



Melissa Crow  
SOUTHERN POVERTY LAW  
CENTER  
1101 17<sup>th</sup> Street NW, Suite 705  
Washington, D.C. 20009  
T: (202) 355-4471  
F: (404) 221-5857

Mary Bauer  
SOUTHERN POVERTY LAW  
CENTER  
1000 Preston Avenue  
Charlottesville, VA 22903  
T: (470) 606-9307  
F: (404) 221-5857

Gracie Willis  
SOUTHERN POVERTY LAW  
CENTER  
150 East Ponce de Leon Avenue, Suite  
340  
Decatur, GA 30030  
T: (404) 221-6700  
F: (404) 221-5857

Michelle P. Gonzalez  
SOUTHERN POVERTY LAW  
CENTER  
P.O. Box 370037  
Miami, FL 33137-0037  
T: 786-753-1383  
F: 786-237-2949

Sean Riordan  
Christine P. Sun  
AMERICAN CIVIL LIBERTIES  
UNION  
FOUNDATION OF NORTHERN  
CALIFORNIA, INC.  
39 Drumm Street  
San Francisco, CA 94111  
T: (415) 621-2493  
F: (415) 255-8437

Blaine Bookey  
Karen Musalo  
Eunice Lee  
Kathryn Jastram  
Sayoni Maitra  
CENTER FOR CONSTITUTIONAL  
RIGHTS  
200 McAllister St.  
San Francisco, CA 34102  
T: (415) 565-4877  
F: (415) 581-8824

Steven Watt  
ACLU FOUNDATION HUMAN  
RIGHTS PROGRAM  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004  
T: (212) 519-7870  
F: (212) 549-2654



## INTRODUCTION

The district court issued a preliminary injunction to temporarily halt return to Mexico to await their removal proceedings, without the most basic safeguards to ensure they are not returned to persecution or torture. The forced return policy constitutes an unprecedented change in U.S. asylum policy, one that puts the lives of returned asylum seekers in grave danger. stay of the injunction should be denied.

*First*, Defendants are unlikely to prevail on their merits arguments on appeal. The district court held that Plaintiffs are likely to succeed on three separate claims: 1) that Defendants are unlawfully applying the forced return policy to a population Congress expressly exempted from contiguous territory return individuals who arrive at the border without proper documents, who are often seeking asylum, and who are subject to proceedings; 2) that the forced return policy is arbitrary and capricious in violation of the Administrative Procedure Act because its fear determination process for determining if individuals can be safely returned to Mexico dramatically departs, without explanation, from prior practice and virtually ensures that noncitizens who face persecution or torture in Mexico will be returned there in violation of our *nonrefoulement* obligation; and 3) that Defendants violated the APA by

adopting the new fear determination process without undergoing notice and comment.

Because Defendants have not shown they are likely to prevail on each of these claims, they are not entitled to a stay.

*Second*, Defendants have failed to demonstrate that the balance of harms favors a stay. They offer conclusory assertions that the injunction will hinder their diplomatic negotiations and efforts to deter unauthorized migration at the border, but provide no concrete evidence of any irreparable harm. In contrast, as the district court correctly found, the Individual and Organizational P at 24.

Moreover, the injury to Plaintiffs and the harm to the public interest will increase exponentially as Defendants expand the policy.

*Finally*, the nationwide reach of the injunction does not warrant a stay.

There is no other way to provide a remedy .999(e )1 A006(res)3-ldpai3.006(o)4.003(n)-2.999(t).

asylum officer and, if they passed, were placed in regular removal proceedings to pursue their asylum applications.



the return pending removal proceedings of noncitizens to whom the ER

The district court also properly rejected argument repeated here that when the government exercises prosecutorial discretion to place an individual subject to

As the district court correctly held, prosecutorial discretion does not change the applicability of the ER statute. Op. at 16-17.

does not mean that the shoplifting statute no longer applies to that person, likewise the decision to place someone who is subject to ER into regular removal proceedings does not change the fact that they are an alien to whom the ER statute applies. *See, e.g., Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (BIA 2011) (holding that the agency has discretion to place noncitizens subject to the ER statute into regular removal proceedings, while recognizing that those individuals continue to be therefore exempt from § 1225(b)(2)(A)).

of the statute has shifted since the injunction

clearly and beyond doubt entitled to be admitted, has nothing to do with the subparagraph (B) exemptions. Stay Mot. at 13 (quoting § 1225(b)(2)(A)).

This new interpretation is untenable, as it ignores the plain text.

Subparagraph (B), which in turn states that : stowaways,  
For this same reason,  
reliance on *Nielsen v. Preap*, 139 S.Ct. 954 (2019), is unavailing.

Defendants cite *Preap* for the proposition

S.Ct. at 964-65). But that proposition is entirely cons  
interpretation of the statute, as subparagraph (B) says nothing about what an  
agency must do to a noncitizen. Rather, it

distinct categories of applicants for admission:

138 S.Ct. at 837. In contrast, under one category of applicants for admission that includes both noncitizens subject to ER as well as those subject to regular removal proceedings. The only interpretation consistent with *Jennings*' conclusion that §§ 1225(b)(1) and (b)(2) provide for two

Similarly implausible is new position that the function of the § 1225(b)(2)(B)(ii) exemption is merely to make clear that noncitizens subject to ER are not entitled to regular removal proceedings. Stay Mot. at 13. This makes no sense, since the ER statute itself makes clear that such individuals are not *required* to be placed in regular removal proceedings unless they pass a credible fear interview.

and make clear that Defendants implemented the forced return policy without regard for the constraints Congress imposed.

Defendants also wrongly claim that noncitizens to whom the ER territory return

- -14. First, the ER statute applies only to noncitizens inadmissible for two grounds: fraud or lack of proper documents. *See* § 1225(b)(1)(A)(i). In contrast, § 1225(b)(2) applies to applicants for admission who are inadmissible for *any other ground of* inadmissibility, such as a criminal conviction, a contagious disease, likelihood of becoming a public charge, or any other of a long list of inadmissibility grounds Congress painstakingly enumerated. *See* § 1182(a).

Moreover, Defendants themselves acknowledge that contiguous territory return was not intended to be a sweeping policy applicable by default to most arriving aliens when they *detention* pending removal proceedings is

rs

. at 14. While Defendants offer no support for their assertion that Congress expected mass *detention* pending removal proceedings, they are right in acknowledging that contiguous territory return was seen as an exception.

Returning vulnerable migrants to another country while awaiting their removal

proceedings is an extreme option, intended for limited circumstances, with explicit exceptions mandated by Congress. Yet, under statutory reading, Congress authorized the return to Mexico of Mexican asylum seekers who are subject to ER, before their asylum claims are adjudicated.<sup>3</sup> This makes no sense, and contiguous territory return to individuals overwhelmingly asylum seekers who are subject to ER.

Finally, Defendants are

**B. The Procedures for Assessing Fear of Return to Mexico Violate the APA.**

The district court correctly held that [redacted] procedures for ensuring compliance with *nonrefoulement* i.e., the prohibition on returning individuals to countries where they face persecution or torture likely violate the APA.<sup>4</sup> Op. at 21-23. Defendants adopted *nonrefoulement* as an objective of the program, AR00009, but established procedures that do not satisfy that obligation, and that fall far short of existing procedures for compliance with this critical obligation, without explanation or acknowledgement and without any opportunity for public comment on these important questions.

**1. The new procedures are arbitrary and capricious.**

The new procedures [redacted] practices for assessing protection claims practices that Defendants previously deemed necessary to satisfy their *nonrefoulement* obligations. *See Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (policy violates APA where agency does not acknowledge, [redacted], departing from prior policy). Moreover, they do not remotely achieve their stated

---

<sup>4</sup> The United States is bound by the *nonrefoulement* obligations set out in the Refugee Convention and Pr  
*See* AR01636, 01679. These critical prohibitions are codified in the withholding of removal statute, §

goals. Instead, they effectively guarantee that asylum seekers with *bona fide* fears of return will be sent to conditions where they face persecution or torture. *See Bangor Hydro-Elec. Co. v. F.E.R.C.*, 78 F.3d 659, 663 (D.C. Cir. 1996) (agency action is arbitrary and capricious where n

are less robust than those available in expedited removal proceedings, or those that apply at Op. at 5. Immigration officers need not notify asylum seekers that they face return to Mexico, or ask about fear of return there. Instead, a refugee must affirmatively return to Mexico to obtain an asylum officer interview. AR02273. Without access to counsel, an opportunity to gather evidence, or guaranteed interpreter, *see* AR02273-02274, noncitizens must prove t chance they will be persecuted or tortured in Mexico. *Id.* Denials are not reviewed by a neutral adjudicator. *See* AR02274.

These procedures hold returnees to the same merits standard more likely than not that applies in regular removal proceedings, but deny them even the minimal procedural protections the agency provides in summary removal proceedings, much less the full protections that accompany regular proceedings. A noncitizen who applies for withholding of removal pursuant to § 1231(b)(3) in regular removal proceedings has notice; access to counsel and an interpreter; a

present, examine, and confront evidence, *id.*

§ 1229a(b)(4)(B);

provide an interpreter where needed; create a summary of the material facts; review that summary with the applicant for accuracy; and create a written record of the decision. *Id.* §§ 208.30(d)(5), (d)(6) & (e)(1), 208.31(c). Denials are subject to IJ review. *Id.* §§ 208.30(g), 1208.30(g), 208.31(g). These minimal procedures reinforce that the lesser process here is woefully inadequate to satisfy *nonrefoulement*.

In addition, Defendants have neither acknowledged nor explained their extraordinary deviation from longstanding procedures for meeting their *nonrefoulement* obligations. This failure also renders the policy arbitrary and capricious. *See Fox Television*, 556 U.S. at 515; Op. at 22.

. Defendants assert that Plaintiffs' claims arise under international law, so they lack a cause of action. Stay Mot. at 15. But Plaintiffs challenge arbitrary and capricious agency action in violation of the APA, which clearly permits their claims. *See* ECF 1 ¶¶ 161-162; 5 U.S.C. § 706(2)(A). Similarly flawed is D *Trinidad y Garcia v. Thomas*, 683 F.3d 952 (9th Cir. 2012) (en banc), to assert their procedures adequately implement their *nonrefoulement* obligations. *See* Stay Mot. at 16. That case does not even on arbitrary departures from agency policy.

Defendants next assert that their procedures are appropriate because MPP involves *returns*, as opposed to formal *removal*. See Stay Mot. at 16-17. But *nonrefoulement* As the district court recognized, Article 33 of the Refugee Convention expressly bars the United States *or return[ing]*

AR01679 (emphasis added); Op. at 20.<sup>7</sup> And the difference to the noncitizen conditions is immaterial.







*Bay Sanctuary Covenant*

the Government itself is undermining its own goal of channeling asylum-seekers to

conclusory assertion of interference with foreign policy similarly lacks support. Defendants make no effort to explain what effect, if any, the injunction would have on U.S.-

9

By contrast, the forced return policy inflicts grave harms on Plaintiffs and the public that dramatically outweigh any potential harm to Defendants.

Defendants do not seriously contest the risk of severe injury the Individual Plaintiffs face in Mexico. Stay Mot. at 20-21. Nor could they, undisputed experiences to date involving physical attacks and threats, and extensive documentation that such mistreatment of migrants in Mexico is the norm. *See, e.g.*, SER 98 (describing how members of the brutal Zetas cartel kidnapped and threatened to kill Plaintiff ); SER 526-31 (describing conditions in Mexico for migrants); SER 438-39 (same).

Defendants erroneously assert that any potential risk to Individual Plaintiffs is cured by that it will abide by domestic and international

---

<sup>9</sup> The Mexican government has already publicly stated that it does not agree with

law. Stay Mot. at 21. But even if taken at face value, these assurances speak only  
*willingness* to try to protect



declining to

be *paroled*

p.

Dated: April 16, 2019

Respectfully submitted,

Jennifer Chang Newell  
Katrina Eiland  
Cody Wofsy  
Julie Veroff  
AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

39 Drumm Street  
San Francisco, CA 94111  
T: (415) 343-0774  
F: (415) 395-0950  
*jnewell@aclu.org*  
*keiland@aclu.org*  
*cwofsy@aclu.org*  
*juveroff@aclu.org*

Melissa Crow  
SOUTHERN POVERTY LAW  
CENTER  
1101 17th Street NW, Suite 705  
Washington, D.C.  
T: (202) 355-4471  
F: (404) 221-5857  
*melissa.crow@splcenter.org*

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

Gracie Willis  
SOUTHERN POVERTY LAW  
CENTER  
150 East Ponce de Leon Avenue, Suite  
340  
Decatur, GA 30030  
T: (404) 221-6700  
F: (404) 221-5857  
*gracie.willis@splcenter.org*

Blaine Bookey  
Karen Musalo  
Eunice Lee  
Kathryn Jastram

Michelle P. Gonzalez  
SOUTHERN POVERTY LAW  
CENTER  
P.O. Box 370037  
Miami, FL 33137-0037  
T: 786-753-1383  
F: 786-237-2949  
*mich.gonzalez@splcenter.org*

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

**CERTIFICATE OF SERVICE**

I hereby certify that on April 16, 2019, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system. There are no unregistered participants.

/s/ Judy Rabinovitz

Judy Rabinovitz

Dated: April 16, 2019

**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 5,186 words. This brief complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

/s/ Judy Rabinovitz

Judy Rabinovitz

Dated: April 16, 2019