AMICUS CURIAE CENTER FOR GENDER & REFUGEE STUDIES
IN SUPPORT OF RESPONDENTS

Blaine Bookey
Karen Musalo
CENTER FOR GENDER
& REFUGEE STUDIES
200 McAllister Street
San Francisco, CA 94102
(415) 565-4877

Melissa Crow
Counsel of Record
CENTER FOR GENDER
& REFUGEE STUDIES
1121 14th Street, NW, Suite 200
Washington DC 20005
(202) 355-4471
crowmelissa@uclawsf.edu

Counsel for Amicus Curiae

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STATEMENT OF INTEREST

Amicus curiae the Center for Gender and Refugee Studies (“Center”) is a scholarly and advocacy organization dedicated to the study, advancement, and implementation of refugee and human rights law.¹ For twenty-five years, the Center has played a central role in the development of law and policy related to asylum and related forms of protection including under the Convention Against Torture (“CAT”). The Center provides expert technical assistance to attorneys representing individuals in U.S. removal proceedings who are applying for fear-based relief, conducting original country conditions research and consulting with country experts from all regions of the world. In addition, the Center works with advocates throughout Latin America and the Caribbean to advance regional migration policies rooted in humanitarian protection frameworks. The Center therefore has a special interest in the proper administration and interpretation of the nation’s immigration laws, particularly those provisions pertaining to international obligations to protect those facing persecution or torture.

SUMMARY OF ARGUMENT

In the decades following World War II, the global community elaborated a series of agreements to advance human rights and protect individuals from experiencing violations of those rights whether by their own government or another State. The United States acceded to several of them including CAT and

¹ Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

incorporated these international norms into U.S. law. Among the enduring provisions found in CAT and other international conventions is the obligation not to return *any* individual, regardless of their nationality, to *any* country where they face a risk of torture. The duty of nonrefoulement to torture is absolute, and derogation is not permitted even in exigent circumstances. It applies with equal force in the context of third country removals.

By making efforts to send individuals to South Sudan and Libya or to a prison in El Salvador—with little or no notice of their intended destination—the administration is not even attempting to comply with its obligations under CAT in good faith. Removals to countries with such shameful, and well-known, human rights records constitute a flagrant violation of domestic and international law. It is self-evident that almost any third-country national would present a valid claim for protection prohibiting their return to these countries. A stay is not warranted here given the grave, irreparable harms faced by respondents—torture and death.

ARGUMENT

I. Domestic and International Law Prohibit the United States from Sending Individuals to Countries Where they Face a Substantial Risk of Torture

Pursuant to CAT, the United States shall not “expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.” 1465 U.N.T.S. 85, art. 3 (entered into force June 26, 1987). The treaty thereby requires the United States to achieve a specified result—nonrefoulement of all persons in

danger of being subjected to torture. The United States ratified CAT in 1994 with no relevant reservations, declarations, or understandings. *See* Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Exec. Doc. No. 100-20, 100th Cong., 1st Sess. (1988).

The nonrefoulement obligation has been interpreted to include the prohibition against removal of an individual to a State where they face a risk of being sent on to another State where they may be tortured (a concept referred to as “chain refoulement”). *See, e.g.,* Comm. Against Torture, *General Comment No. 4*, ¶ 12, U.N. Doc. CAT/C/GC/4 (Sept. 4, 2018). Where such risks of chain refoulement are known, a State cannot evade responsibility for torture inflicted by the subsequent State just because there was an intermediary.

While the treaty affords States discretion based on the traits of their distinct legal systems, the creation of procedures and criteria adequate for identifying the persons who fall within its protected class is mandatory. *See, e.g., General Comment No. 4*, ¶¶ 14, 18. The United States has complied with this obligation through passage of the Foreign Affairs Reform Restructuring Act of 1998 (“FARRA”) and the statute’s implementing regulations. FARRA § 2242(a), Pub. L. No. 105-277, div. G., tit. XXII, 112 Stat. 2681 (codified at 8 U.S.C. § 1231 note); 8 C.F.R. §§ 1208.16-18 (implementing regulations). The regulations directly incorporate the nonrefoulement obligation found in article 3 of CAT, providing that a person will be eligible for protection if an individual establishes “that it is more likely than not

that he or she would be tortured if removed to the proposed country of removal.” 8 C.F.R. § 1208.16(c)(2).²

Freedom from torture is a non-derogable right and has achieved the status of a jus cogens norm. *See, e.g., Doe I v. Cisco Sys., Inc.*, 73 F.4th 700, 716 n.7 (9th Cir. 2023); *Yousuf v. Samantar*, 699 F.3d 763, 775 (4th Cir. 2012). The treaty accordingly provides no justifiable limitations on the obligation of nonrefoulement. CAT, art 2(2). Likewise, U.S. law imposes no bars to eligibility for CAT protection. *See, e.g., Negusie v. Holder*, 555 U.S. 511, 514 (2009).

Congress has also prohibited removal of individuals to countries where they face a substantial risk of persecution. The 1951 Convention Relating to the Status of Refugees, the substantive provisions of which the United States bound itself to abide by in acceding to its 1967 Protocol, prohibits a State from returning persons to territories where their “life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion.” 189 U.N.T.S. 150, art. 33 (entered into force Apr. 22, 1954). The corresponding provision in U.S. law integrates this standard nearly verbatim. *See* 8 U.S.C. § 1231(b)(3)(A) (the Attorney General “may not remove” a person to any country if determined that the person’s “life or freedom would be threatened in that country because of the [person’s] race, religion, nationality, membership in a particular social group, or political opinion”). Indeed, this Court has explicitly

² Even in expedited removal proceedings—which are not at issue in this case—Congress has taken pains to ensure procedural protections for individuals who fear torture if removed. *See* 8 U.S.C. §§ 1225(b)(1)(A)(ii), 1225(b)(1)(B); 8 C.F.R. § 235.3(b)(4).

recognized that in enacting the Refugee Act of 1980, amending § 1231, Congress intended to bring U.S. law into conformance with international law. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 426 (1987); *I.N.S. v. Stevic*, 467 U.S. 407, 421 (1984).

Failure to assess an individual’s risk before removal carries life or death consequences. In *Nasrallah v. Barr*, this Court held the immigration statute permits appellate consideration of the factual components of a CAT order, reasoning “it makes some sense that Congress would provide an opportunity for judicial review” given that it “may be critical to determining whether the noncitizen is likely to be tortured if returned.” *Nasrallah v. Barr*, 590 U.S. 573, 586 (2020). In so doing, this Court recognized the high stakes involved in these claims and the importance of getting it right.

II. Removal to Third Countries Boasting Well-Documented Torture Practices with No Notice or Opportunity to Be Heard Poses an Impermissible Risk of Refoulement

By becoming a State party to CAT, the United States has undertaken to carry out its terms in good faith. Vienna Convention on the Law of Treaties (“VCLT”), May 23, 1969, 1155 U.N.T.S. 331, art. 26 (entered into force Jan. 27, 1980).³ The administration’s designation of South Sudan, Libya, and El Salvador as countries for removal flies in the face of this well-established principle. Indeed, the unassailable brutality of the conditions in each of these countries, in many

³ The United States is not party to VCLT but recognizes it as customary international law. *See, e.g.*, Secretary of State Rogers & Assistant Legal Adviser for Treaty Affairs, Report to the President, 65 Dep’t St. Bull. 684, 685 (Oct. 18, 1971).

instances perpetrated by the governments of those States, indicates an apparent intent to violate statutory and treaty obligations and underscores the punitive character of the removals. In other words, it leaves little doubt that cruelty is the point.

A. South Sudan

Since gaining independence in 2011, peace in South Sudan has been fragile, and the country stands again on the brink of descending back into civil war. As detailed by the head of the United Nations mission in the country, the government has unleashed “indiscriminate attacks on civilians” in recent months, which are “causing significant casualties and horrific injuries.” Vibhu Mishra, *South Sudan on the Brink of Civil War, Top UN Official Warns*, UN News (Mar. 24, 2025), <https://perma.cc/B6VS-U8Y4>. Warnings have become steadily more dire. *See, e.g., UN Rights Chief Calls on South Sudan’s Warring Parties to End Renewed Fighting*, U.N. News (May 23, 2025), <https://perma.cc/TUE8-H6YE>.

Just days ago, the UN Security Council extended sanctions against South Sudan, including an arms embargo. S.C. Res. 2781, U.N. Doc. S/RES/2781 (2025). Acting U.S. Alternate Representative to the United States, John Kelley, hailed the move as “necessary to stem the unfettered flow of weapons into a region that remains awash with guns” and lamented that “[t]oo many innocent lives have been lost due to gun violence and armed conflict.” U.S. Mission to the U.N., *Explanation of Vote on a UN Security Council Resolution on South Sudan* (May 30, 2025), <https://perma.cc/5BJL-XHG2>.

The U.S. Department of State (“DOS”) has similarly reported on a litany of human rights issues plaguing the country. Among others this includes “extrajudicial killings; enforced disappearance; torture or cruel, inhuman or degrading treatment or punishment by security forces, opposition forces, armed militias affiliated with the government and the opposition, and ethnically based groups; harsh and life-threatening prison conditions; arbitrary detention; [and] serious problems with the independence of the judiciary.” U.S. Dep’t of State, *South Sudan 2023 Human Rights Report*, in *Country Reports on Human Rights Practices for 2023*, 1-2 (2024). Earlier this year, the Department issued a level four travel warning—its highest—advising against travel to South Sudan “due to crime, kidnapping, and armed conflict.” U.S. Dep’t of State, *South Sudan International Travel Information*, (Mar. 8, 2025), <https://perma.cc/E2DW-7V5M>.

The conflict shows no signs of abating. In its latest report to the UN Human Rights Council, the Commission on Human Rights in South Sudan expressed dismay about the “unaccountable leaders” in South Sudan who have “fuelled violence and failed to protect citizens” and unjustifiably delayed elections and efforts to restore peace. *Report of the Commission on Human Rights in South Sudan*, U.N. Doc. A/HRC/58/27, at 2 (Feb. 21, 2025). Impunity for those responsible for mass atrocities undergirds the ongoing conflict. *Id.* at 17. Mass displacement has exacerbated the already-acute humanitarian crisis afflicting the country. *Id.* at 12.

Simply put, the selection of South Sudan as a country of removal shocks the conscience.

B. Libya

Sending individuals to Libya, where persistent political divisions threaten the country's safety and stability, further belies any avowal that the administration is deploying its obligations in good faith. As with South Sudan, DOS has issued a level four travel warning, cautioning against travel to Libya because of "crime, terrorism . . . civil unrest, kidnapping, and armed conflict." U.S. Dep't of State, *Libya International Travel Information*, (Aug. 1, 2024), <https://perma.cc/6WWU-EHPR>. The Department's latest human rights report also describes a near identical set of serious rights violations: "extrajudicial killings; enforced disappearance; torture or cruel, inhuman, or degrading treatment or punishment perpetrated by the government and armed groups on all sides; harsh and life-threatening prison conditions; arbitrary arrest or detention; [and] serious problems with the independence of the judiciary." U.S. Dep't of State, *Libya 2023 Human Rights Report*, in *Country Reports on Human Rights Practices for 2023*, at 2 (2024).

Libya has in fact gained notoriety in recent years for its abuse of refugees and other migrants in particular. DOS reports that "migrants routinely experienced unlawful killings, arbitrary detention, torture, sexual exploitation, and other abuses," and that the perpetrators of the violations included "state officials" alongside non-state actors. *Id.* at 33. These findings are echoed in DOS's specialized report on trafficking in persons, which describes government actors in Libya engaging in coordinated efforts extorting migrants "including through the use of

torture, sex trafficking, sexual slavery, and forced labor.” U.S. Dep’t of State, *2024 Trafficking in Persons Report: Libya*, (2024).

Amnesty International has documented these patterns of violations committed with impunity, referring to Libya as a “hellscape” for migrants. Amnesty Int’l, *Libya: Horrific Violations in Detention Highlight Europe’s Shameful Role in Forced Returns* (July 15, 2021), <https://perma.cc/YA9R-PH7K>. In its detailed report on the topic, Amnesty International paints a damning picture of the “cycle of abuse” in which migrants find themselves trapped in Libya. Amnesty Int’l, *‘No One Will Look For You’: Forcibly Returned From Sea to Abusive Detention in Libya*, at 22 (July 15, 2021), <https://perma.cc/92VY-ELFH>.

Consistent with these findings, the United Nations High Commissioner for Refugees (“UNHCR”) has stated unequivocally that Libya is not to be considered a safe third country for migrants given worsening conditions. UNHCR, *Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea* (Sep. 2020), <https://perma.cc/SEP4-6JKP>.

DOS has further reported on the risk of being sent from Libya to another country that poses a torture risk—chain refoulement. U.S. Dep’t of State, *Libya 2023 Human Rights Report*, at 2 (highlighting “refoulement of refugees to a country where they would face torture or persecution” as a human rights concern). These findings mirror those by Amnesty International, which documented widespread expulsions of individuals to countries where they faced torture. *See* Amnesty Int’l,

‘No One Will Look For You’, at 37. Libya is not party to the 1951 Refugee Convention or 1967 Protocol and has no working system for assessing claims for protection. UNHCR, *Position on the Designations of Libya as a Safe Third Country*, at 16 (“Libya should not be regarded as a safe third country in light of the absence of a functioning asylum system, the widely reported difficulties and abuses faced by asylum-seekers and refugees in Libya, the absence of protection from such abuses, the lack of protection against refoulement, and the lack of durable solutions.”).

The ample documentation of widespread torture and other harms meted out against migrants in Libya, against the backdrop of a post-war landscape, all but seal the fate of those removed there.

C. El Salvador

Individuals transferred to El Salvador by this administration are held incommunicado at the notorious Terrorism Confinement Center (“CECOT”). Numerous national and international organizations have documented systematic human rights violations, including brutal acts of violence, against individuals detained at the facility. The non-profit organization Cristosal, for example, has “collected photographic evidence of deaths in detention showing bodies with bruises, lacerations, dislocations, fractures, and other serious injuries.” Cristosal, *El Silencio no Es Opción: Investigación Sobre las Prácticas de Tortura, Muerte y Justicia Fallida en el Régimen De Excepción*, (2024). See also, e.g., Amnesty Int’l, *Behind the Veil of Popularity: Repression and Regression of Human Rights in El Salvador*,

(2023); Human Rights Watch et al., *Widespread Human Rights Violations Under El Salvador's "State of Emergency"*, (2022).

Detentions of those transferred by the United States are occurring in the context of a steady erosion of democratic institutions in El Salvador over the last three years. In March 2022, at the request of Salvadoran President Nayib Bukele, the Salvadoran legislature enacted a State of Exception, which suspends key constitutional protections and grants sweeping authority to security forces. Decreto Legislativo N° 333, 27 de marzo de 2022, Diario Oficial, tomo 434, no. 62 (El Sal.). Initially intended to last just 30 days, the State of Exception has been extended monthly. *See* Asamblea Legislativa de El Salvador, Régimen de Excepción (last visited Jun. 1, 2025) <https://www.asamblea.gob.sv/taxonomy/term/1922>.

DOS has documented deteriorating conditions, citing to “unlawful or arbitrary killings; enforced disappearance; torture or cruel, inhuman, or degrading treatment or punishment by security forces; harsh and life-threatening prison conditions,” among other concerns. U.S. Dep’t of State, *El Salvador 2023 Human Rights Report*, in *Country Reports on Human Rights Practices for 2023*, at 1, (2024). Conditions in the prisons, according to DOS, were “harsh and life threatening” even before the State of Exception and the swelling population has only “exacerbated” the problem. *Id.* at 7. Testimonies of those released speak of “systemic abuse in the prison system, including beatings by guards and the use of electric shocks.” *Id.* at 5.

CECOT and the web of detention centers across El Salvador operate in a legal vacuum. While habeas corpus exists as a constitutional remedy to challenge

detention in El Salvador, at least on paper, in practice it is an exercise in futility. Since the initiation of the State of Exception, more than 7,200 habeas corpus petitions have been filed but less than one percent have been granted. *See, e.g.,* Joshua Keating, *El Salvador's Prisons Should Be a Warning to Americans About Trump*, Rolling Stone, Mar. 20, 2025; Due Process of Law Foundation, *(Lack of) Judicial Protection: The Response of the Constitutional Chamber During the State of Emergency in El Salvador*, (2024). President Bukele has stated in no uncertain terms that detention is indefinite. He tweeted in 2023: “Let all the ‘human rights’ NGOs know that we are going to destroy these damn murderers and their collaborators, we will throw them in prison and they will never get out.” Nayib Bukele [@nayibbukele], “*Que sepan todas las ONGs...*”, X, (May 16, 2023), <https://perma.cc/E8RN-UD55>.

In addition to ill-treatment, individuals detained at CECOT face a risk of chain refoulement. President Bukele has proposed returning Venezuelan transferees to Venezuela in exchange for political prisoners. Nayib Bukele [@nayibbukele], “*Señor @NicolasMaduro, usted ha dicho en numerosas ocasiones que quiere a los venezolanos de regreso...*”, X, (Apr. 20, 2025), <https://perma.cc/64BU-J2XT>. At least some of the Venezuelans removed by the United States have been recognized as refugees or otherwise in need of protection from removal to Venezuela, but President Bukele has indicated no assessment of their individualized risks as part of the exchange. In any event, El Salvador’s asylum system suffers from extreme deficiencies, rendering any potential screening illusory.

See, e.g., U.S. Dep’t of State, *El Salvador 2023 Human Rights Report*, at 22 (“the law [providing protection to refugees] has major regulatory and operational gaps”).

The United States’ actions sending individuals to prolonged detention in CECOT run afoul of the guarantee against refoulement.

CONCLUSION

Removals of third-country nationals to South Sudan and Libya and to incommunicado detention in El Salvador, under any circumstances, makes a mockery of the U.S. protection system given the widespread and severe deprivations of human rights prevalent in those countries. But as being carried out now, without sufficient notice or opportunity for individuals to express their fears, the removals represent an indefensible affront to the bedrock principle of nonrefoulement. For the foregoing reasons and the reasons provided by Respondents, the Court should deny the application for a stay.

Respectfully submitted,

Blaine Bookey
Karen Musalo
CENTER FOR GENDER
& REFUGEE STUDIES
200 McAllister Street
San Francisco, CA 94102
(415) 565-4877

/s/ Melissa Crow
Melissa Crow
Counsel of Record
CENTER FOR GENDER
& REFUGEE STUDIES
1121 14th Street, NW, Suite 200
Washington DC 20005
(202) 355-4471
crowmelissa@uclawsf.edu

Counsel for Amicus Curiae

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