No. 23-16032

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EAST BAY SANCTUARY COVENANT, et al.,
Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, President of the United States, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California, No. 4:18-cv-06810 (Tigar, J.)

BRIEF FOR PROFESSORS OF IMMIGRATION LAW AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

KATHERINE L. EVANS
CHARLES SHANE ELLISON
DUKE UNIVERSITY SCHOOL OF LAW*
210 Science Drive, Box 90360
Durham, NC 27708
Telephone: (919) 613-7036

October 5, 2023

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES, RULES, AND REGULATIONS

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

STATEMENT OF AMICI'S INTEREST[1]

Amici curiae are law professors who teach and publish scholarship about United States immigration law. Amici have collectively studied the implementation and history of the Immigration and Nationality Act (INA) for decades and have written extensively on the topic. They accordingly have an abiding interest in the proper interpretation and administration of the Nation's immigration laws, particularly the INA. Amici respectfully submit that their proposed brief could aid this Court's consideration by placing the current dispute in the broader context and history of relevant immigration statutes. The full list of Amici is included in the Appendix.

SUMMARY OF THE ARGUMENT

The latest asylum ban[2]—like its earlier iterations—is inconsistent with the text, structure, and history of the asylum provisions in the Immigration and Nationality Act (INA). The Biden Administration's rule essentially combines two prior regulatory constraints from the Trump Administration aimed respectively at individuals who enter outside of a port of entry or without a CBP One appointment

---

[1] Amici submit this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) and state that all parties have consented to its timely filing. Amici further state, pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), that no counsel for a party authored this brief in whole or in part, and no person other than the amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] "Circumvention of Lawful Pathways," 88 Fed. Reg. 31314, 31449–52.

and who passed through virtually *any* third country—no matter how briefly—without applying for and being denied protection before claiming asylum in the United States. Though the Biden rule ostensibly contains exceptions to its broad restrictions on asylum eligibility, these exceptions are vanishingly small. *See East Bay Sanctuary Covenant v. Biden*, No. 18-CV-06810-JST, 2023 WL 4729278, at *10 (N.D. Cal. July 25, 2023) (stating that "[t]he Court is not persuaded that the existence of other exceptions or the opportunity to rebut the presumption materially distinguishes this Rule" from the Trump administration's transit and entry bans). Indeed, the Biden rule is even more restrictive by barring asylum for people who enter at a port of entry without the requisite appointment. Amici submitted briefs to this Court in support of Plaintiffs' challenges to the prior rules. No. 19-16487, Dkt. 62; No. 18-17274, Dkt. 48. This Court subsequently found the Trump Administration's extra-statutory restrictions to be unlawful. *East Bay Sanctuary Covenant v. Biden* (*East Bay I*), 993 F.3d 640, 658 (9th Cir. 2021); *East Bay Sanctuary Covenant v. Garland* (*East Bay II*), 994 F.3d 962, 968 (9th Cir. 2021). Amici submit this largely identical brief in support of Plaintiffs' challenges to the Biden Administration's rule because this rule again violates the asylum statutes for the same reasons the Trump Administration's rules did. *East Bay v. Biden*, No. 23-16032, Dkt. 21 (Aug. 3, 2023) (VanDyke, J., dissenting) (stating

that "The Biden administration's 'Pathways Rule' before us . . . is not meaningfully different from the prior administration's rules").

The INA's framework prioritizes protection of asylum seekers from persecution in their home country. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (holding that an asylum claimant can demonstrate a "well-founded fear" by showing a ten percent chance that she would be "shot, tortured, or otherwise persecuted" in her country of origin). The revived rule conflicts with this priority on refugee protection by re-imposing sweeping transit and entry bars that disregard the safeguards Congress placed on asylum restrictions concerning the same topics.

The government's asserted authority for the rule violates the specificity canon, which counsels reading a general provision narrowly to mesh with more specific sections on concrete problems. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank,* 566 U.S. 639, 645 (2012) (Scalia, J.) (citing the "commonplace of statutory construction that the specific governs the general"). As authority for the Biden asylum rule, the government cites a general subsection in the INA's asylum provision stating that "[t]he Attorney General may … establish additional limitations and conditions, *consistent with this section*." 8 U.S.C. § 1158(b)(2)(C) (emphasis added). Under the specificity canon, the requirement that a rule be "consistent with this section" entails reckoning with the asylum

provision's specific limits. Instead of reconciling this authority with the asylum statutes' specific guidance on asylum seekers' passage through third countries and manner of entry, the Biden rule disregards that guidance.

The repackaged entry ban conflicts with Congress's statutory scheme. The plain language, plan, and structure of both the Refugee Act of 1980 ("Refugee Act"), Pub. L. No. 96-212, § 208, 94 Stat. 102, 105, and the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq., support threshold eligibility for asylum for any foreign national "at a land border *or* port of entry." Refugee Act of 1980 § 208(a), 94 Stat. at 105 (emphasis added); *see* 8 U.S.C. § 1158(a)(1) (providing that "*[a]ny alien* … who arrives in the United States (*whether or not at a designated port of arrival*) … may apply for asylum") (emphasis added). This robust textual commitment to asylum eligibility provides a stark comparison with the inadequate remedies that the most recent Department of Homeland Security (DHS) rule reserves for arrivals at designated entry points without a CBP One appointment or between designated entry points. In place of asylum, the revived DHS rule would limit available remedies to withholding of removal or protection under the Convention Against Torture ("CAT"), which impose much higher standards of proof on the applicant fleeing harm and do not provide lasting protection against removal. The rule's presumption of asylum ineligibility is therefore not "consistent with" the INA.

As part of the balance in the INA between efficiency and asylum protections, Congress set parameters for two express statutory bars on asylum addressing passage through third countries, concerning claims by asylum seekers who are (1) "firmly resettled" in another country prior to their seeking protection in the United States, 8 U.S.C. § 1158(b)(2)(A)(vi), or (2) covered by safe third country agreements. *See id*. § 1158(a)(2)(A). The INA's safe third country agreement and firm resettlement bars include robust constraints that harmonize with the asylum provision's protective priority. *See* 8 C.F.R. § 208.15 (noting that firm resettlement requires a third country's offer of safe, permanent legal status to a refugee, not merely a refugee's passing physical presence within third country's territory); 8 U.S.C. § 1158(a)(2)(A) (requiring that safe third country agreements include specific accord between states and official findings regarding a third country's "full and fair" asylum procedures).

Firm resettlement under the INA has a history that extends back *over seventy years*, to the global refugee crisis at the end of World War II. Early in the efforts to cope with that crisis, the United States, working with the United Nations, determined that firm resettlement meant far more than mere physical presence in or transit through a country. Instead, using firm resettlement as a basis for disqualifying a person from refugee protection required a showing that the refugee had accrued a robust stake in a country by incurring "rights and obligations"

equivalent to those enjoyed by the country's *own nationals*. *See Rosenberg v. Yee Chien Woo,* 402 U.S. 49, 56 n.5 (1971). Neither the United States nor its many international partners in the post–World War II refugee relief effort would have considered the refugee's mere presence in or movement through a country as meeting that test.

The revived transit and entry restrictions include none of the statutory constraints. It therefore disrupts the INA's balance between efficient adjudication and asylum protection. A rule with such disruptive effects cannot be "consistent with" Congress's carefully wrought asylum scheme. 8 U.S.C. § 1158(b)(2)(C).

ARGUMENT

I. THE INA PRIORITIZES PROTECTION OF ASYLUM SEEKERS

Congress's framework protects asylum seekers from removal to a country in which they could face persecution based on one of five factors: race, religion, nationality, membership in a particular social group, or political opinion. *See* 8 U.S.C. § 1101(a)(42)(A); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987). In *Cardoza-Fonseca*, the Supreme Court held that an asylum claimant can meet the INA's "well-founded fear" of persecution standard by showing a *ten percent* chance of harm based on one of the five covered factors. *Cardoza-Fonseca*, 480 U.S. at 440.

While the challenge to the Biden asylum rule does not concern Congress's Expedited Removal provisions, these provisions illustrate Congress's interest in ensuring that any restrictions on access to asylum do not turn away plausible claims. The preliminary screening criteria used by asylum officers reinforce this prioritization of protection from harm over procedural limitations. To trigger further proceedings instead of removal, an asylum officer must find that a foreign national at the border who lacks a visa or has sought to enter through fraud has a "credible fear" of persecution in her country of origin. 8 U.S.C. § 1225(b)(1)(B)(ii). The INA defines the "credible fear" threshold as a "significant possibility" that the claimant "*could* establish eligibility for asylum." 8 U.S.C. § 1225(b)(1)(B)(v) (emphasis added). Notably, Congress did not require *certainty* at this preliminary stage that the claimant would ultimately obtain asylum, or even a preponderance of the evidence. A more demanding initial test would filter out too many colorable claims for asylum and increase the risk that the United States would return claimants to a country in which they could be "shot, tortured, or otherwise persecuted"—the very outcomes that the Supreme Court in *Cardoza-Fonseca* said Congress wished to prevent. *Cardoza-Fonseca*, 480 U.S. at 440.

The Biden Rule subverts the protective scheme Congress created by adding extra-statutory restrictions related to transit through a third country and manner of entry and then prioritizes these over protecting the applicant.

II. THE RULE'S ENTRY RESTRICTION RUNS COUNTER TO THE PLAIN MEANING OF THE INA'S ASYLUM PROVISIONS

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Congress expressly provided that foreign nationals fleeing persecution can "apply for asylum" at any point along a U.S. land border, "*whether or not at a designated port of arrival*." 8 U.S.C. § 1158(a)(1) (emphasis added). IIRIRA's provision for arriving asylum-seekers' threshold eligibility reinforced the plain language of the Refugee Act of 1980. Refugee Act of 1980 § 208(a), 94 Stat. at 105 (authorizing asylum applications "at a land border" of the United States). The trajectory of legislative text toward more specific guarantees of threshold eligibility is manifestly inconsistent with the Biden rule's denial of asylum for foreign nationals who arrive at undesignated border locations or at a port of entry without a CBP One appointment. Moreover, the Biden rule's effort to force asylum seekers toward remedies such as withholding of removal and CAT protection is inconsistent with both the plain meaning of the asylum provisions and Congress's deliberate prioritizing of asylum over withholding and CAT.

A. Plain Meaning

As part of the Refugee Act of 1980's effort to "provide a permanent and systematic procedure for the admission … of refugees," Refugee Act of 1980 § 101(b), 94 Stat. at 102, Congress authorized asylum claims by any foreign national "physically present in the United States *or* at a land border or port of

entry." *Id*. § 208(a), 94 Stat. at 105 (emphasis added). This language reflected Congress's explicit decision not to condition eligibility for asylum on an applicant's manner of entering the United States. Under this section, any foreign national "physically present in the United States" could establish asylum eligibility regardless of whether the individual entered without inspection ("EWI"). *See id*. § 208(a), 94 Stat. at 105; *see also* 8 U.S.C. § 1158(a)(1). The section's inclusion of persons "at a land border *or* port of entry" also recognized the importance of broad access to asylum.

Congress amended this text in 1996 to reinforce its adherence to the threshold eligibility of asylum seekers who arrived at *any point* along a land border. Much of IIRIRA reflected Congress's abiding concern with border security. Nevertheless, the 1996 legislation balanced an array of stricter procedures with even clearer language about locational asylum eligibility. For example, the 1996 text of § 1158(a)(1) provided that "[a]ny alien who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival* and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum" (emphasis added).

Compared with the already clear text of the Refugee Act, IIRIRA's language is even more compelling evidence of Congress's commitment to threshold

eligibility of asylum seekers arriving at any border location. The 1996 provision provided a meticulous catalog of arriving asylum seekers. That careful catalog demonstrates Congress's express commitment to the principle of threshold eligibility for asylum seekers "who 'one way or another, arrive on our shores . . .'" seeking refuge from persecution. *See The Refugee Act of 1979: Hearing on H.R. 2816 Before the H. Subcomm. on Int'l Operations, Comm. on Foreign Affairs*, 96th Cong. 72 (1979) (statement of David A. Martin).

B. Congress's Intentional Distinction Between Asylum and Withholding

As the Court explained in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), Congress carefully distinguished in the text of the INA between asylum and the more demanding and contingent remedy of withholding of removal. *Id*. at 436-43. Compared with asylum, withholding of removal and CAT protection—the other remedy under the Biden rule available to asylum seekers arriving at an undesignated border point subject to presumptive ineligibility—are both harder to get and easier to lose. *See id.* at 440-41. In addition, only asylum provides a successful applicant with a chance for family reunification. 8 U.S.C. §§ 1158(b)(3)(A), 1157(c)(2)(A). The functional differences between asylum on the one hand, and withholding and CAT protection on the other, demonstrate that Congress's provision for asylum eligibility in § 1158(a)(1) was entirely intentional.

By relegating certain asylum seekers to these lesser remedies, the Biden DHS rule undermines that legislative choice.

The standard of proof for withholding and CAT is far higher than the standard for asylum. Both withholding and CAT protection require an applicant to show by a preponderance of the evidence that she would be subject to persecution (or torture in the case of the CAT) upon return to her country of origin. *See Cardoza-Fonseca*, 480 U.S. at 430 (noting that applicant for withholding must "demonstrate a 'clear probability of persecution'"). In contrast, the Supreme Court has held that an applicant can more readily satisfy asylum's "well-founded fear" standard. *Id.* at 431.

Explaining its conclusion that asylum requires a lower standard of proof, the *Cardoza-Fonseca* Court cited a vivid example from the work of a leading scholar of refugee law, who had written that "well-founded fear" would logically follow if "it is known that in the applicant's country of origin *every tenth adult male* person is either put to death or sent to some remote labor camp." 480 U.S. at 431 (emphasis added). Parsing the international law standard on which Congress had relied in the 1980 Act, the Court found that "[t]here is simply no room in the United Nations' definition [of asylum] for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted … he or she has no 'well-founded fear' of the event happening." *Id.* at 440 (citation omitted).

According to the Court, Congress clearly believed that a standard higher than 10% was unduly onerous. Particularly since a refugee must often leave a place of danger hurriedly and must then reconstruct past events thousands of miles away to gain asylum, insistence on a preponderance standard would provide inadequate protection.

Withholding and CAT protection are inherently more contingent and fragile. Neither withholding nor CAT vitiate an already-entered removal order, *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2288 (2021); *Nasrallah v. Barr*, 140 S. Ct. 1683, 1691 (2020), nor do they lead to lawful permanent resident status. In contrast, an asylee may after one year adjust to LPR status. 8 U.S.C. § 1159(b)(1)-(2).

In addition, Congress provided that the spouse and children of an asylee may be granted the very same lawful status when "accompanying, or following to join" a recipient of asylum. 8 U.S.C. §§ 1158(b)(3)(A). Recipients of withholding and CAT protection lack this statutory opportunity.

Withholding and CAT are thus inadequate substitutes for asylum. Congress was surely aware of this stark difference when it authorized broad threshold eligibility for asylum seekers arriving at any point along the border. In confining asylum seekers arriving at an undesignated border point or at a port of entry without a CBP One appointment to more contingent and demanding remedies such as withholding and CAT, the Biden rule clashes with the INA's overall scheme.

III. THE RULE'S THIRD COUNTRY PROVISION IS INCONSISTENT WITH THE STATUTORY SCHEME OF THE INA

The latest version of the asylum ban clashes with the canon that specific provisions of a statute generally prevail over more open-ended provisions. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (Scalia, J.) (acknowledging the "commonplace of statutory construction that the specific governs the general"); Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012) (stating that "the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence").

The specificity canon is particularly compelling for statutes in specialized areas of law, such as immigration or bankruptcy, where Congress "has enacted a comprehensive scheme and deliberately targeted specific problems with specific solutions." *RadLAX*, 566 U.S. at 645 (citation omitted). In a statute's specific provisions, Congress has balanced the interests of myriad stakeholders. *Id*. If Congress intended a "major departure" from the statutory scheme, one would expect to see "some affirmative indication of [Congress's] intent," not the amorphous contours of a general grant of authority. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 978, 984 (2017) (explaining that Congress does not "hide elephants in mouseholes") (quoting *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001))). A judicial outcome or agency rule that construes a

general term as prevailing over a more specific statutory provision risks upsetting that balance and injecting uncertainty into the legislative drafting process.

The same deference to specific language should govern interpretation of the INA's asylum provision, including the scope of the government's power to promulgate rules "consistent with this section." 8 U.S.C. § 1158(b)(2)(C). Demonstrating the role of the asylum provision's specific terms requires a closer look at Congress's express categorical bars addressing asylum seekers' passage through third countries: The safe third country agreement and firm resettlement provisions.

A. The Asylum Rule's Third Country Provision Fails To Meet the Rigorous Criteria Required For Safe Third Country Agreements

Just as the prior third country rule sidestepped the safe third country agreements authorized by Congress in 8 U.S.C. § 1158(a)(2)(A), the Biden rule's equivalent provision also contravenes Congress's standards for these agreements. *East Bay II*, 994 F.3d at 977-78; 8 U.S.C. § 1158(a)(2)(A). The United States has an agreement with only one country: Canada. *See* Agreement on Safe Third Country, Can.-U.S., Dec. 5, 2002 ("Canada Third Country Agreement"). [3] That

[3] The Biden Administration ended the agreements the Trump Administration had entered with Guatemala, Honduras, and El Salvador. Anthony Blinken, Sec'y of State, "Suspending and Terminating the Asylum Cooperative Agreements with the Governments of El Salvador, Guatemala, and Honduras," (Feb. 6, 2021) *available at* https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras. *See also*

agreement features exhaustive safeguards for asylum seekers and methodical monitoring from both parties to ensure that removal of foreign nationals under the agreement will comply with Congress's goal of protection from persecution and "access to a full and fair procedure for determining a claim to asylum." 8 U.S.C. § 1158(a)(2)(A). The Biden rule circumvents all of these protections.

The Canada Third Country Agreement is a lengthy, detailed memorandum of understanding that expressly refers to the respective countries' "generous systems of refugee protection … [and] traditions of assistance to refugees and displaced persons abroad, consistent with the principles of international solidarity that underpin the international refugee protection system." Canada Third Country Agreement (Preamble). Each party asserted that it was "determined to safeguard … access to a full and fair refugee status determination procedure." *Id.* For example, the agreement requires each party to afford an opportunity to each claimant to have an agent of her choice present at appropriate phases of proceedings. *See id.* (Statement of Principles No. 1).

In addition, each party will provide: (1) "an opportunity for the applicant to understand the basis for the proposed determination"; (2) a chance to correct the record and offer further information; and (3) review by an independent decision-

---

East Bay, 2023 WL 4729278, at *14 (stating that the record evidence shows that transit countries remain unsafe).

maker. Canada Third Country Agreement (Statement of Principles No. 4). Both Canada and the United States have also committed to a latticework of oversight mechanisms. In Canada's case, these mechanisms include access to Canada's Federal Court, a formal dispute resolution mechanism for the two countries, and "partnership" with the UNHCR. *See* U.S. Citizenship & Immigration Services, *U.S.-Canada Safe Third Country Agreement*, Ch. 4(A)(3) (Nov. 16, 2006) ("U.S.-Canada Agreement Review").

The UNHCR plays an integral role in ensuring that each party will observe the fundamental tenets of refugee protection. In the first year of the agreement, the UNHCR monitored implementation. *U.S.-Canada Agreement Review*, Ch. 4(A)(3). As might be expected, the UNHCR was hardly a rubber stamp. Indeed, when Canada implemented measures that included summary transfer back to the United States during "surges" in the volume of refugee claims, the UNHCR pushed back, cautioning that such transfers could result in the return of bona fide refugees to home countries where they faced persecution. *Id*. at Ch. 4(B)(1)(v). Acknowledging the UNHCR's concern, Canada agreed to abandon the summary process in all but "extraordinary situations," where consultation with senior officials was required.

In sum, the Canada Third Country Agreement pooled the efforts of two states with longtime commitments to the rule of law. It relied on close

collaboration with UNHCR, the world's leader on refugee protections. Moreover, it provided a systematic process for adjudication of exceptions to the agreement, backed up by strong procedural protections and consultation with established outside actors.[4]

Unlike the safe third country agreements authorized under § 1158, the Biden rule's third country provision does not entail an agreement between states or U.S. findings that a third country will be safe for refugees and will employ "full and fair" procedures in adjudicating asylum or other protection. Instead, the rule bars asylum for those who have not filed for protection in a third country, without any bilateral agreement or findings about whether that country can protect asylum seekers from persecution or establish a full and fair system for adjudicating asylum claims.

The current rule's departure from previous practice surrounding the United States' safe third country agreement with Canada is even more pronounced. The rule contains none of the safeguards of that robust agreement. For example, the rule does not mandate consultation with rigorous interlocutors such as the UNHCR, who have decades of experience in assessing refugees' claims dating

[4] While the U.S.-Canada Safe Third Country Agreement was expanded on March 24, 2023, the safeguards discussed above remain intact. *See* Additional Protocol to the Safe Third Country Agreement.

back to the aftermath of World War II. Indeed, as the district court observed, the rule "imposes a presumption of ineligibility on asylum seekers who did not apply for or [did not receive a final denial of protection] in a transit country regardless of whether that country is a safe option." *East Bay Sanctuary Covenant v. Biden*, 2023 WL 4729278, at *10 (N.D. Cal. July 25, 2023).

In Mexico and elsewhere, the resurrected rule would consign asylum seekers seeking refuge in the United States to physical danger and unreliable legal procedures. Far from being "consistent" with the INA's asylum provision, this dire result would vitiate the comprehensive scheme of refugee protection crafted by Congress.

B. The Rule Disregards the Firm Resettlement Doctrine's 70-Year History

The concept of firm resettlement was a fixture in both international and U.S. refugee law long before the Refugee Act of 1980 or the concept's current home in the asylum provisions of the INA. 8 U.S.C. § 1158(b)(2)(A)(vi). The development of firm resettlement in the crucible of the post–World War II refugee crisis sheds particular light on the third country rule's marked departure from that doctrine. Both Congress and U.S. courts in that post-war era would have viewed the current version of the rule as a manifest distortion of the firm resettlement doctrine's nature, purposes, and application. *See Rosenberg v. Yee Chien Woo*,

402 U.S. 49, 57 n.6 (1971) (noting that mere "stops along the way" in a refugee's journey to a final destination did not vitiate her claim for asylum).

1. The Origins Of Firm Resettlement

Firm resettlement had its origins in the aftermath of World War II, in which decimated Central European capitals such as Vienna and Berlin teemed with hundreds of thousands of refugees and displaced persons. The victorious allies, including the United States, faced the problem of finding permanent homes for these survivors of the global conflict's carnage and the relentless persecution engineered by Nazi Germany and its collaborators. Acting through the new United Nations General Assembly, the United States and its allies, along with many other states, pooled their efforts in a multi-national entity called the International Refugee Organization (IRO). *See Displaced Persons in Europe*, S. Rep. No. 950, at 2 (as reported by S. Comm. on the Judiciary, Mar. 2, 1948).

Acting under this U.N. mandate, the IRO assumed responsibility for assisting refugees in finding new homes. To aid in resource allocation, the IRO fashioned the concept of firm resettlement, which allied powers such as the United States soon adopted in the enactment of domestic legislation for refugee aid. S. Rep. No. 950, at 9. The adjective "firm" is telling, since it connoted durable rights, possessions, and ties that were utterly foreign to refugees' tenuous existence. The

term "resettled" also connoted a permanence of status and protection that would require concerted and diligent efforts by the IRO and its member states.

Congress used the term "firmly resettled" in the Displaced Persons Act of 1948, S. Rep. No. 950, at 50, and continued to use that term in further legislation that addressed persistent refugee needs in the post-war era. For example, Congress again expressly included language covering those "not … firmly resettled" in its 1950 Act to Amend the Displaced Persons Act of 1948. Pub. L. No. 81-555, § 1, 64 Stat. 219 (1950) (amending § 2(c) of the Displaced Persons Act of 1948). Congress also expressly referred to the term in the Refugee Relief Act of 1953. Pub. L. No. 83-203, § 2(a), 67 Stat. 400.

Indeed, by the early 1950s, the contours of firm resettlement had crystallized in international law. The 1951 Convention Relating to the Status of Refugees ("1951 Refugee Convention"), which the United States adopted when it ratified the 1967 Refugee Protocol, included the same focus on resource allocation that had driven the efforts of the IRO and informed Congress's efforts to aid displaced persons.[5] The 1951 Refugee Convention paired a functional and a formal approach to defining firm resettlement. Setting out a functional approach, the

[5] Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; *see also* Sloane, *An Offer of Firm Resettlement*, 36 Geo. Wash. Int'l L. Rev. 47, 49-50 (2004) (discussing history).

Convention excluded from coverage any "person who is recognized by the competent authorities of the country in which he has taken residence as having the *rights and obligations* which are attached to the possession of the nationality of that country." Refugee Convention, art. 1(E) (emphasis added). In case this formulation was too vague, the Convention also presented a more formal alternative specifically tied to the acquisition of citizenship, which excluded any person who "has acquired a new nationality, and enjoys the protection of the country of his new nationality." *Id*., art. I(C). Under international law, firm resettlement's functional "rights and obligations" prong contemplated permanence and stability.

Refugee protections in the 1950s and 1960s underscored the permanence and stability at the heart of the firm resettlement criterion; Congress *never* wavered. Indeed, the only dispute that arose in interpretation of statutory protections was whether Congress had, starting in 1957, turned to a *formal* definition of firm resettlement hinging on citizenship that would have *narrowed* the concept's application and thus provided even more expansive refugee protections. The Supreme Court read the statute as retaining a functional focus. *See Rosenberg*, 402 U.S. at 55-56, n.5 (citing the functional "rights and obligations" language found in the 1951 Refugee Convention language and several other U.N. documents).

To stress the narrow scope of the firm resettlement bar, the Court observed, firm resettlement "does not exclude from refugee status those who have fled from persecution and who make their flight in successive stages. … Certainly many refugees make their escape to freedom from persecution in successive stages and come to this country only after stops along the way. Such stops do not necessarily mean that the refugee's aim to reach these shores has in any sense been abandoned." *Rosenberg*, 402 U.S. at 57 n.6.

2. Case Law and Current Statute and Regulations

For many years following *Rosenberg*, firm resettlement was guided by case law and regulations promulgated by the INS. Adjudicators at that time could consider firm resettlement as a factor when deciding if they should grant asylum in the exercise of discretion. In other words, firm resettlement was not a categorical bar. In *Matter of Salim*, 18 I & N Dec. 311 (BIA 1982), the Board of Immigration Appeals referred to regulations used by District Directors in making discretionary determinations: "[The] District Director shall consider all relevant factors such as whether an outstanding offer of resettlement is available to the applicant in a third country and the public interest involved in the specific case." *Id.* at 315.

Five years later, in *Matter of Pula*, 19 I & N Dec. 467 (BIA 1987),[6] during a time when "firm resettlement" or passage into a third country were still discretionary factors, the Board set an important standard:

> Instead of focusing only on the circumvention of orderly refugee procedures, the totality of the circumstances and actions of an alien in his flight from the country where he fears persecution should be examined in determining whether a favorable exercise of discretion is warranted. … [T]he length of time the alien remained in a third country, and his living conditions, safety, and potential for long-term residency there are also relevant. … [T]he danger of persecution should generally outweigh all but the most egregious of adverse factors.

Id. at 473-74.

It was not until 1996 that Congress created a statutory provision governing firm resettlement, which reinforced the doctrine's longtime values of permanence and safety. The current language of the INA reads: An applicant is ineligible for asylum if the applicant "was firmly resettled in another country prior to arriving in the United States." 8 U.S.C. § 1158(b)(2)(A)(vi). And in 2000, INS published the following regulations defining "firm resettlement": "An alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement."

---

[6] *Matter of Pula* was superseded in part by statute on other grounds as recognized in *Andriasian v. I.N.S.*, 180 F.3d 1033, 1043-1044 & n.17 (9th Cir. 1999).

8 C.F.R. § 208.15. In order for the firm resettlement doctrine to be triggered, the government must at a minimum prove that an asylum applicant has an offer of permanent residency from a third country. *See Matter of A-G-G-*, 25 I & N Dec. 486, 494 (BIA 2011).

The regulations also include two exceptions to the offer test: "(a) That his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country; or (b) That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled." 8 C.F.R. § 208.15. Even in situations where the noncitizen has received an offer of permanent residence, then, the first exception underscores an intent to protect those who passed through a third country during the course of their flight and entry into the United States. In the case of asylum seekers affected by the new asylum rule, the vast majority are passing through Mexico as a "necessary consequence" of their flight from persecution and have remained only as long as necessary.

By reviving the third country restriction, the government has again decimated these finely crafted exceptions, as well as the firm resettlement doctrine's focus on safety and permanence. Indeed, the Biden rule devastates the

overall system of asylum adjudication established by Congress, precluding asylum for thousands of people who have entered or sought to enter the country at the southern border. It strains credulity to believe that Congress would have regarded such a sea change in asylum adjudication as "consistent with this section." 8 U.S.C. § 1158(b)(2)(C).

* * *

The rule's continued restriction on third country transit far beyond the INA's limitations on safe third country agreements and firm resettlement disrupts Congress's comprehensive framework for asylum protection. Just like DHS's prior attempt to impose additional restrictions on third country transit, this rule likewise exceeds the government's authority under 8 U.S.C. § 1158(b)(2)(C) to promulgate rules that are "consistent with" the INA's asylum provision.

IV. THE BIDEN RULE VIOLATES IIRIRA'S BALANCE BETWEEN DETAILED PROCEDURAL LIMITS ON ASYLUM AND THRESHOLD ELIGIBILITY FOR ARRIVING ASYLUM SEEKERS

IIRIRA was a fraught and hard-fought compromise between the threshold eligibility for asylum affirmed in § 1158(a)(1) and rigorous procedural limits on asylum secured by legislators who contended that the border was in "crisis." *See* Smith Stmt. 2. The legislative deal emerged from multiple congressional hearings featuring representatives from a myriad of stakeholders, followed by intensive negotiations and consultation with the White House. *See* Schmitt, *Bill to Limit*

Immigration Faces a Setback in Senate, N.Y. Times, Mar. 14, 1996 (discussing complex legislative maneuvering prior to IIRIRA's passage), https://www.nytimes.com/1996/03/14/us/bill-to-limit-immigration-faces-a-setback-in-senate.html. The Biden asylum rule disrupts that exacting legislative agreement.

In 1996, Congress—even as it enacted the clear language on threshold eligibility for asylum—enacted significant procedural curbs. Most importantly, Congress authorized expedited removal for foreign nationals arrested at or near a U.S. border or port of entry, 8 U.S.C. § 1225(b)(1)(A)(i), (ii), required detention of foreign nationals arrested at or near the border, *id.* § 1225(b)(1)(B)(ii), limited the time in which to file asylum applications, *id*. § 1158(a)(2)(B), and authorized the U.S. government to enter into agreements with foreign countries to safely house asylum applicants pending a "full and fair" adjudication in those countries of the individual's claim for asylum or related protection, *id.* § 1158(a)(2)(A).

Many legislators accepted these restrictions with great reluctance.[7] Each of the restrictions has elicited ongoing policy debate, and some continue to face legal

[7] *See* 142 Cong. Rec. 26,703 (Sept. 30, 1996) (remarks of Sen. Leahy) (arguing that World War II refugees could have been "summarily excluded" from United States under expedited removal provisions).

challenges.[8] Additional categorical restrictions not contemplated by Congress would distort the difficult compromise that Congress reached in 1996.

A. Expedited Removal

The most prominent procedural restriction on asylum in IIRIRA is its provisions for "expedited removal" of certain foreign nationals. Expedited removal directly addresses the border pressures that concerned Congress. Under these provisions, immigration officers who apprehend a foreign national arriving in the United States without a visa may summarily order the removal of that person "*without further hearing or review*." 8 U.S.C. § 1225(b)(1)(A)(i) (emphasis added).

Removal power is subject to only one caveat, which is relevant to the legality of the Biden asylum rule. The expedited removal provisions require additional procedures for an arriving foreign national who "indicates either an intention to apply for asylum under section 1158 … or a fear of persecution." 8 U.S.C. § 1225(b)(1)(A)(ii). Importantly, this statutory exception expressly tracks the INA's language on threshold eligibility for asylum. First, the caveat on expedited removal provides a cross-reference to § 1158 (the asylum procedure provision), which includes express mention of threshold eligibility. Second, and

[8] *See*, *e.g.*, *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018) (remanding case on mandatory detention to Ninth Circuit for consideration of constitutional claims).

even more clearly, Congress in the *very first subsection* of the expedited removal provisions inserted language that is virtually identical to the language it used in § 1158, making the provision applicable to an alien who is "present in the United States" or who "arrives in the United States (*whether or not at a designated port of arrival* …)." *Id.* § 1225(a)(1) (emphasis added).

Under expedited removal, persons asserting a claim for asylum "whether or not at a designated port of arrival" get only an interview with an asylum officer, who determines whether the applicant has a "credible fear" of persecution. 8 U.S.C. § 1225(b)(1)(B)(ii). If the asylum officer decides that the applicant lacks a credible fear, the asylum officer shall order the removal of the applicant "without further hearing or review." *Id.* § 1225(b)(1)(B)(iii)(I).

The main procedural safeguard provided in this situation is a hearing before an immigration judge—held very quickly and often with no counsel present for the applicant—after the determination of no credible fear, consistent with the statutory requirement to conduct the review "as expeditiously as possible." 8 U.S.C. § 1225(b)(1)(B)(iii)(III). An applicant only receives a full hearing before an immigration judge if the asylum officer first determines that the applicant *has* a "credible fear" of persecution. *Id.* § 1225(b)(1)(B)(ii). The rigorous procedural gauntlet established by Congress's detailed expedited removal process indicates

that Congress was fully mindful of the issue of border inflow that the Biden rule purports to address.

B. The 1-Year Rule for Asylum Applications

As part of its extensive web of detailed procedural restrictions on asylum, IIRIRA also imposed a significant temporal limit on filing of asylum applications. Absent "changed … or extraordinary circumstances," an applicant has to file for asylum "within 1 year" of the applicant's arrival in the United States. *See* 8 U.S.C. § 1158(a)(2)(B), (D). The one-year rule already narrows the relief available to persons who enter the United States at or between a designated point of entry or who transit through third countries. *See* Schrag et al., *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum*, 52 Wm. & Mary L. Rev. 651, 666 (2010).

Congress was well aware that EWIs filed asylum claims after their entry. *See Proposals to Reduce Illegal Immigration and Control Costs to Taxpayers: Hearing on S. 269 Before the S. Comm. on the Judiciary,* 104th Cong. 23 (1995) (statement of Sen. Alan K. Simpson). Congress's imposition of the time limit shows that Congress chose to preserve threshold eligibility but subject it to restraints. Again, the Biden rule undermines Congress's carefully calibrated compromise.

C. Provisions for Safe Third Country Agreements

IIRIRA's provision for establishment of "[s]afe third country" agreements is also part of the procedural limitations on asylum eligibility Congress created as part of its balancing act. 8 U.S.C. § 1158(a)(2)(A). As described above, the United States can remove an asylum applicant to another country, if the United States and that country had entered into a bilateral or a multilateral agreement to that effect. The rigorous standards that apply to safe third country agreements highlight Congress's focus on threshold asylum eligibility. This Court should not permit those provisions to be overridden by the Biden asylum rule.

The limited exceptions in the Biden asylum rule only underscore its conflict with the INA's asylum provisions. Consider the rule's "compelling circumstances" exception, which purports to provide relief to an asylum seeker who can show an "imminent and extreme" threat to life or safety "*at the time of entry*." To grasp the inadequacy of this exception, suppose an applicant waiting for a CBP One appointment faced an imminent threat at the border that was only moderate, not extreme. That moderate threat might concern assault, robbery, or extortion instead of extreme harm such as "rape, kidnapping, torture, or murder." A rational asylum applicant would attempt to enter the United States at an undesignated border crossing point, rather than risk this imminent but moderate harm. However, that rational noncitizen's decision would not comport with the

rule's exception, which only covers harm that is imminent *and* extreme. Therefore, the noncitizen in our hypothetical would be ineligible for asylum, even where they possess a well-founded fear of severe and highly probable harm *in their country of nationality*. That result is inconsistent with the INA's asylum protections. *Cardoza-Fonseca*, 480 U.S. at 440.

* * *

In sum, given the level of detail in Congress's restrictions, the additional sweeping limits on threshold eligibility in the Biden asylum rule are simply not "consistent" with the INA's asylum provisions, as the statute requires. *See* 8 U.S.C. § 1158(b)(2)(C).

CONCLUSION

For the aforementioned reasons, this Court should uphold the vacatur order issued by the district court.

Respectfully submitted,

/s/ Katherine L. Evans

KATHERINE L. EVANS
CHARLES SHANE ELLISON
DUKE UNIVERSITY SCHOOL OF LAW
210 Science Drive, Box 90360
Durham, NC 27708
Telephone: (919) 613-7036

October 5, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 23-16032

I am the attorney or self-represented party.

This brief contains 6,904 **words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ◉ is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - ☐ it is a joint brief submitted by separately represented parties.
  - ☐ a party or parties are filing a single brief in response to multiple briefs.
  - ☐ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated ____.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/Katherine L. Evans **Date** 10/05/2023
*(use "*s/[typed name]*" to sign electronically-filed documents)*

APPENDIX

INDEX OF AMICI[1]

Evangeline G. Abriel, Santa Clara University School of Law

Roni Amit, UMass Law School

Nermeen Arastu, CUNY School of Law

Sabrineh Ardalan, Harvard Law School

Lauren R. Aronson, University of Illinois College of Law

David Baluarte, Washington and Lee University School of Law

Angela M. Banks, Sandra Day O'Connor College of Law, Arizona State University

Jon Bauer, University of Connecticut School of Law

Lenni B. Benson, New York Law School

Kaci Bishop, University of North Carolina School of Law

Stacy L. Brustin, The Catholic University of America

J. Anna Cabot, University of Houston Law Center

Gabriel J. Chin, University of California, Davis, School of Law

Sara P. Cressey, University of Maine School of Law

Ingrid Eagly, UCLA School of Law

Charles Shane Ellison, Duke University School of Law

Kate Evans, Duke University School of Law

Jill Family, Widener Law Commonwealth

César Cuauhtémoc García Hernández, Ohio State University College of Law

Denise Gilman, University of Texas School of Law

Lindsay M. Harris, University of San Francisco School of Law

Laila L. Hlass, Tulane Law School

Margaret Hu, William & Mary Law School

---

[1] University affiliations are listed solely for informational purposes

Alan Hyde, Rutgers University Law School

Kit Johnson, The University of Oklahoma College of Law

Elizabeth Jordan, University of Denver Sturm College of Law

Hiroko Kusuda, Loyola University New Orleans College of Law

Matthew Lindsay, University of Baltimore School of Law

Lynn Marcus, University of Arizona James E. Rogers College of Law

Fatma Marouf, Texas A&M School of Law

Tom McDonnell, Elisabeth Haub School of Law at Pace University

Estelle McKee, Cornell Law School

M Isabel Medina, Loyola University New Orleans College of Law

Katie H. Meyer, Washington University in St. Louis School of Law

Mauricio Noroña, Touro Law Center Immigrant Rights Advocacy

Clinic Gabriela Quercia Kahrl, Chacón Center for Immigrant Justice at University of Maryland Francis King Carey School of Law Carrie Rosenbaum, Chapman Fowler School of Law

Emily Ryo, Duke University School of Law

Erica Schommer, St. Mary's University School of Law

Sarah Sherman-Stokes, Boston University School of Law

Doug Smith, Brandeis University

Maureen A. Sweeney, Chacón Center for Immigrant Justice at University of Maryland Francis King Carey School of Law Julia Vázquez, Southwestern Law School

Jonathan Weinberg, Wayne State University

Anna Welch, University of Maine School of Law

Michael Wishnie, Yale Law School

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 2023, I electronically filed the foregoing 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.

Dated: October 5, 2023

/s/ Katherine L. Evans

KATHERINE L. EVANS
DUKE UNIVERSITY SCHOOL OF LAW
210 Science Drive, Box 90360
Durham, NC 27708
Telephone: (919) 613-7036