No. 23-16032

IN THE 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
Case No. 4:18-cv-06810-JST

BRIEF FOR *AMICI CURIAE* FORMER IMMIGRATION JUDGES & FORMER MEMBERS OF THE BOARD OF IMMIGRATION APPEALS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules and Regulations

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Amici curiae are former immigration judges and former members of the Board of Immigration Appeals, listed in Appendix A, with substantial, combined years of service in and intimate knowledge of the U.S. immigration system. *Amici* seek to illuminate for this Court the important protections the Immigration and Nationality Act, 8 U.S.C. § 1158 (the "INA") provides for refugees at the border, and how the Circumvention of Lawful Pathways Rule, 88 Fed. Reg. 31,314 (May 11, 2023) will severely compromise these protections for many *bona fide* asylees.

Amici filed comments to the Notice of Proposed Rulemaking prior to publication of the Rule. *Amici* are invested in the issues presented by Plaintiffs-Appellees because they have dedicated their careers to improving the fairness and efficiency of the U.S. immigration system, even after departing from the bench. Given *amici*'s familiarity with the procedures and realities of the immigration adjudication system, *amici* respectfully submit that this Court should find the Rule is unlawful.

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[1] Pursuant to Fed. R. App. P. 29(a)(2), counsel for *amici curiae* certifies that all parties have consented to the timely filing of this brief. Pursuant to Rule 29(a)(4), counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

As former immigration judges and former members of the Board of Immigration Appeals, *amici* have centuries of collective experience impartially administering justice in removal hearings. Drawing on our expertise and experience, *amici* understand the impact of the regulations in question on due process and on access to humanitarian protections obligated under international law.

We thus submit this *amicus* brief to ask the Court to affirm the district court's grant of summary judgment and vacatur of the Circumvention of Lawful Pathways Rule, 88 Fed. Reg. 31,314 (May 11, 2023) (hereinafter, the "Rule"). The Rule, which came into effect in the immediate aftermath of Title 42's sunset and which applies to non-Mexican asylum seekers at the U.S.-Mexico border, automatically forecloses a migrant's asylum claim unless the person (i) arrives at an official port of entry having secured an immigration appointment through a complex mobile phone application, (ii) receives advance permission to travel to the U.S., or (iii) comes to the U.S. after having applied for and been denied asylum in a transit country. Absent proof of one of these narrow exceptions or a medical or other emergency, non-Mexican asylum seekers will be unable to seek asylum regardless of whether they have compelling claims to relief.

The Rule violates the important protections for migrants seeking asylum set forth in the INA by creating clear bars to asylum for most non-Mexican migrants,

disingenuously labeled as "rebuttable presumptions," that directly conflict with the statutory requirements and this Court's precedent. Moreover, the government's lofty claim that the Rule will "help[] to ensure that the processing of migrants seeking protection in the United States is done in an effective, humane, and efficient manner[,]" 88 Fed. Reg. at 31,314, ignores the reality that the Rule will necessarily prolong and complicate asylum cases and will result in the denial of asylum for many migrants who, absent the Rule's improper bars, would be entitled to protection under the INA.

ARGUMENT

A. The Rule Creates A Near-Complete Bar To Asylum For Most Non-Mexican Asylum Seekers.

With only narrow exceptions, the Rule bars asylum to migrants who cross the border between ports of entry, notwithstanding its framing it as a "rebuttable presumption." 88 Fed. Reg. at 31,318. Labeling the bar to asylum as a "presumption" is disingenuous, as the Rule's bars are in fact insurmountable obstacles for nearly all asylum seekers who cross between ports of entry.

It is important to distinguish a "rebuttable presumption" from a "bar," which are terms different in definition, but both commonly and distinctly used in asylum law and procedure. A rebuttable presumption is a legal assumption that parties can dispute through the introduction of evidence. *See Rebuttable Presumption*, Black's Law Dictionary (Online Edition), https://thelawdictionary.org/rebuttable-

presumption/ ("In the law of evidence. A presumption which may be rebutted by evidence. Otherwise called a 'disputable' presumption. A species of legal presumption which holds good until disproved."). A presumption is "an attitude or belief dictated by probability . . .[;] a legal inference as to the existence or truth of a fact…drawn from the known or proved existence of some other fact." *Presumption*, Merriam-Webster Dictionary (Online Edition), https://www.merriam-webster.com/dictionary/presumption. For the Rule to stand as a rebuttable presumption, it must flow from established facts. Indeed, U.S. asylum law contains several presumptions in the context of common factual scenarios. For instance, an asylum applicant who has suffered persecution in the past is entitled to a presumption that she will face persecution in the future. 8 C.F.R. §1208.13(b)(1). That presumption can be rebutted by evidence that the applicant can now live safely in her home country because, for example, the government that persecuted her is no longer in power.[2] Similarly, a refugee who fears persecution by his government is entitled to a presumption that relocation within his country of origin would not be safe. 8 C.F.R. § 1208.13(b)(3)(ii). The government may rebut this presumption by

[2] To satisfy this threshold, the government must prove by a preponderance of the evidence that the changed conditions they proffer to rebut the presumption of persecution "obviate the risk to life or freedom related to the original claim[.]" *Kone v. Holder*, 596 F.3d 141, 149 (2d Cir. 2010) (internal quotation marks omitted).

offering evidence that parts of the country are safe for relocation—for instance, that an opposition force securely controls that part of the country. These presumptions logically follow from the facts underlying them. For example, the fact of actual past persecution can lay a foundation for fear of future persecution. Similarly, when an applicant fears persecution from her government, she is likely to face persecution anywhere in that country's territory.

What the Rule calls a presumption is, in fact, a bar to asylum. A bar is "that which defeats, annuls, cuts off, or puts an end to." *Bar*, Black's Law Dictionary (Online Edition), https://thelawdictionary.org/bar/. Asylum law contains many bars duly enacted through the INA. For example, INA Section 208(a)(2)(B) states that a migrant cannot apply for asylum more than one year after arrival in the United States. 8 U.S.C. § 1158(a)(2)(B). This one-year filing bar contains *exceptions* for changed or extraordinary circumstances, but the exceptions do not turn the bar into a presumption. 8 U.S.C. § 1158(a)(2)(D); *see Alquijay v. Garland*, 40 F.4th 1099, 1102 (9th Cir. 2022) (describing the one-year filing deadline as a "bar" to which "exceptions" may apply). On the other hand, the INA establishes presumptions that can be rebutted by presenting *facts* to the contrary, such as showing a consular officer that an applicant intends to return home to rebut the presumption of immigrant intent. *See* 8 U.S.C. § 1184(b) (presumption of immigrant intent can be rebutted by showing

"to the satisfaction of the consular officer, at the time of application for a visa … that he is entitled to a nonimmigrant status").

There is no presumption to rebut in the Rule. It is a bar with very limited exceptions. Unlike the existing presumptions based on past persecution and government action mentioned above, there is no intrinsic connection between the Rule's failure to book an immigration appointment through a complex digital application or the lack of advance "permission" to travel to the U.S. to seek asylum, on the one hand, and the lack of a cognizable claim under U.S. asylum law, on the other. Rather, the Rule's design resembles the one-year application bar codified in Section 208(a)(2)(B), which bars from asylum individuals who have not applied within a year of entry, subject to limited exceptions, such as maintaining lawful immigration status in the United States. As demonstrated in the context of the Section 208(a)(2)(B) carve-out, the existence of exceptions to a bar does not defeat the fundamental nature of the regulation as a bar.

The distinction between a rebuttable presumption and a bar matters. To characterize the Rule's central element as a rebuttable presumption obscures its insidious power to deny relief to asylum seekers with valid, compelling claims. As the district court correctly recognized, the Rule's "exceptions will not be meaningfully available to many noncitizens subject to the Rule." ER-33. The government cannot and does not even attempt to dispute the court's finding that "the

presumption's exception for parole-related travel authorization will necessarily be unavailable to many asylum seekers[.]" ER-28; *see also, generally*, Gov't Brief. The district court also correctly found that "[s]eeking protection in a transit country is [] infeasible for many asylum seekers subject to the Rule." ER-28-31. And the district court, likewise, correctly found that the exception for migrants who secure appointments using the mobile application (or those who meet the narrow exceptions to this exception) is not a viable option for many migrants, due to the technological glitches with the mobile application and safety issues in Mexico for those waiting to secure appointments. ER-31-32. The record reflects the reality—without viable exceptions, the Rule's presumption of ineligibility for asylum simply bars most migrants at the U.S.-Mexico border from seeking asylum in the United States.

B. The Rule Violates The INA.

The district court correctly held that the Rule cannot stand because the conditions imposed by the Rule are inconsistent with, and therefore violate, Section 1158. Section 1158(b)(2)(C) authorizes the Attorney General to establish, by regulation, "additional limitations and conditions, *consistent with [Section 1158]*, under which an alien shall be ineligible for asylum under paragraph (1) [of subsection (b)]." 8 U.S.C. § 1158(b)(2)(C) (emphasis added). The Rule violates this provision in two ways.

First, the exception to the presumption of ineligibility for asylum for those who "[p]resented at a port of entry, pursuant to a pre-scheduled" appointment booked through the mobile application (or who meet the narrow exceptions to this exception), 88 Fed. Reg. at 31,450 (8 C.F.R. §208.33(a)(2)(ii)(B)); 88 Fed. Reg. at 31,451 (8 C.F.R. §1208.33(a)(2)(ii)(B)), conditions asylum eligibility on presenting at a port of entry. But "Section 1158(a) provides that migrants arriving anywhere along the United States's borders may apply for asylum." *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 669 (9th Cir. 2021) ("*East Bay I*"). By "requir[ing] migrants to enter the United States at ports of entry to preserve their eligibility for asylum[,]" this Rule, like the entry ban at issue in *East Bay I*, conflicts with "a method of entry explicitly authorized by Congress in Section 1158(a)" and thus exceeds the authority granted the Attorney General under Section 1158(b)(2)(C) to establish additional limitations and conditions under which an alien shall be *ineligible* for asylum (not, importantly, under which an alien may *apply* for asylum). *See id*. at 669-70.

The Rule also violates Section 1158(b)(2)(C) because the main other purported exception to the "presumption" of ineligibility—for those who "[s]ought asylum or other protection in a country through which the alien traveled and received a final decision denying that application[,]" 88 Fed. Reg. at 31,450 (8 C.F.R. §208.33(a)(2)(ii)(C)); 88 Fed. Reg. at 31,451 (8 C.F.R. §1208.33(a)(2)(ii)(C))—

conflicts with the safe-third-country and firm-resettlement bars in the INA. As this Court explained in *East Bay Sanctuary Covenant v. Garland*, 994 F.3d 962 (9th Cir. 2020) ("*East Bay II*"), the safe-third-country and firm-resettlement bars "cover[] aliens who do not need the protection of asylum in the United States" because "other safe options are available" to them. *Id*. at 976-77 (citing *Matter of B-R-*, 26 I. & N. Dec. 119, 122 (BIA 2013); *Yang v. INS*, 79 F.3d 932, 939 (9th Cir. 1996)). These statutory bars contain important requirements intended to ensure that the third country to which the migrant will be removed will be safe. "The safe-third-country bar requires that the third country enter into a formal agreement with the United States; that the alien will not be persecuted on account of a protected ground in that country; and that the alien will have access to a 'full and fair' asylum procedure in that country." *East Bay II*, 994 F.3d at 977 (citing 8 U.S.C. § 1158(a)(2)(A)). The firm- resettlement bar, which requires a finding that the applicant has found or been offered permanent residence in a new country before coming to the United States, likewise "ensure[s] that if [the United States] denies a refugee asylum, the refugee will not be forced to return to land where he would once again become a victim of harm or persecution[.]" *East Bay II*, 994 F.3d at 977 (quoting *Andriasian v. INS*, 180 F.3d 1033, 1046-47 (9th Cir. 1999)).

In stark contrast, the Rule at issue here "imposes a presumption of ineligibility on asylum seekers who did not apply for or were granted asylum in a transit country

regardless of whether that country is a safe option." ER-21. For many asylum seekers, the Rule directly conflicts with the statutory bars and is thus "contrary to law[,]" as the district court rightly found, "because it presumes ineligible for asylum noncitizens who fail to apply for protection in a transit country, despite Congress's clear intent that such a factor should only limit access to asylum where the transit country actually presents a safe option." ER-22.

C. The Rule Will Prolong and Complicate Immigration Proceedings.

The Rule is also based on an erroneous assumption that it will "help[] to ensure that the processing of migrants seeking protection in the United States is done in an effective, humane, and efficient manner." 88 Fed. Reg. at 31,314. To the contrary, while the Rule is indeed brutally efficient in sweeping away the ability of *bona fide* refugees to seek asylum at the U.S.-Mexico border, it will not make proceedings more efficient. Instead, the Rule will inevitably prolong and complicate immigration cases.

The Rule, by its terms, imposes new obligations on asylum adjudicators and immigration judges to undertake fact-intensive inquiries entirely unrelated to the merits of migrants' claims for asylum. Before asylum officers and immigration judges may consider the merits of a migrant's claim for asylum (if at all), the Rule demands that they first determine whether the Rule's "presumption" applies, whether any exception to the "presumption" applies, and/or whether the alien has

demonstrated that exceptionally compelling circumstances exist to excuse the "presumption." 88 Fed. Reg. at 31,450-51. The Rule thus introduces new fact issues, which will add to the complication of the already overburdened system, and at least several of which may also require consideration of additional expert analysis. For example, if a migrant contends that she faced an imminent and extreme threat to life and safety at the time of entry and thus is entitled to "rebut" the "presumption" of ineligibility, *id.*, she may need an expert to address the safety issues in Mexico (and perhaps one or more other countries through which she transited), in addition to an expert on the conditions of the country from which she is fleeing.

The Rule will, thus, necessarily complicate and prolong immigration court trials, also known as "merits" or "individual" hearings, particularly given immigration judges' affirmative duty to fully develop the record, especially "in those circumstances where applicants appear without counsel." *Jacinto v. INS*, 208 F.3d 725, 734 (9th Cir. 2000).[3] Under current practice, an asylum seeker presents only the facts relating to her claim for asylum, even if she may qualify for withholding of removal and/or protection under the Convention Against Torture—two other typical

[3] The Rule also leaves several of the relevant inquiries undefined, such as whether, for example, a noncitizen in fact faced an "imminent or extreme threat to life or safety" or was unable to schedule a CBP One appointment due to an "ongoing and serious obstacle." 88 Fed. Reg. at 31,450-51. The lack of clarity in the regulations will most certainly lead to additional appeals as the adjudicators and courts sort through these new issues.

sources of protection for refugees. Accordingly, a merits hearing currently focuses on the applicant's well-founded fear of persecution in his or her country of nationality. The story of her transit to the United States plays little, if any, role in the trial.

Under the new Rule, the threshold question for an asylum seeker will not be the merits of her asylum claim, but rather whether she meets one of the Rule's exceptions (or in the Rule's parlance, can rebut its presumption). The trial will thus start with an examination of her journey to the United States, whether she applied for protection in a transit country and received a final denial, the workings of the CBP One app, and threats to her in Mexico at the time of entry. These complicated sets of facts and circumstances may require not only substantial fact investigation and testimony, but also expert testimony. This is all before the applicant presents her claim for asylum.

Of course, the litigation over whether the Rule applies in a given case will be substantial, since applicants have strong incentives to obtain asylum rather than withholding of removal. An applicant who wins asylum is on her way to permanent residence and, eventually, citizenship. An applicant granted withholding of removal has no path to permanent immigration status in the United States. Even though asylum provides much stronger benefits, a claim for asylum requires only that the applicant show a "reasonable possibility" of persecution (which the Supreme Court

has indicated could be even less than a 10% chance of persecution), while withholding of removal requires proof that persecution is "more likely than not" (*i.e.*, a probability greater than 50%). *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431, 440 (1987).

Accordingly, the Rule turns the trial into a much more complicated affair. Merits hearings in which the respondent is seeking asylum typically take half a day; under the Rule, we believe that these trials will stretch to a full day, if not longer. This is not efficient. It is complicated, chaotic, and unfair.

CONCLUSION

For the reasons stated above and in Appellees' Answering Brief, *amici* respectfully urge the Court to affirm the district court's grant of summary judgment and vacatur of the Circumvention of Lawful Pathways Rule.

Dated: October 5, 2023 Respectfully submitted,

/s/ *Ashley Vinson Crawford*

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by Federal Rule of Appellate Procedure 29(a)(5) and Ninth Circuit Rule 32-1. The brief is 3,026 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f) and Ninth Circuit Rule 32-1(c). The brief's type size and type face comply with Federal Rule of Appellate Procedure 32(a)(5) and (6) and Ninth Circuit Rule 32-1(d).

Dated: October 5, 2023

/s/ *Ashley Vinson Crawford*
Ashley Vinson Crawford

APPENDIX A

Former Immigration Judges and Members of the Board of Immigration Appeals

Hon. Steven Abrams, Immigration Judge, New York, Varick St., and Queens Wackenhut, 1997-2013

Hon. Terry A. Bain, Immigration Judge, New York, 1994-2019

Hon. Sarah M. Burr, Assistant Chief Immigration Judge and Immigration Judge, New York, 1994-2012

Hon. Esmerelda Cabrera, Immigration Judge, New York, Newark and Elizabeth, NJ, 1994-2005

Hon. Jeffrey S. Chase, Immigration Judge, New York, 1995-2007

Hon. Joan V. Churchill, Immigration Judge, Washington, D.C. and Arlington, VA, 1980-2005

Hon. George T. Chew, Immigration Judge, New York, 1995 - 2017

Hon. Matthew D'Angelo, Immigration Judge, Boston, 2003-2018

Hon. Bruce J. Einhorn, Immigration Judge, Los Angeles, 1990-2007

Hon. Cecelia M. Espenoza, Appellate Immigration Judge, Board of Immigration Appeals, 2000-2003

Hon. Noel A. Ferris, Immigration Judge, New York, 1994-2013

Hon. James R. Fujimoto, Immigration Judge, Chicago, 1990-2019

Hon. Gilbert Gembacz, Immigration Judge, Los Angeles, 1996-2008

Hon. Alberto E. Gonzalez, Immigration Judge, San Francisco, 1995 - 2005

Hon. John F. Gossart, Jr., Immigration Judge, Baltimore, 1982-2013

Hon. Paul Grussendorf, Immigration Judge, Philadelphia and San Francisco, 1997-2004

Hon. Miriam Hayward, Immigration Judge, San Francisco, 1997-2018

Hon. Charles M. Honeyman, Immigration Judge, New York and Philadelphia, 1995-2020

Hon. Rebecca Jamil, Immigration Judge, San Francisco, 2016-2018

Hon. William P. Joyce, Immigration Judge, Boston, 1996-2002

Hon. Carol King, Immigration Judge, San Francisco, 1995-2017

Hon. Eliza C. Klein, Immigration Judge, Miami, Boston, Chicago, 1994-2015; Senior Immigration Judge, Chicago, 2019-2023

Hon. Elizabeth A. Lamb, Immigration Judge, New York, 1995 - 2018

Hon. Dana Leigh Marks, Immigration Judge, San Francisco, 1987-2021

Hon. Margaret McManus, Immigration Judge, New York, 1991-2018

Hon. Steven Morley, Immigration Judge, Philadelphia, 2010-2022

Hon. Charles Pazar, Immigration Judge, Memphis, 1998-2017

Hon. Robin Paulino, Immigration Judge, San Francisco, 2016-2020

Hon. Laura L. Ramirez, Immigration Judge, San Francisco, 1997-2018

Hon. John W. Richardson, Immigration Judge, Phoenix, 1990-2018

Hon. Lory D. Rosenberg, Appellate Immigration Judge, Board of Immigration Appeals, 1995-2002

Hon. Susan G. Roy, Immigration Judge, Newark, 2008-2010

Hon. Paul W. Schmidt, Chairperson and Appellate Immigration Judge, Board of Immigration Appeals, 1995-2003; Immigration Judge, Arlington, VA, 2003-2016

Hon. Helen Sichel, Immigration Judge, New York, 1997-2020

Hon. Patricia M. B. Sheppard, Immigration Judge, Boston, 1993-2006

Hon. Ilyce S. Shugall, Immigration Judge, San Francisco, 2017-2019

Hon. Andrea Hawkins Sloan, Immigration Judge, Portland, 2010-2017

Hon. Gabriel C. Videla, Immigration Judge, New York and Miami, 1994-2022

Hon. Robert D. Vinikoor, Immigration Judge, Chicago, 1984-2017

Hon. Polly A. Webber, Immigration Judge, San Francisco, 1995-2016

Hon. Robert D. Weisel, Assistant Chief Immigration Judge, Immigration Judge, New York, 1989-2016

Hon. Mimi Yam, Immigration Judge, San Francisco, Houston, 1995-2016