

Nos. 19-16487 & 19-16773

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

EAST BAY SANCTUARY COVENANT, *et al.*,

Plaintiffs-Appellees,

v.

WILLIAM P. BARR, Attorney General of the United States, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
Nos. 3:1-cv-04073-JST

**BRIEF OF FORMER NATIONAL SECURITY OFFICIALS
AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES**

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Alex Nowrasteh, *Criminal Immigrants in Texas: Illegal Immigrant Conviction and Arrest Rates for Homicide, Sex Crimes, Larceny, and Other Crimes*, Cato Inst. (Feb. 26, 2018)..... 6

Ames Grawert & Cameron Kimble, *Crime in 2018: Updated Analysis*, Brennan Ctr. for Just. (Dec. 18, 2018) 6

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Doctors Without Borders, *Forced to Flee Central America’s Northern Triangle: A Neglected Humanitarian Crisis* at 8 (May 2017) 3

Holly Rosenkrantz, *Sanders Repeats Claim on Terrorists at the Border Refuted by Administration’s Own Data*, CBS News (Jan. 7, 2019, 3:28 PM)..... 4

Human Rights First, *Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy* (Oct. 1, 2019)..... 3

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John Gramlich, *5 Facts About Crime in the U.S.*, Pew Res. Ctr. (Jan. 3, 2019)..... 6

Julia Ainsley, *Only Six Immigrants in Terrorism Database Stopped by CBP at Southern Border from October to March*, NBC News (Jan. 7, 2019, 4:10 PM)..... 5

Michelangelo Landgrave & Alex Nowrasteh, *Criminal Immigrants in 2017: Their Numbers, Demographics, and Countries of Origin*, Cato Inst. (Mar. 4, 2019)..... 6

Michelle Mark, *Trump’s tough border policies are actually helping the human smuggling business, experts say*, Insider (May 30, 2019)..... 4

Press Release, U.S. Dep’t of Homeland Security, DOJ, DHS Report: Three Out of Four Individuals Convicted of International Terrorism and Terrorism-Related Offenses were Foreign-Born (Jan. 16, 2018)..... 5

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INTEREST OF *AMICI CURIAE*¹

Amici curiae, listed in the Appendix to this brief, are former officials in the U.S. government who have worked on national security, foreign policy and homeland security issues from the White House as well as agencies across the Executive Branch. They have served in senior leadership roles in administrations of both major political parties. Collectively, they have devoted a great many decades to protecting the security interests of the United States. They have held the highest security clearances, and participated at the senior-most levels of policy deliberations in the U.S. government. *Amici* write to offer the Court their experience regarding the security and foreign policy issues raised by this case.

ARGUMENT

On July 16, 2019, the Trump Administration issued an interim final rule (“Rule”) that denies asylum to individuals who cross the United States’ southern border by land without first having sought and been denied asylum in any country through which they traveled. The Rule effectively withholds asylum from nearly

¹ *Amici* affirm that no counsel for any party authored this brief in whole or in part; no party or party’s counsel contributed money intended to fund preparing or submitting the brief; and no person, other than *amici*, their members, and counsel, contributed money that was intended to fund preparing or submitting this brief. The views expressed by Yale Law School’s legal clinics are not necessarily those of the Yale Law School. Plaintiffs-Appellees consent to the filing of an amicus brief, and Defendants-Appellants consent to the timely filing of an amicus brief consistent with Fed. R. App. P. 29, including that rule’s word limitations.

everyone at the southern border other than Mexicans, who do not need to transit through a third country to reach the United States. The Administration justifies this sweeping and punitive rule—as well as its emergency imposition without notice-and-comment rulemaking even before this Court has heard the merits—by invoking “humanitarian and security” needs at the southern border and the presence of what it describes as “ongoing diplomatic negotiations” with other countries.²

Having addressed these needs in many diplomatic negotiations, we submit that there is no humanitarian or security justification for such a drastic executive action. In our opinion, this punitive rule does not advance, but rather does grievous harm to, U.S. foreign policy and diplomatic interests.

First, the United States has a proud and long-standing humanitarian tradition of opening its borders to those fleeing violence or persecution. This country was founded by descendants of those escaping religious persecution. That history has defined our nation’s fundamental values, which have long included granting sanctuary to those most in need of help. By welcoming those seeking asylum and refugee, our country has played an enduring role as a beacon of hope, and a safe haven for the most vulnerable. Although the United States has not always charted a

² Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, at 33,842 (July 16, 2019).

steady path in this regard, it has long since turned away from the days when it shunned people at the borders and turned them back to danger. Across multiple administrations and different political parties, the United States has taken great pride in its defining role in establishing, promoting, and enforcing the 1951 Refugee Convention and its 1967 Protocol.

The Administration's "no asylum" rule is a deeply punitive action that will severely harm those seeking humanitarian relief. The Administration's policy endangers vulnerable individuals throughout the region, and will lead to the denial or deterrence of countless legitimate asylees, pushing them back to countries experiencing "unprecedented levels of violence outside a war zone."³ In fact, this Rule is the latest in a series of unilateral Administration policies that, in the name of supposed humanitarian concerns and easing the "burden" on the United States, creates and compounds a humanitarian crisis of its own. The Rule leaves countless thousands of families and children in unsanitary and vulnerable conditions in overwhelmed and dangerous cities, and fuels rather than mitigates the scourge of kidnapping and smuggling.⁴ By denying asylum altogether to the most vulnerable

³ See Doctors Without Borders, *Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis* at 8 (May 2017).

⁴ See, e.g., Human Rights First, *Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy* (Oct. 1, 2019) (documenting how the administration's Migrant Protection Protocols have compelled thousands of families and children from Northern Triangle countries to

people across the vast expanse of the southern border, these actions do not address the claimed overloading of the asylum system. Instead, they simply close the doors of that system.

Second, although the Rule repeatedly cites an unidentified “security crisis” as its rationale, Defendants appear to abandon that claim in their brief to this Court. They offer no reason to believe that there is a security emergency at the southern border that remotely could justify such a rule. To the contrary, this administration’s own most recent Country Report on Terrorism found “no credible evidence indicating that international terrorist groups have established bases in Mexico, worked with Mexican drug cartels, or sent operatives via Mexico into the United States.”⁵ Although the White House once claimed that almost 4,000 known or suspected terrorists were intercepted at the southern border in a single year,⁶ this

wait for months in dangerous conditions without access to water or proper sanitation throughout Mexico); Michelle Mark, *Trump’s tough border policies are actually helping the human smuggling business, experts say*, Insider (May 30, 2019) (discussing how Trump administration migrant policies have exacerbated smuggling problems along the southern border).

⁵ U.S. Dep’t of State, Country Reports on Terrorism 2017, at 205 (Sept. 2018).

⁶ See White House, *Congressional Border Security Briefing: A Border Security and Humanitarian Crisis* (Jan. 4, 2019); Holly Rosenkrantz, *Sanders Repeats Claim on Terrorists at the Border Refuted by Administration’s Own Data*, CBS News (Jan. 7, 2019, 3:28 PM). Vice President Mike Pence made similar statements during his appearance on ABC the next week. See Betsy Klein, *Pence Misleadingly Cites Some Statistics to Push Trump Border Wall*, CNN (Jan. 8, 2019, 5:46 PM).

assertion was widely and consistently repudiated, including by this administration's own Department of Homeland Security.⁷ The overwhelming majority of individuals on terrorism watchlists who were intercepted by U.S. Customs and Border Patrol were attempting to travel to the United States by air.⁸ Only 13 percent of the individuals on the terrorist watchlist encountered while entering the United States during fiscal year 2017 traveled by land,⁹ and only a small fraction of those did so at the southern border. Between October 2017 and March 2018, forty-one foreign immigrants on the terrorist watchlist were intercepted at the northern border, as compared to only six intercepted at the southern border.¹⁰

Nor can the Administration defend its sweeping ban on asylees as necessary to combat crime. There is “no empirical evidence that immigration increases crime

⁷ See U.S. Dep't of Homeland Security, *Myth/Fact: Known and Suspected Terrorists/Special Interest Aliens* (Jan. 7, 2019); *see also, e.g.*, Brett Samuels, *Conway: Sarah Sanders Made 'Unfortunate Misstatement' About Terror Suspects at Border*, Hill (Jan. 8, 2019, 10:30 AM).

⁸ See U.S. Dep't of Homeland Security, *supra* note 7.

⁹ See Press Release, U.S. Dep't of Homeland Security, DOJ, DHS Report: Three Out of Four Individuals Convicted of International Terrorism and Terrorism-Related Offenses were Foreign-Born (Jan. 16, 2018).

¹⁰ See Julia Ainsley, *Only Six Immigrants in Terrorism Database Stopped by CBP at Southern Border from October to March*, NBC News (Jan. 7, 2019, 4:10 PM).

in the United States;”¹¹ in fact, authorized immigrants are 75 percent less likely to be incarcerated than native-born Americans.¹² In Texas, the state with the best available data, unauthorized immigrants were found to have a first-time conviction rate 32 percent below that of native-born Americans,¹³ and the conviction rates of unauthorized immigrants for violent crimes such as homicide and sex offenses stand well below those of native-born Americans.¹⁴ Meanwhile, overall rates of violent crime in the United States have declined significantly over the past 25 years, falling 49 percent from 1993 to 2017.¹⁵ And violent crime rates in the country’s 30 largest cities decreased on average by 2.7 percent in 2018 alone.¹⁶

Finally, the government cannot plausibly justify the Rule, or its issuance on

¹¹ Jennifer Doleac, *Are Immigrants More Likely to Commit Crimes?*, EconoFact (Feb. 14, 2017); *see also* Richard Pérez-Peña, *Contrary to Trump’s Claims, Immigrants Are Less Likely to Commit Crimes*, N.Y. Times (Jan. 26, 2017) (summarizing data showing no support for claim that “undocumented immigrants commit a disproportionate share of crime”); Alex Nowrasteh, *Immigration and Crime—What the Research Says*, Cato Inst.: Cato at Liberty Blog (July 14, 2015) (reviewing numerous studies that fail to establish a link between immigrants, including undocumented immigrants, and increased crime).

¹² Michelangelo Landgrave & Alex Nowrasteh, *Criminal Immigrants in 2017: Their Numbers, Demographics, and Countries of Origin*, Cato Inst. (Mar. 4, 2019).

¹³ *See id.*

¹⁴ Alex Nowrasteh, *Criminal Immigrants in Texas: Illegal Immigrant Conviction and Arrest Rates for Homicide, Sex Crimes, Larceny, and Other Crimes*, Cato Inst. (Feb. 26, 2018)

¹⁵ John Gramlich, *5 Facts About Crime in the U.S.*, Pew Res. Ctr. (Jan. 3, 2019).

¹⁶ Ames Grawert & Cameron Kimble, *Crime in 2018: Updated Analysis*, Brennan Ctr. for Just. (Dec. 18, 2018).

an immediate or emergency basis, on the ground that it is indispensable to U.S. “foreign policy” or “relations with another country.”¹⁷ *Amici* include diplomats who have negotiated repeatedly with Mexico on matters of foreign policy, security, and trade. *Every* asylum or migrant policy involves “relations” and ongoing conversations with another country. If the mere fact of such discussions immunized illegal action from judicial review, or allowed the government to ignore statutes regarding rulemaking, the government could violate domestic and international law without repercussions, simply by engaging in diplomatic discussions regarding that violation with another country.

Defendants offer no evidentiary support for their claim that failure to implement this Rule immediately will “provok[e] a disturbance in domestic politics in Mexico and the Northern Triangle countries.”¹⁸ Defendants do not identify—and amici are unaware of—any diplomatic fallout that resulted from the preliminary injunction that had prevented this Rule from going into effect. In amici’s judgment, failure to move forward with this rule on an emergency basis will not damage our ongoing relations with Mexico or Northern Triangle countries in any meaningful way. To the contrary, the most likely consequence of this

¹⁷ 84 Fed. Reg. at 33,841-42 (quoting *Am. Ass’n of Exps. & Imps.-Textile & Apparel Grp.*, 751 F.2d 1239, 1249 (Fed. Cir. 1985)).

¹⁸ 84 Fed. Reg. at 33,842.

unilateral, provocative step will be to inflame tensions and undermine our diplomatic relations with Mexico and across the Western Hemisphere, in the process compromising critical security and other urgent forms of cooperation with these nations.

The claimed emergency Rule also will do harm our foreign policy interests well beyond this hemisphere. In our professional judgment, if this Rule is allowed to go into effect, it will undermine the credibility of the United States, and its longstanding commitment to protecting the displaced and dispossessed.

Authoritarian leaders around the world take their cue from punitive policies such as these to justify their own blanket restrictions on those seeking humanitarian relief, in contravention of international law. Other countries have long sought pretexts to deny access to refugees; the Administration's precedent grants them license to dramatically decrease opportunities for refugees and other vulnerable migrants around the world, with potentially severe consequences for individuals seeking safety and our broader national interest in regional and global stability. Finally, this Rule will inflict lasting damage on the United States' credibility and commitment to the rule of law and basic human dignity. The United States has so long been a global leader in securing the international recognition for the rights of the displaced, that our direct role in eroding those rights would be all the more devastating.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the ruling below should be affirmed.

Dated: October 15, 2019

Respectfully Submitted,

/s/ Phillip Spector

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APPENDIX

List of *Amici Curiae*

1. Madeleine K. Albright served as Secretary of State from 1997 to 2001. A refugee and naturalized American citizen, she served as U.S. Permanent Representative to the United Nations from 1993 to 1997.
2. Daniel Benjamin served as Ambassador-at-Large for Counterterrorism at the U.S. Department of State from 2009 to 2012.
3. John O. Brennan served as Director of the Central Intelligence Agency from 2013 to 2017. He previously served as Deputy National Security Advisor for Homeland Security and Counterterrorism and Assistant to the President from 2009 to 2013.
4. William J. Burns served as Deputy Secretary of State from 2011 to 2014. He previously served as Under Secretary of State for Political Affairs from 2008 to 2011, as U.S. Ambassador to Russia from 2005 to 2008, as Assistant Secretary of State for Near Eastern Affairs from 2001 to 2005, and as U.S. Ambassador to Jordan from 1998 to 2001.
5. James Clapper served as U.S. Director of National Intelligence from 2010 to 2017.
6. Bathsheba N. Crocker served as Assistant Secretary of State for International Organization Affairs from 2014 to 2017.
7. Nancy Ely-Raphel served as Senior Adviser to the Secretary of State and Director of the Office to Monitor and Combat Trafficking in Persons from 2001 to 2003. She previously served as U.S. Ambassador to Slovenia from 1998 to 2001.
8. Daniel F. Feldman served as Special Representative for Afghanistan and Pakistan at the U.S. Department of State from 2014 to 2015.

9. Jonathan Finer served as Chief of Staff to the Secretary of State from 2015 to 2017, and Director of the Policy Planning Staff at the U.S. Department of State from 2016 to 2017.

10. Suzy George served as Executive Secretary and Chief of Staff of the National Security Council from 2014 to 2017.

11. Chuck Hagel served as Secretary of Defense from 2013 to 2015, and previously served as Co-Chair of the President's Intelligence Advisory Board. From 1997 to 2009, he served as U.S. Senator for Nebraska, and as a senior member of the Senate Foreign Relations and Intelligence Committees.

12. Heather A. Higginbottom served as Deputy Secretary of State for Management and Resources from 2013 to 2017.

13. Prem Kumar served as Senior Director for the Middle East and North Africa at the National Security Council from 2013 to 2015.

14. Janet Napolitano served as Secretary of Homeland Security from 2009 to 2013. She served as the Governor of Arizona from 2003 to 2009.

15. James C. O'Brien served as Special Presidential Envoy for Hostage Affairs from 2015 to 2017. He served in the U.S. Department of State from 1989 to 2001, including as Principal Deputy Director of Policy Planning and as Special Presidential Envoy for the Balkans.

16. Matthew G. Olsen served as Director of the National Counterterrorism Center from 2011 to 2014.

17. Anne W. Patterson served as Assistant Secretary of State for Near Eastern Affairs from 2013 to 2017. Previously, she served as the U.S. Ambassador to Egypt from 2011 to 2013, to Pakistan from 2007 to 2010, to Colombia from 2000 to 2003, and to El Salvador from 1997 to 2000.

18. Thomas R. Pickering served as Under Secretary of State for Political Affairs from 1997 to 2000. He previously served as Ambassador to El Salvador

from 1983 to 1985, and as U.S. Permanent Representative to the United Nations from 1989 to 1992.

19. Amy Pope served as Deputy Homeland Security Advisor and Deputy Assistant to the President from 2015 to 2017.

20. Samantha Power served as U.S. Permanent Representative to the United Nations from 2013 to 2017. From 2009 to 2013, she served as Senior Director for Multilateral Affairs and Human Rights at the National Security Council.

21. Jeffrey Prescott served as Deputy National Security Advisor to the Vice President from 2013 to 2015, and as Special Assistant to the President and Senior Director for Iran, Iraq, Syria and the Gulf States from 2015 to 2017.

22. Dan Restrepo served as Special Assistant to the President and Senior Director for Western Hemisphere Affairs at the National Security Council from 2009 to 2012.

23. Anne C. Richard served as Assistant Secretary of State for Population, Refugees, and Migration from 2012 to 2017.

24. David Robinson served as Assistant Secretary of State for Conflict and Stabilization Operations from 2016 to 2017. Previously, he served as Assistant Chief of Mission at the U.S. Embassy in Kabul, Afghanistan from 2013 to 2014, and Principal Deputy Assistant Secretary for Population, Refugees and Migration from 2009 to 2013.

25. Eric P. Schwartz served as Assistant Secretary of State for Population, Refugees, and Migration from 2009 to 2011. From 1993 to 2001, he was responsible for refugee and humanitarian issues at the National Security Council, ultimately serving as Special Assistant to the President for National Security Affairs and Senior Director for Multilateral and Humanitarian Affairs.

26. Wendy R. Sherman served as Under Secretary of State for Political

Affairs from 2011 to 2015.

27. Vikram J. Singh served as Deputy Special Representative for Afghanistan and Pakistan from 2010 to 2011 and as Deputy Assistant Secretary of Defense for Southeast Asia from 2012 to 2014.

28. Dana Shell Smith served as U.S. Ambassador to Qatar from 2014 to 2017. Previously, she served as Principal Deputy Assistant Secretary of Public Affairs.

29. Jake Sullivan served as National Security Advisor to the Vice President from 2013 to 2014. He previously served as Director of Policy Planning at the U.S. Department of State from 2011 to 2013.

30. Strobe Talbott served as Deputy Secretary of State from 1994 to 2001.

31. Arturo A. Valenzuela served as Assistant Secretary of State for Western Hemisphere Affairs from 2009 to 2011. He previously served as Special Assistant to the President and Senior Director for Inter-American Affairs at the National Security Council from 1999 to 2000, and as Deputy Assistant Secretary of State for Mexican Affairs from 1994 to 1996.

UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I, Phillip Spector, hereby certify that on October 15, 2019, the foregoing document was filed and served with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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