

## **EXHIBIT**

**Brief of Amici Curiae Center for Gender & Refugee Studies,  
Harvard Immigration & Refugee Clinical Program, and Boston  
University School of Law Immigrants' Rights and Human  
Trafficking Program in Support of Plaintiffs**

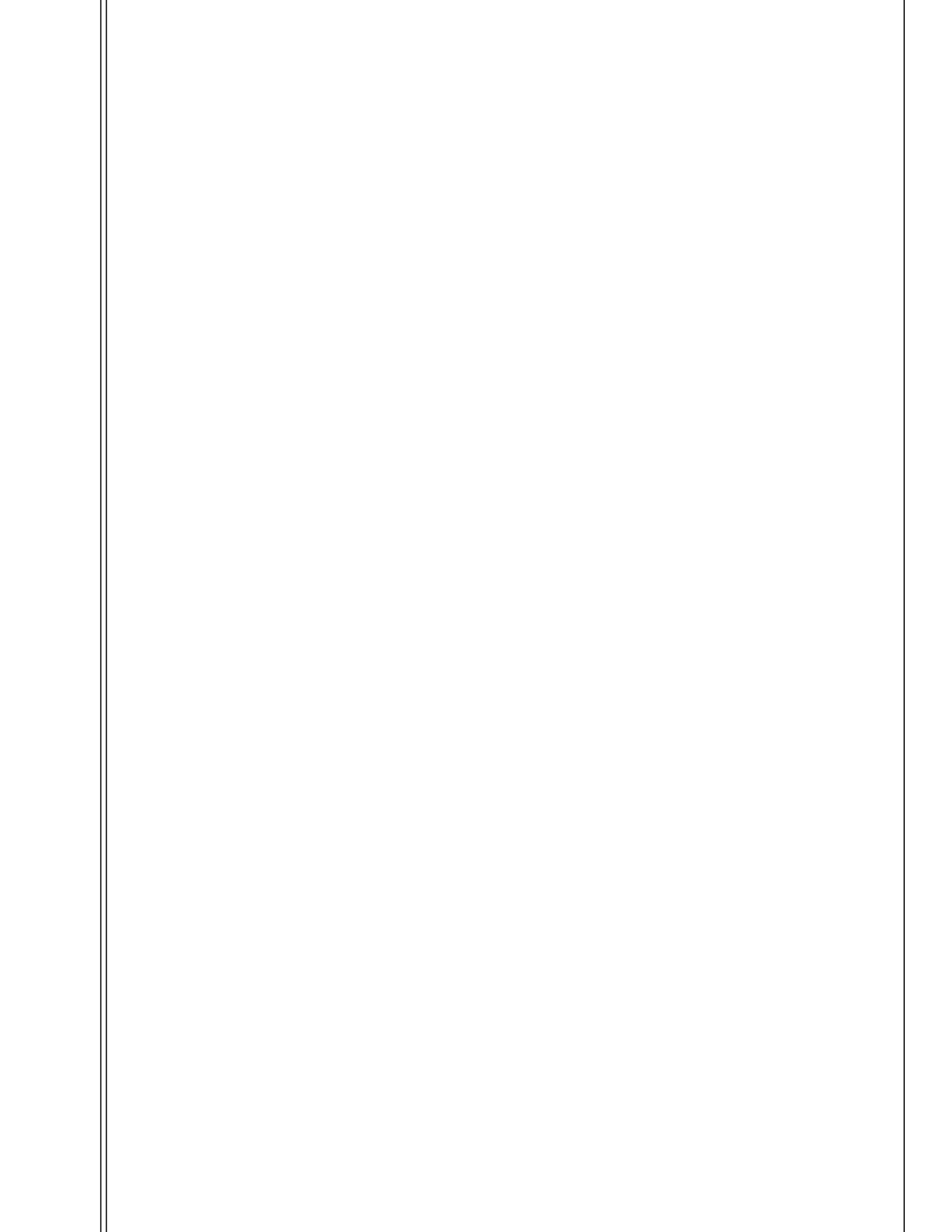


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1 First, the challenged conduct gives rise to liability under the Alien Tort Statute  
2 (“ATS”), 28 U.S.C. § 1350, because it forces ~~04 108 718.8 T0 Dc 0 Tw (t95d(o lia Tw -2.fTw(-2~~

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1 For the reasons set forth below, Amici Curiae Center for Gender & Refugee  
2 Studies (“CGRS”), Harvard Immigration & Refugee Clinical Program (“HIRC”), and  
3 Boston University School of Law Immigrants’ Rights and Trafficking Program (“Boston  
4 University Clinic”) (collectively “Amici”) respectfully request the Court to grant  
5 summary judgment for Plaintiffs and immediately enjoin the (m)1212.1 (ti)b(tf)3.7[(r)3.tfQq[(r

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1           The Boston University Clinic represents vulnerable immigrants and asylum seekers  
2 in a broad range of complex legal proceedings before the immigration courts, state, local  
3 and federal courts and before immigration agencies. Under the supervision of professors  
4 and instructors, law students represent children and adults seeking protection in the  
5 United States including survivors of torture and trauma, survivors of domestic violence,  
6 and detained and non-detained individuals in removal proceedings. The Boston  
7 University Clinic has also

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1 under the ATS once they attain the same kind of “definite content and acceptance among  
2 civilized nations” as these historical examples. *Id.* at 732.

3 A norm may form the basis of an ATS claim if it has become “specific, universal,  
4 and obligatory,” a three-part test adopted by the Supreme Court in *Sosa*, 542 U.S. at 732.  
5 *See Doe I*, 766 F.3d at 1019. When assessing whether a norm meets the *Sosa* standard,  
6 courts look to “international conventions, international customs, the general principles of  
7 law recognized by civilized nations, judicial decisions, and the works of scholars,” as  
8 well as sources “that provide an authoritative expression of the views of the international  
9 community.” *Doe I*, 766 F.3d at 1019–20 (internal quotation marks omitted). In addition  
10 to examining the status of the norm in international law, *Sosa* also requires courts to  
11 weigh any prudential concerns associated with recognizing a

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1 While the ATS only requires that a norm attain the status of customary  
2 international law before it may be actionable under the statute, *Sosa*, 542 U.S. at 733, the  
3 status of *non-refoulement* as a *jus cogens* norm—the “highest status within international  
4 law” as the Ninth Circuit wrote in *Siderman de Blake*, 965 F.2d at 715—is powerful  
5 evidence that the prohibition is sufficiently specific, universal, and obligatory to satisfy  
6 the *Sosa* test for recognition under the ATS. 542 U.S. at 733.

7 In sum, the principle of *non-refoulement* is a binding norm under customary  
8 international law. The Government’s undisputed dereliction of its *non-refoulement*  
9 obligations through the Turnback Policy is actionable under the ATS and should be  
10 enjoined immediately.

11 **II. The Agency’s Turnback Policy Violates the Principle of *Non-***  
12 ***Refoulement*, in Violation of the Government’s International and**  
13 **Domestic Law Obligations**

14 The Turnback Policy violates U.S. obligations under international and domestic  
15 law. Through coercive tactics and outright preclusion of access to ports of entry, the  
16 United States denies the right to seek asylum and other protection and has returned  
17 countless asylum seekers to “the frontiers of territories where [their] life or freedom  
18 would be threatened,” precisely what Article 33 of the 1951 Convention (3



1 that they would be separated from their children or deported to the country where they  
2 feared persecution. Pl.'s Mem. at 5.

3 As discussed next, the Government's concerted actions to bar people from seeking  
4 asylum have forced thousands of asylum seekers to return to Mexico, where they face  
5 ongoing threats to their lives and freedom and/or fear of likely torture or persecution, in  
6 direct violation of this country's binding *non-refo*

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1 The United Nations High Commissioner for Refugees (“UNHCR”) has similarly  
2 emphasized that Article 33 encompasses “non-admission[s] at the border” and “informal  
3 transfer[s],” as well as “forcible removal[s].”<sup>25</sup> This UNHCR Guidance is directly  
4 relevant to the interpretation of the Refugee Act of 1980. *See Diaz Reynoso v. Barr*, 968  
5 F.3d 1070, 1082–87 (9th Cir. 2020); *see also Cardoza-Fonseca*, 480 U.S. at 438–39 (“In  
6 interpreting the Protocol’s definition of ‘refugee’ we are further guided by the analysis  
7 set forth in the Office of the United Nations High Commissioner for Refugees[.]”).<sup>26</sup>

8 ***1. The U.S. Government’s Turnback Policy Violates Core Non-***  
9 ***Refoulement Obligations by Returning Mexican Asylum Seekers***  
10 ***to the Territory Where Their Lives Are Threatened***

11 Up to 80% of asylum seekers stuck at some U.S. – Mexico ports of entry are  
12 Mexican citizens seeking refuge from persecution in their home country.<sup>27</sup> By subjecting  
13 Mexican asylum seekers to metering pursuant to the Turnback Policy, among other  
14 coercive practices, the Government is, *per se*, returning refugees to a territory where their  
15 lives or freedom are threatened on account of a protected ground. *See* UNHCR Guidance  
16 at 2 (“[A] person is a refugee within the meaning of the 1951 Convention as soon as he or  
17 she fulfills the criteria contained in the refugee definition . . . . [A] person does not  
18 become a refugee because of recognition, but is recognized because he or she is a  
19 refugee.”).

20 CBP forces metered asylum seekers to put their names on a waitlist maintained by  
21 the Mexican government, which increases the risk that they will be “discovered by their  
22 persecutors—whether members of the [Mexican] government or non-state persecutors,”  
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24 <sup>25</sup> *Id.* at 3.

25 <sup>26</sup> *See also* European Union Agency for Fundamental Rights, *Scope of the*  
26 *Principle of Non-Refoulement in Contemporary Border Management* (2016),  
27 [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2016-scope-non-refoulement-](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-scope-non-refoulement-0_en.pdf)  
28 [0\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-scope-non-refoulement-0_en.pdf) (explaining that *non-refoulement* obligations adhere at designated border  
crossing points).

<sup>27</sup> *See Barred at the Border*, *supra* note 21, at 4.

1 whom the government is unable or unwilling to control. *See Barred at the Border, supra*  
2 note 21, at 8 (explaining Mexican immigration authorities “have been implicated in  
3 organized crime and extortion of migrants”); Pls.’ Mem. at 5–6. The waitlist process  
4 often requires asylum seekers to provide “their biographical information, photograph, and  
5 location to a Mexican local or federal official,” making them easy targets for persecution.  
6 *Barred at the Border, supra* note 21, at 8.

7 Concerns that Mexican citizens will be persecuted due to metering at the border are  
8 far from theoretical. *See, e.g.,* Human Rights Watch, “U.S.: Mexican Asylum Seekers  
9 Ordered to Wait,” (Dec. 23, 2019), [https://www.hrw.org/news/2019/12/23/us-mexican-](https://www.hrw.org/news/2019/12/23/us-mexican-asylum-seekers-ordered-wait)  
10 [asylum-seekers-ordered-wait](https://www.hrw.org/news/2019/12/23/us-mexican-asylum-seekers-ordered-wait) (documenting dangers facing Mexican asylum-seekers  
11 stuck waiting at the border where their Mexican persecutors may be able to locate them);  
12 ACLU Ltr. to J. Cuffari *et al.* (Nov. 14, 2019),  
13 [https://www.aclutx.org/sites/default/files/aclu\\_oig\\_complaint\\_metering.pdf](https://www.aclutx.org/sites/default/files/aclu_oig_complaint_metering.pdf) (OIG  
14 complaint documenting threats to Mexican nationals subjected to metering).

15 ***2. The U.S. Government Has Endangered the Lives of Non-***  
16 ***Mexican Asylum Seekers, Placing Them at Risk of Indirect***  
17 ***Refoulement and Other Serious Human Rights Violations***  
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1 encouraged Mexican officials to deport asylum seekers in violation of U.S. *non-*  
2 *refoulement* obligations. Amnesty Report, *supra* note 28, at 23 (quoting a senior Mexican  
3 official who described U.S. officials as making Mexico ‘do their dirty work’).<sup>29</sup> Thus,  
4 when plaintiffs like Roberto Doe are deported from Mexican custody, the United States  
5 bears responsibility for their indirect *refoulement* to a country where they face threats to  
6 life or freedom or danger of persecution or torture. Defs.’ Mem. at 36 (conceding Mexico  
7 detained and deported Roberto Doe).

8 In addition, due to the U.S. government’s illegal Turnback Policy, bona fide  
9 asylum seekers left waiting in limbo in Mexico are vulnerable to kidnappings, rape, and  
10 threats of death.<sup>30</sup> Mexican authorities have, for example, beaten and jailed transgender  
11 asylum seekers from Central America, and armed men have targeted, threatened and  
12 attacked LGTBQ individuals, including transgender women and minors, with impunity.<sup>31</sup>  
13 Plaintiffs’ Memorandum further documents dangers in which the Turnback Policy  
14 unconscionably places non-Mexican asylum seekers trapped on the Mexican side of the  
15 border. Pls.’ Mem. at 35. The Turnback Policy thus subjects asylum seekers to significant  
16 risks of forced return to their countries of origin and to pervasive mistreatment and  
17 victimization in direct contravention of U.S. *non-refoulement* obligations.

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<https://www.amnesty.org/download/Documents/AMR5191012018ENGLISH.PDF>  
23 (“Amnesty Report”).

24 <sup>29</sup> The United States has also specifically funded initiatives like the Programa  
25 Frontera Sur that systematically return Central Americans in Mexico to the Northern  
26 Triangle. *See* Ardalan, *supra* note 2, at 284–92.

27 <sup>30</sup> *Barred at the Border*, *supra* note 21; Doctors Without Borders, *Unacceptable*  
28 *Treatment of Migrants in Piedras Negras, Mexico* (Feb. 16, 2019),  
<https://www.doctorswithoutborders.org/what-we-do/news-stories/news/unacceptable-treatment-migrants-piedras-negras-mexico>.

<sup>31</sup> Amnesty Report, *supra* note 28, at 23.

1           **III. There Is Nothing Controversial About Holding the Turnback Policy a**  
2           **Violation of International Law that Is Actionable Under the ATS**

3           Defendants argue that it would be an unwarranted expansion of the ATS to  
4 recognize *non-refoulement* as an actionable norm and to hold the Government to account  
5 for violating its international and domestic law obligations through enforcement of the  
6 Turnback Policy. On the contrary, *non-refoulement* is such a deeply rooted and

7 undisputed norm that

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1 commitments. The 1967 Protocol expanded the scope of the 1951 Convention, which by  
2 its terms, had only applied to persons who became refugees as a result of events prior to  
3 January 1, 1951.<sup>35</sup> The 1967 Protocol notably eliminated the temporal and geographical  
4 limitations of the 1951 Convention, applying its protective mandate to all future refugees  
5 regardless of origin.<sup>36</sup> This underlines the continued commitment to the principle of *non-*  
6 *refoulement* by the international community, creating an expansive scope of refugee  
7 protections to which all signatories were bound—a deeply rooted and well-established  
8 principle.

9         Consistent with the *non-refoulement* provisions in the many international and  
10 regional treaties addressed above in Part I, international and domestic courts have  
11 attempted to hold states to their international obligations against *refoulement*. The  
12 International Criminal Court has observed that the *non-refoulement* principle is  
13 considered to be a norm of customary international law, an integral part of the  
14 international human rights protection and that all individuals are entitled to enjoy its  
15 application.<sup>37</sup> Domestic courts of several nations have accordingly found that *non-*  
16 *refoulement* applies not only to the parties that have signed and ratified

1 As shown above in Part II, Defendants' Turnback Policy constitutes unlawful  
2 *refoulement*, in violation of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Convention) and the  
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1 seekers.’”<sup>40</sup> Our continuing violations of *non-refoulement* do not go unnoticed by the  
2 world community.

3 **B. The Harms of the Turnback Policy Are Devastating for Individuals**  
4 **and Undermines U.S. Credibility and the Sanctity of the *Non-***  
5 ***Refoulement* Norm**

6 Moreover, the current Turnback Policy has placed tens of thousands of people—  
7 including many asylum seekers—in an indefinite holding pattern at our Southern border.  
8 The harms of the Turnback Policy are part of a broader effort on the part of the  
9 Government to outsource the refugee protections it is obligated to uphold. For example,  
10 more than 67,000 people are currently subject to the so-called Migrant Protection  
11 Protocols (“MPP”),<sup>41</sup> which forces asylum seekers to await their day in immigration court  
12 in Mexico. Among the 67,000 people subject to MPP are 20,000 children, all exposed to  
13 the dangerous and inhumane conditions in makeshift border camps.<sup>42</sup>

14 With the Turnback Policy, the United States is now directly responsible for the  
15 creation of perilous border camps, holding tens of thousands of vulnerable asylum  
16 seekers and others in need of protection in the United States. Through metering and the  
17 MPP, the United States is impermissibly outsourcing the refugee protections to which it  
18 is obligated; instead of processing migrants and asylum seekers within our borders, as  
19 U.S. law requires, these policies contract out the financial and human cost of that  
20 protection and processing to Mexico.<sup>43</sup> The rule of law—and the norms of equality and

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21 <sup>40</sup> Costello and Foster, *supra* note 13, at 300.

22 <sup>41</sup> *Details on MPP (Remain in Mexico) Deportation Proceedings*, TRAC  
23 IMMIGRATION, <https://trac.syr.edu/phptools/immigration/mpp/> (last visited Oct. 26, 2020).

24 <sup>42</sup> Kristina Cooke, Mica Rosenberg, and Reade Levinson, *U.S. Migrant Policy*  
25 *Sends Thousands of Children, Including Babies, Back to Mexico*, REUTERStl(B)8.1 (a)3.5us( )T



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