

1 Judy Rabinovitz\*\*  
Michael Tan\*\*  
2 Omar Jadwat\*\*  
Lee Gelernt\*\*  
3 Anand Balakrishnan\*\*\*  
Daniel Galindo\*\*\*\*(SBN 292854)  
4 ACLU FOUNDATION  
IMMIGRANTS' RIGHTS PROJECT  
5 125 Broad Street, 18th Floor  
New York, NY 10004  
6 T: (212) 549-2660  
F: (212) 549-2654  
7 *jrabinovitz@aclu.org*  
*mtan@aclu.org*  
8 *ojadwat@aclu.org*  
*lgelernt@aclu.org*  
9 *abalakrishnan@aclu.org*  
*dgalindo@aclu.org*

Jennifer Chang Newell (SBN 233033)  
Katrina Eiland (SBN 275701)  
Julie Veroff (SBN 310161)  
ACLU FOUNDATION  
IMMIGRANTS' RIGHTS PROJECT  
39 Drumm Street  
San Francisco, CA 94111  
T: (415) 343-0770  
F: (415) 395-0950  
*jnewell@aclu.org*  
*keiland@aclu.org*  
*jveroff@aclu.org*

10 Melissa Crow\*\*\*  
11 SOUTHERN POVERTY LAW CENTER  
1101 17th Street NW, Suite 705  
12 Washington, DC 20036  
13 T: (202) 355-4471  
F: (404) 221-5857  
*melissa.crow@splcenter.org*

14  
15 *Attorneys for Plaintiffs* (Additional counsel listed on following page)

16  
17 **UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

18 Innovation Law Lab, *et al.*,

CASE NO.: 3:19-CV-00807-RS

19 *Plaintiffs,*

20 v.

21 Kirstjen Nielsen, *et al.*,

22 *Defendants.*  
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28

1 Mary Bauer\*\*\*  
SOUTHERN POVERTY LAW CENTER  
1000 Preston Avenue  
2 Charlottesville, VA 22903  
T: (470) 606-9307  
3 F: (404) 221-5857  
*mary.bauer@splcenter.org*

4 Saira Draper\*\*\*  
5 Gracie Willis\*\*\*  
SOUTHERN POVERTY LAW CENTER  
6 150 East Ponce de Leon Avenue, Suite 340  
Decatur, GA 30030  
7 T: (404) 221-6700  
F: (404) 221-5857  
8 *saira.draper@splcenter.org*  
*gracie.willis@splcenter.org*

9 Steven Watt\*\*\*  
10 ACLU FOUNDATION HUMAN RIGHTS  
PROGRAM  
11 125 Broad Street, 18th Floor  
New York, NY 10004  
12 T: (212) 519-7870  
F: (212) 549-2654  
13 *swatt@aclu.org*

14  
15 *Attorneys for Plaintiffs*

16 *\*Admitted pro hac vice*  
17 *\*\*Application for pro hac vice pending*  
18 *\*\*\*Pro hac vice application forthcoming*  
19 *\*\*\*\* Application for admission forthcoming*  
20  
21  
22  
23  
24  
25  
26  
27  
28

Sean Riordan (SBN 255752)  
Christine P. Sun (SBN 218701)  
AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF NORTHERN  
CALIFORNIA, INC.  
39 Drumm Street  
San Francisco, CA 94111  
T: (415) 621-2493  
F: (415) 255-8437  
*sriordan@aclunc.org*  
*csun@aclunc.org*

Blaine Bookey  
Eunice Lee  
Karen Musalo  
Kathryn Jastram  
Sayoni Maitra\*\*\*  
CENTER FOR GENDER & REFUGEE  
STUDIES  
200 McAllister St.  
San Francisco, CA 94102  
T: (415) 565-4877  
F: (415) 581-8824  
*bookeybl@uchastings.edu*  
*leeunice@uchastings.edu*  
*musalok@uchastings.edu*  
*jastramkate@uchastings.edu*  
*maitras@uchastings.edu*

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1 **INTRODUCTION**

2 On January 29, 2019, Defendants began implementing an unprecedented forced return policy  
3 at the southern border. Under the new policy, individuals who have come to the United States to  
4 seek asylum are forced to return to Mexico while their removal proceedings are pending, even  
5 though they are not from Mexico, have no domicile in that country, and the border regions they are  
6 being sent back to are among the most dangerous in the world. The new policy, which Defendants  
7 dub the “Migrant Protection Protocols,” is the government’s latest effort to deter asylum seekers  
8 from seeking protection in the United States under the pretext of a manufactured border crisis.  
9 Apprehension rates at the southern border in FY 2017 were the lowest since 1972. *See* Isacson Decl.  
10 ¶ 4. Meanwhile U.S. Customs and Border Protection’s budget is at a record high. *See id.* ¶ 9.

11 A bedrock principle of U.S. and international law known as *nonrefoulement* prohibits the  
12 United States from returning individuals to countries where they are more likely than not to face  
13 persecution, torture, or cruel, inhuman, or degrading treatment. Defendants pay lip service to this  
14 standard, stating that under their new policy no one who can prove such a claim will be returned.  
15 *See, e.g.*, Rodriguez Decl., Ex. A (Memorandum from Kirstjen M. Nielsen,



1 survive. It will be difficult if not impossible for them to pursue their asylum cases from Mexico.  
2 Almost none of the Individual Plaintiffs were even asked about the dangers they fear in Mexico, *see*,

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1 issued by U.S. Citizenship and Immigration Services (“USCIS”) on January 28, 2019, set out the  
2 procedures for satisfying this obligation. Rodriguez Decl., Ex. D (USCIS, Policy Memorandum, PM-  
3 602-0169, Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act  
4 and the Migrant Protection Protocols, Jan. 28, 2019). It provides that individuals will be referred (in  
5 person, by videoconference, or by phone) to an asylum officer only if they affirmatively express a  
6 fear of return to Mexico during processing. *Id.* at 3.

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1 2003)).

2 **ARGUMENT**

3 **I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS**

4 **A. The Forced Return Policy Violates 8 U.S.C. § 1225(b)(2)(C).**

5 Defendants claim that their new forced return policy is authorized by 8 U.S.C.  
6 § 1225(b)(2)(C), which allows certain individuals to be returned to Mexico or Canada while their  
7 removal proceedings are pending. That is wrong: Defendants are misapplying the return provision to  
8 a class of individuals who are not subject to it. The provision specifically exempts from its scope  
9 individuals to whom the expedited removal statute, 8 U.S.C. § 1225(b)(1), “applies.” *See* 8 U.S.C.  
10 § 1225(b)(2)(B)(ii). That includes all the Individual Plaintiffs and the general population affected by  
11 the forced return policy. Thus, the policy violates § 1225(b)(2)(C). In addition, § 1225(b)(2)(C) only  
12 authorizes return of individuals “pending a [regular removal] proceeding under section 1229a[.]” *Id.*  
13 Although the Individual Plaintiffs were issued notices to appear (“NTAs”) for such removal  
14 proceedings, to the best of counsel’s knowledge, those NTAs have not been filed with the  
15 immigration court, and thus no proceedings are officially pending. *See* 8 C.F.R. § 1239.1(a); *see also*  
16 Tavarez Decl. ¶¶ 1-4 (summarizing Individual Plaintiffs’ case information available on the  
17 Executive Office for Immigration Review’s (“EOIR”) automated immigration court case information  
18 system).

19 Section 1225(b)(2) provides:

20 (2) Inspection of other aliens

21 (A) In general

22 Subject to subparagraphs (B) and (C), in the case of an alien who is an  
23 applicant for admission, if the examining immigration officer determines that  
24 an alien seeking admission is not clearly and beyond a doubt entitled to be  
admitted, the alien shall be detained for a proceeding under section 1229a of  
this title.

25 (B) Exception *Subparagraph (A) shall not apply to an alien—*

26 (i) who is a crewman,

27 (ii) *to whom paragraph (1) applies, or*  
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1 ultimate determination of whether persecution is “more likely than not” must be made by an  
2 immigration judge in full removal proceedings where noncitizens have the right to counsel, 8 U.S.C.  
3 § 1362, 8 U.S.C. § 1229a(b)(4)(A); 8 C.F.R. § 1240.3, and the right to a “full and fair hearing,”  
4 *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000), with a “reasonable opportunity” to present,  
5 examine, and confront evidence, 8 U.S.C. § 1229a(b)(4)(B).<sup>2</sup> Defendants’ procedure is thus unlawful  
6 because it authorizes an asylum officer to make withholding determinations and without an adequate  
7 process.

8         *Second*, the forced return policy does not even provide any of the minimal procedural  
9 safeguards afforded as part of the credible fear and reasonable fear screenings

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1                                   **2. The Significant Public Interest in the Forced Return Policy also Makes**  
2                                   **Notice and Comment Rulemaking Appropriate.**

3                   In evaluating the need for notice and comment rulemaking, many courts have considered the  
4 level of public interest in the issue at stake. *See, e.g., Hoctor v. USDA*, 82 F.3d 165, 171 (7th Cir.  
5 1996) (“The greater the public interest in a rule, the greater reason to allow the public to participate  
6 in its formation.”); *Chamber of Commerce of U.S. v. U.S. Dep’t of Labor*, 174 F.3d 206, 212 (D.C.  
7 Cir. 1999) (where “thousands of employers” would be affected by a rule, “[t]he value of ensuring  
8 that [the agency] is well informed and responsive to public comments” is “considerable”).

9                   Defendant Nielsen characterized the forced return policy as a “historic measure[] to bring the  
10 illegal immigration crisis under control,” Rodriguez Decl., Ex. B at 1, and has emphasized its  
11 significance.<sup>6</sup> Had Defendants engaged in notice and comment rulemaking, the Organizational  
12 Plaintiffs would have submitted comments explaining why the forced return policy is unlawful and  
13 unnecessary. *See* Brown Scott Decl. ¶ 27; Cutlip-Mason Decl. ¶ 19; First Manning Decl. ¶ 26;  
14 Sanchez Decl. ¶¶ 38-40; Wolfe-Roubatis Decl. ¶¶ 33-34. Given the potentially far-reaching impact  
15 of the policy, its stark departure from longstanding agency practice, and the potentially thousands of  
16 migrants to whom the policy applies, many other stakeholders likely would have done the same.

17                                   **D. The Forced Return Policy Is Arbitrary And Capricious In Violation Of The**  
18                                   **APA Because It Is Not Rationally Connected To Its Justifications.**

19                   Finally, Defendants’ forced return policy is arbitrary and capricious because the policy’s  
20 design is not rationally connected to its purported justifications, many of which are impermissible  
21 and belied by the facts. A policy is arbitrary and capricious in violation of the APA where the  
22 agency cannot articulate “a rational connection between the facts found and the choice made,” “has  
23 relied on factors which Congress has not intended it to consider,” has “entirely failed to consider an  
24 important aspect of the problem,” or has “offered an explanation for its decision that runs counter to  
25 the evidence before the agency.” *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins.*  
26 *Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). All three flaws apply to Defendants’

27 <sup>6</sup> *See also* Hrg. on Homeland Security Oversight, Immigration & Border Security, Before the House  
28 Judiciary Cmte., Wildlife, 115th Cong. (Dec. 20, 2018) (testimony of Kirstjen Nielsen, Sec’y, Dep’t  
Homeland Security) at minute 26:34, <https://www.c-span.org/video/?456086-1/homeland-security-department-oversight#>.

1 policy.

2 **1. There is No Rational Connection Between the Policy and Its Purported**  
3 **Justifications.**

4 The asserted justifications for the forced return policy are not rationally connected with the  
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1 but Defendants’ application of the forced return policy in the current context arbitrarily deprives  
2 asylum seekers of any way to meaningfully exercise that right.

3 **2. The Agency Relied on Factors Congress Did Not Intend for It to**  
4 **Consider.**

5 DHS has justified the forced return policy in part by pointing to “[m]isguided court decisions  
6 and outdated laws [that] have made it easier for illegal aliens to enter and remain in the U.S.,”  
7 especially “adults who arrive with children, unaccompanied alien children, or individuals who  
8 fraudulently claim asylum.” Rodriguez Decl., Ex. C at 2. Defendants may not like these court  
9 decisions and laws, but that does not change the fact that they are bound to follow them.  
10 Circumvention of court decisions and duly enacted statutes surely was not a factor that Congress  
11 intended the agency to consider when deciding to implement § 1225(b)(2)(C). Agency action  
12 intended to serve as an end run around courts and Congress is arbitrary and capricious. *Cf. Venetian*  
13 *Casino Resort, LLC v. EEOC*, 530 F.3d 925, 935 (D.C. Cir. 2008) (“To maintain two irreconcilable  
14 policies, one of which . . . apparently enables the agency . . . to circumvent the other . . . is arbitrary  
15 and capricious agency action.”).

16 **3. The Agency’s Justifications for the Policy are Based on False Premises.**

17 Finally, DHS’s key justifications offered to explain the challenged policy are based on false  
18 premises and are inconsistent with the evidence before the agency.

19 *First*, the agency explained that it is instituting the forced return policy because “many”  
20 asylum seekers “disappear[] into the country before a judge denies their claim and simply become  
21 fugitives.” Rodriguez Decl., Ex. C at 2. That explanation is at odds with the facts before the agency.  
22 Data from EOIR shows that between FY 2008 and FY 2018, asylum seekers who passed a credible  
23 fear interview showed up for their immigration court hearings approximately 87.5 percent of the  
24 time. *See* Reichlin-Melnick Decl. ¶ 9 (discussing EOIR data).

25 *Second*, the agency explained that it is instituting the policy because of an “unprecedented  
26 number of . . . fraudulent asylum claims.” Rodriguez Decl., Ex. C at 1 (internal quotation marks  
27 omitted). But the assertions marshaled in support of this justification are incorrect. Asylum seekers  
28 from



1 **II. THE REMAINING FACTORS TIP DECIDEDLY IN FAVOR OF GRANTING A**  
2 **TRO AND PRESERVING THE STATUS QUO**

3 **A. Plaintiffs Are Suffering Irreparable Harm.**

4 Plaintiffs have experienced irreparable harm and are at significant risk of suffering additional  
5 harms as a result of Defendants’ forced return policy. In Mexico, the Individual Plaintiffs have  
6 already endured physical attacks and threats at the hands of members of the Mexican government  
7 and organized criminal groups due in large part to their status as migrants. For example, members of  
8 the brutal Mexican Zetas cartel kidnapped Plaintiff Howard Doe in Chiapas and threatened to kill  
9 him and “burn” his body. ECF No. 5-10 (Howard Doe Decl.) ¶ 20. Mexican police have detained  
10 Plaintiff Ian Doe on multiple occasions, threatening a month ago to “take [him] to jail unless [he]  
11 paid a bribe.” ECF No. 5-11 (Ian Doe Decl.) ¶ 24. Other Individual Plaintiffs have also been  
12 assaulted and h8pTc -0.0020.0020.0020.(nd h8pTc )4(r)-7( D)-A-uc o. - yr3re(a0020.0020.(nd h8pTc )4(r),o

1 down in Mexico where they cannot expect any protection from the Mexican government. *See*  
2 Shepherd Decl. ¶ 8 (describing the presence of Central American gangs in Mexico); Slack Decl. ¶ 10  
3 (same); *id*

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1 El Salvador, Guatemala, and Honduras if returned. *See* Menjivar Decl. ¶¶ 14-18.

2 Defendants' policy will also cause substantial harm to the Organizational Plaintiffs. Plaintiffs

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1 notice-and-comment requirements before putting the policy into effect, the Organizational Plaintiffs  
2 would have had the opportunity to inform Defendants of their serious concerns regarding the

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**CONCLUSION**

For the foregoing reasons, Plaintiffs' motion for a TRO should be granted.

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1 Steven Watt\*  
2 ACLU FOUNDATION HUMAN RIGHTS  
3 PROGRAM  
4 125 Broad Street, 18th Floor  
5 New York, NY 10004  
6 T: (212) 519-7870  
7 F: (212) 549-2654  
8 *swatt@aclu.org*

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*Attorneys for Plaintiffs*

*\*Admitted pro hac vice*  
*\*\*Application for pro hac vice pending*  
*\*\*\*Pro hac vice application forthcoming*  
*\*\*\*\* Application for admission forthcoming*

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