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. 18-cv-6810-JST

BRIEF OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

Alice Farmer
OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
1800 Massachusetts Avenue NW
Washington, DC 20036
farmera@unhcr.org
(202) 243-7621

Robert Reeves Anderson
ARNOLD & PORTER KAYE SCHOLER LLP
1144 Fifteenth Street, Suite 3100
Denver, CO 80202-2848
reeves.anderson@arnoldporter.com
(303) 863-1000
(303) 863-2301 (fax)

Samuel M. Witten
Kaitlin Konkel
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue NW
Washington, DC 20001
(202) 942-5000

October 5, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Cases (cont.)

Statutes

Other Authorities

Page(s)

Other Authorities (cont.)

Page(s)

Other Authorities (cont.)

INTEREST OF *AMICUS CURIAE* [1]

The Office of the United Nations High Commissioner for Refugees ("UNHCR") is the organization entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees. *See* G.A. Res. 428(V), annex, UNHCR Statute ¶ 1 (Dec. 14, 1950). UNHCR has a direct interest in this matter, which requires the Court to consider the lawfulness of a substantial restriction of asylum access under U.S. law. Consistent with UNHCR's role and interest, both this Court and the U.S. Supreme Court have recognized that UNHCR provides "significant guidance" in interpreting international refugee law and its incorporation into the domestic law of the United States. *E.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987); *E. Bay Sanctuary Covenant ("EBSC") v. Biden*, 993 F.3d 640, 672 n.13 (9th Cir. 2021).

UNHCR has a mandate to "[p]romot[e] the conclusion and ratification of international conventions for the protection of refugees" and to "supervis[e] their application and propos[e] amendments thereto." UNHCR Statute ¶ 8(a). UNHCR's

[1] All parties have consented to the timely filing of this brief. No person other than UNHCR and its counsel authored this brief in whole or in part or contributed money intended to fund its preparation or submission. This brief does not constitute a waiver, express or implied, of any privilege or immunity that UNHCR or its staff may enjoy under applicable international legal instruments or recognized principles of international law. *See* Convention on the Privileges & Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15.

supervisory role is also expressly provided for in two refugee conventions that apply to the United States: the 1951 Convention Relating to the Status of Refugees ("1951 Convention"), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, and the 1967 Protocol Relating to the Status of Refugees ("1967 Protocol"), Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

UNHCR exercises its supervisory responsibility, among other ways, by issuing interpretations of the 1951 Convention, the 1967 Protocol, and other international refugee instruments. It also regularly presents its guidance to national courts, including U.S. federal courts. This authoritative guidance is informed by UNHCR's more than seven decades of experience assisting refugees and supervising the treaty-based system of refugee protection.

UNHCR submits this brief out of concern that the rule at issue in this case, Circumvention of Lawful Pathways, 88 Fed. Reg. 31,314 (May 16, 2023) (the "Rule"), significantly restricts access to asylum in a way that is at variance with international law protections. UNHCR has a strong interest in ensuring that U.S. asylum policy remains consistent with the international treaty obligations that the United States has assumed (and helped to create), and respectfully offers its guidance on those obligations. Consistent with its approach in other cases, UNHCR takes no position on the merits of the underlying asylum claims of the individuals whom Plaintiffs serve.

SUMMARY OF ARGUMENT

The United States is bound by international treaty obligations related to refugees, including those enshrined in the 1967 Protocol, to which the United States is formally a party, and the 1951 Convention, which is incorporated by reference in the 1967 Protocol. Both treaties set forth core procedural and substantive rights and obligations that parties must uphold, which the U.S. Congress incorporated into domestic statutory law through the Refugee Act of 1980 ("Refugee Act"), Pub. L. No. 96-212, 94 Stat. 102. As this Court and others have recognized, UNHCR provides authoritative guidance on the interpretation of these instruments.

UNHCR is concerned that the Rule conflicts with fundamental principles of international refugee law, including the right to seek asylum; the principle of non-refoulement; principles permitting the transfer of responsibility for asylum claims; and the prohibition against penalties for irregular entry. The Rule contains a number of exceptions and rebuttal provisions, but they do not cure these violations of international law.

Consistent with UNHCR's responsibility to supervise the implementation of international refugee treaties and advise state parties of their duties thereunder, UNHCR respectfully encourages the Court to consider the United States' international law obligations when evaluating the legality of the Rule.

ARGUMENT

I. UNHCR Provides Authoritative Guidance on the 1951 Convention and the 1967 Protocol, As This Court and the U.S. Supreme Court Have Recognized

The United States is bound by the 1951 Convention and the 1967 Protocol, and this Court and others have recognized that UNHCR provides significant guidance on the meaning of those instruments.

In 1950, delegates from the United States and other United Nations Member States convened to draft an international agreement that would ensure that "individuals . . . are not turned back to countries where they would be exposed to the risk of persecution." Andreas Zimmerman & Claudia Mahler, *Article 1A, Para. 2*, *in* The 1951 Convention Relating to the Status of Refugees & Its 1967 Protocol: A Commentary 281, 337 (Andreas Zimmerman et al. eds., 2011). The result was the 1951 Convention, which delineates the basic rights of refugees and asylum-seekers that state parties must uphold. For more than seven decades, the Convention has served as the "cornerstone of the international system" for refugee protection. G.A. Res. 49/169 (Dec. 23, 1994).

The 1951 Convention primarily addressed the plight of those who fled persecution in the wake of World War II. *See* 1951 Convention art. 1(A). Sixteen years later, following decisive action by states and the United Nations General Assembly, a second refugee treaty—the 1967 Protocol—came into effect. The 1967

Protocol universalized the Convention's protections by extending them to any individual unable to return to his or her country of origin on account of threatened persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion. 1967 Protocol art. I(2)-(3); Handbook on Procedures & Criteria for Determining Refugee Status & Guidelines on International Protection, U.N. Doc. HCR/1P/4/ENG/REV.4 ¶¶ 28, 34-35 (4th ed. 2019) [hereinafter Handbook].

Nearly 150 state parties, including the United States, have acceded to the 1967 Protocol. As Article I(1) of the 1967 Protocol binds parties to Articles 2 through 34 of the 1951 Convention, by ratifying the Protocol, the United States agreed to comply with all of the "substantive provisions" of the 1951 Convention. *Cardoza-Fonseca*, 480 U.S. at 429. To implement the United States' commitments, Congress passed the Refugee Act, which amended the Immigration and Nationality Act ("INA") to bring "United States refugee law into conformance" with both treaties. *Id.* at 436. "The legislative history of the Refugee Act . . . makes clear that Congress intended to protect refugees to the fullest extent of [the United States'] international obligations," rendering the scope and meaning of those obligations relevant to any interpretation of the INA's asylum provisions. *Yusupov v. Attorney Gen.*, 518 F.3d 185, 203 (3d Cir. 2008) (footnote omitted); *accord, e.g.*, *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1060-61 (9th Cir. 2017) (en banc).

UNHCR has a mandate to supervise the application of international conventions for the protection of refugees, including the 1951 Convention and the 1967 Protocol. UNHCR Statute ¶ 8(a). In language proposed by the United States, both treaties specifically acknowledge UNHCR's supervisory role. *See* 1951 Convention pmbl., art. 35; 1967 Protocol art. II. UNHCR exercises its supervisory responsibility in part by issuing interpretive guidance concerning the 1951 Convention and its 1967 Protocol. Chief among these interpretations is UNHCR's Handbook, which UNHCR first issued in 1979.

Consistent with this role, this Court and the U.S. Supreme Court have recognized that UNHCR provides "significant guidance" in construing the 1951 Convention and the 1967 Protocol, as well as the Refugee Act that implemented them into domestic law. *See, e.g.*, *EBSC v. Biden*, 993 F.3d at 672 n.13 (quoting *Cardoza-Fonseca*, 480 U.S. at 439 n.22). This Court "view[s] the UNHCR Handbook as persuasive authority in interpreting the scope of refugee status under domestic asylum law." *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 949 (9th Cir. 2007) (quotation marks omitted).

Indeed, the Court has considered interpretive guidance from UNHCR in connection with challenges to two previous asylum-related rules: the "entry bar," 83 Fed. Reg. 55,934, and the "transit bar," 84 Fed. Reg. 33,829. *See EBSC v. Biden*, 993 F.3d at 672-75; *EBSC v. Garland*, 994 F.3d 962, 976 (9th Cir. 2020). Those

rules were promulgated by the prior Administration and share key features with the current Rule. In both cases, the Court considered principles of international law and cited to UNHCR's amicus brief, the Handbook, and other documents relating to the United States' obligations under international law.

In *EBSC v. Garland*, the Court held, among other things, that the transit bar was inconsistent with the asylum statute. 994 F.3d at 988. The Court addressed the 1951 Convention and UNHCR's Handbook as follows:

> Section 1158 is rooted in the 1951 Convention, which excludes from protection two broad categories of aliens—those persons "considered not to be *deserving* of international protection," and those persons "not considered to be in *need* of international protection." [UNHCR Handbook], ch. 4, ¶¶ 144-63 (emphases added); *see Cardoza-Fonseca*, 480 U.S. at 439 n.22, 107 S. Ct. 1207 (noting that Handbook provides "significant guidance" in interpreting refugee law); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (same).

Id. at 976.

In *EBSC v. Biden*, the Court held that the entry bar "unlawfully conflict[ed] with the text and congressional purpose of the INA." 993 F.3d at 658. It further held that the government's interpretation of the statute was "unreasonable, as the district court discussed, in light of the United States's treaty obligations":

> As the [UNHCR] explains, the Rule runs afoul of three of these codified rules: the right to seek asylum, the prohibition against penalties for irregular entry, and the principle of non-refoulement embodied in Article 31(1) of the 1951 Convention.

Id. at 672 (footnote omitted).

The Court explained that UNHCR's arguments provided "significant guidance" and that the Handbook constitutes "persuasive authority" on these issues:

> The arguments presented by the United Nations in its amicus brief on how the 1951 Convention and 1967 Protocol should be construed are not binding on this court. *See Cardoza-Fonseca*, 480 U.S. at 439 n.22, 107 S. Ct. 1207. But they do "provide[ ] significant guidance in construing the [1967] Protocol, to which Congress sought to conform[,]" and are "useful in giving content to the obligations that the Protocol establishes." *Id.*; *see also Miguel-Miguel v. Gonzales*, 500 F.3d 941, 949 (9th Cir. 2007) ("We view the UNHCR Handbook as persuasive authority in interpreting the scope of refugee status under domestic asylum law.") (internal quotation marks and citation omitted).

Id. at 672 n.13.

UNHCR's amicus brief in today's matter discusses many of the same principles of international law, and it directs the Court to many of the same authorities, including UNHCR's Handbook. UNHCR respectfully submits that the Court should again consider those principles in deciding the legality of the Rule.

II. The Rule Is Fundamentally Inconsistent with the International Framework Established in the 1951 Convention and the 1967 Protocol

The Rule subjects certain categories of asylum-seekers to a presumption of ineligibility unless they qualify for one of three exceptions defined in the Rule, discussed further in Section II.D. 8 C.F.R. § 208.33(a)(2). If no exception applies, the only way to avoid the asylum bar is to "demonstrat[e] by a preponderance of the evidence that exceptionally compelling circumstances exist." 8 C.F.R. § 208.33(a)(3); *see* Section II.D.

Several of the current Plaintiffs previously challenged the prior Administration's transit bar and entry bar, as discussed above. In connection with those challenges, this Court has already invalidated two of the key requirements upon which the Rule conditions the availability of an exception: the requirement that asylum-seekers enter at ports, *EBSC v. Biden*, 993 F.3d at 658, and the requirement that they apply for and be denied protection in transit countries, *EBSC v. Garland*, 994 F.3d at 988. On May 11, 2023, the current Rule went into effect, *see* 88 Fed. Reg. 31,314, and Plaintiffs amended their complaint in *EBSC v. Biden*. The district court granted summary judgment in Plaintiffs' favor on July 25, 2023, holding, among other things, that the Rule was contrary to law.

The latest iteration of the Rule conflicts with the framework of the 1951 Convention and 1967 Protocol in at least three ways: (1) the Rule restricts the right to seek asylum, which can lead to refoulement; (2) the Rule is inconsistent with principles permitting the transfer of responsibility for asylum claims; and (3) the Rule creates a penalty for unlawful entry, notwithstanding that refugees are protected under the 1951 Convention from such penalties under certain conditions. As noted, the Rule contains a patchwork of exceptions and rebuttal grounds, but they are not sufficient—either individually or collectively—to remedy these violations of international law.

A. The Rule Restricts the Right to Seek Asylum, Which Can Lead to Refoulement

The 1951 Convention and the 1967 Protocol establish a comprehensive framework for the exclusion of asylum-seekers from international protection. These exclusion grounds, which are exhaustive, may not be modified or supplemented except by an international convention to that effect. Contrary to those bedrock principles, the Rule's presumption of ineligibility amounts to the unlawful imposition of an additional exclusion ground not permitted under refugee law. Moreover, introducing a new exclusion ground risks turning away people with valid claims, violating the fundamental principle of non-refoulement.[2]

i. The Rule Restricts the Right to Seek Asylum Through an Individualized, Fair, and Efficient Process

Asylum is non-discretionary under the comprehensive framework of the 1951 Convention and the 1967 Protocol.[3] In stark contrast, the Rule treats asylum as discretionary by permitting the exclusion of asylum-seekers who would qualify for protection under that framework. Even prior to the Rule, the U.S. practice of

[2] Defendants have conceded that the Rule "will result in the denial of some asylum claims that otherwise may have been granted." Opening Br. 38 (quoting 88 Fed. Reg. at 31,332).

[3] "Asylum" is used here to refer to international protections afforded to refugees under the 1951 Convention and the 1967 Protocol. Notwithstanding this international framework, U.S. statutory law characterizes the grant of asylum as discretionary in a given case.

discretionary denial of asylum was at odds with international law, which does not recognize discretion as a factor in determining whether to provide protection to persons who are refugees. Rather, someone who meets the standards stipulated in Article 1 of the Convention and Article I of the Protocol "shall" be considered a refugee. *See* 1951 Convention art. 1A(2); 1967 Protocol art. I(2).

The 1951 Convention and the 1967 Protocol define who is a refugee without reference to whether an individual has been officially recognized as such. A person is a refugee, and entitled to the protections that come with that status, if he or she is outside his or her country and unable to return due to a "well-founded fear" of persecution "for reasons of race, religion, nationality, membership of a particular social group or political opinion." 1951 Convention art. 1(A)(2); 1967 Protocol art. I(2)-(3). In other words, a grant of asylum or refugee status does not make a person a refugee, but rather formally recognizes that the person is a refugee. Handbook ¶ 28; *see also G v. G* [2021] UKSC 9 ¶¶ 77-81 (U.K).

The 1951 Convention and the 1967 Protocol's extension of protection to refugees who have not received formal recognition of their status necessarily requires a process for identifying refugees among asylum-seekers. Handbook ¶ 189; Exec. Comm. of the High Commissioner's Programme, Note on International Protection ¶ 11, U.N. Doc. A/AC.96/815 (1993) [hereinafter Note on International Protection]. That process must meet basic due process requirements, chief among

which is an individualized examination of whether each asylum-seeker meets the definition of a refugee set forth in the 1951 Convention and the 1967 Protocol. Handbook ¶¶ 44, 192; UNHCR Exec. Comm., Conclusion No. 8 (XXVIII) ¶ (e) (1977).[4]

The international legal regime acknowledges that there are individuals who may meet the positive ("inclusion") criteria for refugee status, but who nonetheless are excluded from international protection. The 1951 Convention and the 1967 Protocol lay out a clear framework for determining who is a refugee (and is therefore entitled to the rights enumerated in the 1951 Convention itself)—and who, while otherwise having the characteristics of a refugee, should nonetheless be excluded from refugee status. *See* 1951 Convention, arts. 1D, 1E, 1F. Such exclusionary considerations should generally be contemplated only after a thorough assessment of the inclusion factors, and should be balanced against the need for protection itself.[5] While these grounds are subject to interpretation, they cannot be

[4] UNHCR's Executive Committee Conclusions are adopted by consensus by the states that comprise the Executive Committee. The Conclusions reflect these states' understanding of legal standards regarding the protection of refugees. The United States has been a member of the Executive Committee continuously since 1951.

[5] *See* UNHCR, Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees, ¶ 31 (2003) ("The exceptional nature of Article 1F suggests that inclusion should generally be considered before exclusion."); UNHCR, Background Note on the Application of Exclusion Clauses: Article 1F of the 1951 Convention Relating

(continued . . .)

supplemented by additional criteria in the absence of an international convention to that effect. *See* Background Note on Exclusion Clauses ¶ 7.

In addition, the Rule goes well beyond the limited exclusions that are codified in the 1951 Convention. The 1951 Convention makes refugee protection unavailable when there are serious reasons to believe that a person has engaged in crimes against peace, war crimes, crimes against humanity, serious non-political crimes, or acts contrary to the purposes and principles of the United Nations. 1951 Convention art. 1(F). Separately, the 1951 Convention limits the prohibition on refoulement for refugees who pose a danger to national security or the community. *See id.* art. 33(2). Importantly, all of these clauses require access to an individualized process in the first instance, which the Rule does not provide. *See, e.g.*, Handbook ¶ 149. By establishing a presumption of ineligibility, the Rule risks excluding asylum-seekers who would otherwise qualify for refugee status.

ii. The Rule Creates a Risk of Refoulement

Non-refoulement, a norm of customary international law, is the foundation of the 1951 Convention and its 1967 Protocol. UNHCR is concerned that the Rule

---

to the Status of Refugees ¶ 99 (2003) [hereinafter Background Note on Exclusion Clauses] (explaining that application of the exclusion clauses requires an evaluation of the crime, the applicant's role, and the nature of the persecution feared).

creates a risk of refoulement for asylum-seekers of many different nationalities, ethnic backgrounds, and religions, encompassing a very wide range of people at risk.

Article 33(1) of the 1951 Convention prohibits state parties from "expel[ling] or return[ing] ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The article has a broad reach, reflecting that the principle of non-refoulement applies both within a state's territory and at its border, *see Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 180-82 (1993), and to recognized refugees and asylum-seekers whose status has not yet been determined, *see* Note on International Protection ¶ 11.

The importance of non-refoulement cannot be overstated. It is "the cornerstone of asylum and of international refugee law" and one of the core principles of the 1951 Convention. *Id.* ¶ 10. As the High Commissioner has explained, "[i]t would be patently impossible to provide international protection to refugees if States failed to respect this paramount principle of refugee law and of human solidarity." *Id.* Importantly, non-refoulement is recognized as a principle of customary international law. *See* UNHCR, The Principle of Non-Refoulement as a Norm of Customary International Law: Response to Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2BvR

1938/93, 2 BvR 1953/93, 2 BvR 1954/93 ¶¶ 4-5 (Jan. 31, 1994); *Mason v. Canada*, 2023 S.C.C. 21, ¶ 108 (Can.).

The Rule's presumption of ineligibility risks excluding refugees, placing them at risk of refoulement to the very states they have sought to escape. Such a return to persecution is forbidden by Article 33(1) and is inconsistent with the "international community['s commitment] to ensure to [all] those in need of protection the enjoyment of fundamental human rights, including the rights to life . . . and to liberty and security of [the] person." Note on International Protection ¶ 10; UNHCR Exec. Comm., Conclusion No. 6 (XXVIII) ¶¶ (a)-(c) (1977).

Importantly, Article 33(1) would not be satisfied even if those affected by the Rule were returned to third countries instead of their countries of origin, if they faced persecution or threats to their life or freedom in those countries. The prohibition against refoulement applies even if the return to persecution occurs through indirect or "chain refoulement," or removal to a third country where there is a "readily ascertainable risk of subsequent *refoulement*." James C. Hathaway, The Rights of Refugees Under International Law 325 (2005); *accord, e.g.*, *Suresh v. Canada*, [2002] 1 S.C.R. 3, 35-36 (Can.).

UNHCR observes with concern that the Rule purports to remain in compliance with international obligations because of the continued availability of statutory withholding of removal. *See* Circumvention of Lawful Pathways, 88 Fed.

Reg. at 31,323-24. As an initial matter, compliance with obligations under the 1951 Convention and the 1967 Protocol is not brought about merely by complying with one article therein, such as the non-refoulement obligations under Article 33. Instead, the United States must maintain an asylum process that complies with those instruments as a whole, accounting for both inclusion and exclusion. Withholding of removal offers less robust protection with a more onerous standard of proof, creating a risk of refoulement. It simply is not an adequate replacement for access to asylum, and it cannot be used as a substitute.

B. The Rule Is Inconsistent with Principles Permitting Transfer of Asylum Claims

The Rule amounts to an unofficial and impermissible transfer of asylum claims to countries south of the United States, as in the implementation of the Rule, certain asylum seekers who would otherwise have qualified for processing in the United States absent the Rule are instead sent back to Mexico.[6] UNHCR emphasizes that, as a general rule, primary responsibility for international protection remains with the state where an asylum claim is lodged. UNHCR, Guidance on Responding to Irregular Onward Movement of Refugees & Asylum-Seekers ¶ 16 (2019) [hereinafter Onward Movement Guidance]; *see also* UNHCR, Guidance Note on

[6] For instance, Mexico has agreed to take returns of certain nationals from countries with which the United States has difficulty executing removals. *See* ER-34.

Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers ¶ 1 (2013). In many cases, asylum-seekers move onward to seek international protection that is not in fact available in the place to which they have initially fled. Onward Movement Guidance ¶ 4. The fact that an asylum-seeker "has moved onward does not affect his or her right to treatment in conformity with international human rights law," including "protection from *refoulement*." *Id.* ¶ 11. Accordingly, "asylum should not be refused solely on the ground that it could be sought" elsewhere. UNHCR Exec. Comm., Conclusion No. 15 (XXX) ¶ (h)(iv) (1979).

Acknowledging the realities of onward movement, states may come to an agreement for another country to assume responsibility for adjudicating asylum claims, provided that safeguards are in place. *See* Onward Movement Guidance ¶ 17. Those safeguards—detailed below—exist to protect the fundamental right to seek asylum, to guarantee that each individual will have his or her claim adjudicated fairly and efficiently, and to ensure each individual will enjoy standards of treatment commensurate with those guaranteed by the 1951 Convention, including protection from refoulement. *Id.* ¶¶ 17-18. Absent an agreement with these safeguards, a state must uphold its responsibility to provide access to asylum, and a failure to do so risks refoulement of refugees.

Specifically, states may transfer adjudicatory responsibility for an asylum claim to a third country with the consent of that third country, but only *after* ensuring that the transfer will meet the following conditions:

1. The asylum-seeker will be protected from persecution and other threats to physical safety and freedom in the third country;

2. If not already granted protection, the asylum-seeker will have access to a fair and efficient asylum process in the third country;

3. The asylum-seeker will have the right to remain in the third country during the pendency of the asylum adjudication and, if the individual is determined to be a refugee, beyond that;

4. The asylum-seeker will enjoy standards of treatment commensurate with those guaranteed by the 1951 Convention and international human rights standards, including but not limited to, protection from *refoulement*; and

5. The transfer arrangement itself is governed by a justiciable agreement between the countries concerned, enforceable in a court of law by asylum-seekers.

Id.; UNHCR, Legal Considerations Regarding Access to Protection & a Connection Between the Refugee & the Third Country in the Context of Return or Transfer to Safe Third Countries ¶ 4 (2018) [hereinafter Third Country Legal Considerations].

As these conditions "cannot be [evaluated] without looking at the [third] state's . . . actual practice of implementation" of human-rights law, the fact that the transferee state has ratified the 1951 Convention or its 1967 Protocol is not sufficient to validate a transfer. *See* Third Country Legal Considerations ¶ 10. Moreover,

because a third country may be safe for one applicant but not another with a different profile, states that seek to transfer responsibility for an asylum claim must ordinarily ensure, after an *individualized* inquiry, that the third state will be safe for the particular claimant and will afford him or her appropriate treatment and a fair and efficient asylum process. Onward Movement Guidance ¶ 22.

The Rule lacks the aforementioned safeguards that would allow the United States to transfer asylum claims to third countries. Fundamentally, the Rule is not a mechanism for transferring claims—it is a mechanism for denying asylum claims without individualized process simply based on indications that the person could have sought protection elsewhere. It fails to ensure that affected individuals will be removed to a third country that guarantees the right to seek asylum; those affected by the Rule may be removed to any number of states, including the very states from which they have fled. *See* 8 U.S.C. § 1231(b). This may lead to refoulement, by returning a refugee to a country of persecution without ever having afforded him or her a fair opportunity to demonstrate his or her need for protection.

UNHCR is concerned that the Rule is increasing strains on asylum systems in countries to the south through sharp increases in case numbers, overall reducing asylum space in the region, not enhancing it. *See* UNHCR, 2022 Highlights: UNHCR Mexico 8 (2022) ("The complexity of mixed movements of refugees and migrants, and consequent response policies . . . increased not only the risk of

refoulement (and chain refoulement) but also posed additional pressure on the already overstretched processing capacity of the Mexican Commission for Refugee Assistance (COMAR) in the face of the fast-increasing asylum demands and absence of alternative legal pathways for those who need them."). Such burden-shifting is contrary to the principles of solidarity, international cooperation, and responsibility sharing articulated in the Preamble of the 1951 Convention and reaffirmed in the Global Compact on Refugees and regional coordination frameworks such as the Comprehensive Regional Protection and Solutions Framework (MIRPS), the Quito Process, and the Los Angeles Declaration.

C. The Rule Creates a Penalty for Unlawful Entry that Is Prohibited by Article 31(1) of the 1951 Convention

The Rule is inconsistent with Article 31(1) because it penalizes asylum-seekers for irregular entry. UNHCR is particularly troubled by the nature of the penalty imposed—the categorical denial of access to asylum procedures—as its imposition will likely result in the return of some refugees to countries where they will be persecuted.

Under Article 31(1) of the 1951 Convention, states are prohibited from imposing penalties on asylum-seekers "on account of their illegal entry or presence . . . provided they present themselves without delay to the authorities and

show good cause for their illegal entry or presence."[7] The reference to "penalties" in Article 31(1) is not intended to be limited to criminal penalties and encompasses "any administrative sanction or procedural detriment imposed on a person seeking international protection." UNHCR, Legal Considerations on State Responsibilities for Persons Seeking International Protection in Transit Areas of "International" Zones at Airports ¶ 8 (2019). This Article gives effect to a principle of non-discrimination between asylum-seekers on the basis of the form of their entry.

Refugees are "rarely in a position to comply with the requirements for legal entry." Memorandum from the Secretary-General annex art. 24 cmt. ¶ 2. Given that they are fleeing persecution and do not have the protection of their home states, refugees may lack "appropriate documentation" for exit and entry or may need to evade the detection of authorities or other persecutors, and must thus resort to "cross[ing] borders clandestinely in order to access protection." *Attorney-Gen. v. Refugee Council of N.Z., Inc.* [2003] 2 NZLR 577 at [6] per Tipping J. (CA) (N.Z.); *R v. Asfaw* [2008] UKHL 31, [51] (Lord Hope of Craighead) (U.K.); UNHCR Exec. Comm., Conclusion No. 58 (XL) ¶ (i) (1979); *accord Akinmade v. INS*, 196 F.3d

[7] Likewise, under U.S. statutory law, "[a] refugee fulfilling the requirements set out in Article 31(1) of the 1951 Convention should not be charged in relation to document fraud committed at the time of entry." Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees*, *in* Refugee Protection in International Law 185, 198 (Volker Türk et al. eds., 2003).

951, 955 (9th Cir. 1999) ("[W]e recognize that a genuine refugee escaping persecution may lie about his citizenship to immigration officials in order to flee his place of persecution.").

Because a "quest for asylum" can "reasonably involve[] . . . breaching the law," *R v. Uxbridge Mags. Ct.* [1999] EWHC (Admin) 765, [15]-[16] (Brown LJ) (Eng.), Article 31(1) restricts parties' ability to penalize asylum-seekers for crossing borders irregularly:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

1951 Convention art. 31(1). The provision's drafting history makes clear that "[t]he fact that a refugee was fleeing from persecution was [in of itself] good cause" for illegal entry. *See* Hathaway at 393 (alterations in original) (quoting Conf. of Plenipotentiaries on the Status of Refugees & Stateless Perss., U.N. Doc. A/CONF.2/SR.14 (1951) (Statement of Mr. Hoare of the United Kingdom)); UNHCR, Summary Conclusions on Non-Penalization for Illegal Entry or Presence ¶ 18 (Mar. 15, 2017) [hereinafter Summary Conclusions on Non-Penalization].

Moreover, the humanitarian purpose of the 1951 Convention and the 1967 Protocol is to ensure that all refugees can gain access to international protection.

Summary Conclusions on Non-Penalization ¶ 2. Accordingly, the term "penalties" in Article 31(1) should be interpreted in a manner that protects, rather than prevents, refugees' access to asylum. *See id.* ¶ 2; Cathryn Costello et al., Article 31 of the 1951 Convention Relating to the Status of Refugees 32 (UNHCR Paper No. PPLA/2017/01, 2017). A protective reading of the language of Article 31(1) also accords with Article 31(1)'s drafting history, which shows that the provision's framers abandoned a "narrow construction of the notion of" penalties included in the original draft and adopted a United States proposal to prohibit *any* penalties imposed on refugees due to their unlawful entry. Hathaway at 408-10.

Accordingly, Article 31(1)'s import "for domestic admissibility provisions is clear . . . '[A]n individual cannot be denied refugee status—or, most important, the opportunity to make a claim for such status through fair assessment procedures—solely because of the way in which that person sought or secured entry into the country of destination.'" *B010 v. Canada*, [2015] 3 S.C.R. 704, 729 (Can.) (quoting Anne T. Gallagher & Fiona David, The International Law of Migrant Smuggling 165 (2014)).

It does not change the analysis if some of the refugees affected by the Rule have transited through other countries on their way to seek protection in the United States. Although Article 31(1) protects only refugees who "com[e] directly" from a jurisdiction where they faced persecution on account of a protected ground, this

limiting language "does not disfranchise" refugees who have "passed through, or even [have] been provisionally admitted to, another country."[8] Hathaway at 396; Goodwin-Gill at 217-18; UNHCR Exec. Comm., Conclusion No. 15 (XXX) ¶ (h)(iii) (1979). Rather, it simply permits the imposition of penalties on refugees who have already sought and found asylum in a safe third country and later cross into another state irregularly. Gregor Noll, *Article 31*, *in* 1951 Convention Commentary at 1243, 1257; Goodwin-Gill at 218.

This reading of Article 31(1)'s "coming directly" language is well supported by Article 31(1)'s drafting history. As the House of Lords described that history, "there was universal acceptance [among the drafters] that the mere fact that refugees stopped while in transit ought not deprive them of the benefit of the article." *Asfaw* [2008] UKHL 31, [56] (Lord Hope of Craighead). Moreover, a more expansive reading of the "coming directly" language would overlook the provision's functional role in supporting the architecture of the 1951 Convention. Article 31(1) helps to implement one of the core lessons from the interwar period—the importance of "international co-operation" in ensuring that no one country is forced to bear an

[8] There is no obligation under international law for a person to seek asylum at the first effective country, and "asylum should not be refused solely on the ground that it could be sought from another State." UNHCR Exec. Comm., Conclusion No. 15 (XXX) ¶ (h)(iv) (1979).

"unduly heavy burden[]" that could prompt the closing of borders to refugees. 1951 Convention pmbl.; *see* Noll at 1256.

In short, though Article 31(1) might not preclude penalization of individuals who have spent significant time in a third country of refuge (and who have had access to a full and fair asylum procedure there), its provisions were "intended to apply, and ha[ve] been interpreted to apply, to persons who have briefly transited other countries." *Asfaw* [2008] UKHL 31, [19], [50] (Lord Hope of Craighead) (quoting *Summary Conclusions: Article 31 of the 1951 Convention*, *in* Refugee Protection in International Law at 253, 255); *accord, e.g.*, Bundesgericht [BGer] [Federal Supreme Court] Mar. 17, 1999, No. 6S.737/1998, 2/1999 Asyl 21, 21-23 (Switz.); Hathaway at 396. The Rule is inconsistent with these settled principles.

D. The Rule's Exceptions and Rebuttal Factors Do Not Remedy These Concerns

The above concerns apply notwithstanding the availability of certain exceptions and rebuttal factors under the Rule. UNHCR addresses these provisions in turn.

i. Exceptions to the Presumption of Asylum Ineligibility

The Rule establishes three categories of exceptions to the presumption of asylum ineligibility, but none can remedy the international law violations discussed above. In fact, two of the exceptions effectively introduce penalties for

circumventing preauthorized entry into the United States, thus raising additional concerns that the Rule violates international law.

Parole exception. This exception applies when the person "was provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process." 8 C.F.R. § 208.33(a)(2)(ii)(A).

UNHCR welcomes the use of pathways to preauthorized entry into the United States, but insists that reliance on such pathways *at the expense of* other ways to access territory for asylum-seekers violates international law. The international refugee law framework requires states to grant access to territory and examine the individual's claim to international protection. Handbook ¶ 192. When a state does not do so, it risks refouling those in need of protection, regardless of whether the state also makes available pathways to preauthorized entry for some classes of potential asylum claimants.

Port of entry and appointment exception. This exception applies when a person has "[p]resented at a port of entry, pursuant to a pre-scheduled time and place, or presented at a port of entry without a pre-scheduled time and place, if the [person] demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle." 8 C.F.R. § 208.33(a)(2)(ii)(B).

As with the parole exception, UNHCR welcomes the use of safe and orderly mechanisms to facilitate preauthorized entry, but making those mechanisms the near-exclusive means of accessing protection violates international law by denying access to asylum. UNHCR is concerned that the operation of the presumption of ineligibility, in conjunction with the exceptions connected to alternative pathways (parole and appointments at ports of entry), amounts to penalization of irregular entry in violation of Article 31(1) of the 1951 Convention. Disparate treatment of two groups of refugees—those who arrive at ports of entry and those who enter irregularly or who arrive at a port of entry without having secured an appointment—is exactly the kind of conduct that Article 31(1) prohibits.

Final denial exception. This exception applies where the person "[s]ought asylum or other protection in a country through which the [person] traveled and received a final decision denying that application." 8 C.F.R. § 208.33(a)(2)(ii)(C).

As an initial matter, UNHCR reiterates that individuals are not required to apply for asylum in any country through which they travel, and by extension, cannot be required to present a denial. Under international law, asylum-seekers need not apply for protection in the first, or any subsequent, country through which they transit. UNHCR further reiterates that the primary responsibility for international protection remains with the state where an asylum claim is lodged. *See* Onward Movement Guidance ¶ 16. Refugees' intentions should be taken into account in

considering onward movement, as should their connections to the country in which the refugee applies for asylum. The fact that an asylum-seeker has moved onward without having had his or her claim assessed in another country does not affect his or her right to apply for asylum and be treated in conformity with international refugee and human rights law, including protection from refoulement. *See id.* ¶ 11.

ii. Rebuttal of the Presumption of Asylum Ineligibility

If an asylum-seeker does not qualify for one of the Rule's three exceptions to the presumption of ineligibility, the only way to avoid the asylum bar is to rebut the presumption. To do so, the asylum-seeker must establish "exceptionally compelling circumstances" by a preponderance of the evidence. 8 C.F.R. § 208.33(a)(3)(i). The Rule expressly identifies three such circumstances—acute medical emergency, imminent and extreme threat to life or safety, and status as a victim of a severe form of trafficking in persons—and provides that others may be determined at the discretion of the adjudicator. These rebuttal grounds, both individually and together, are insufficient to remedy the violations of international law that arise from the Rule.

Acute medical emergency. The Rule provides that asylum-seekers may demonstrate that they or an accompanying family member "faced an acute medical emergency." 8 C.F.R. § 208.33(a)(3)(i)(A). UNHCR is concerned that this rebuttal ground is framed too restrictively to provide effective access to territory. In particular, it is limited to a very narrow range of circumstances, which may exclude

serious but non-acute medical needs, as well as non-medical needs raising compelling humanitarian interests.

Imminent and extreme threat. Second, asylum-seekers may provide evidence of an "imminent and extreme threat to life or safety," citing as examples "an imminent threat of rape, kidnapping, torture, or murder." 8 C.F.R. § 208.33(a)(3)(i)(B). Distinguishing between asylum-seekers based on whether they have experienced particularly repugnant and time-sensitive threats is inconsistent with the right to seek asylum. Furthermore, these high temporal and qualitative thresholds risk excluding people with valid claims from protection, placing them at risk of refoulement or chain refoulement.

Trafficking. Third, asylum-seekers may show that they are "victim[s] of a severe form of trafficking in persons" pursuant to the Trafficking Victims Protection Act. 8 C.F.R. § 208.33(a)(3)(i)(C). This rebuttal ground, like the others, is overly narrow. UNHCR welcomes the Rule's consideration of the human rights situation of victims of severe forms of human trafficking, but it observes that requiring such victims to prove their status by a "preponderance of the evidence" raises the possible negative effect of "[limiting] trafficking victims' access to justice and protection." Costello at 8 (citation omitted).

Other rebuttal grounds. Finally, adjudicators may recognize other "exceptionally compelling circumstances" as sufficient to overcome the

presumption. This standard ignores that the right to seek asylum is premised on persecution, not on a different and arbitrary test. In addition, the Rule's allocation of burden is inconsistent with the framework established in the 1951 Convention and 1967 Protocol. This framework provides for a right to asylum under defined circumstances, without the need to overcome state-specific presumptions.

CONCLUSION

UNHCR is concerned that the Rule conflicts with the United States' obligations under international law, and it respectfully requests that the Court consider those obligations when evaluating the legality of the Rule and the merits of the district court's decision.

Dated: October 5, 2023

Respectfully submitted,

/s/ R. Reeves Anderson

Robert Reeves Anderson
ARNOLD & PORTER
KAYE SCHOLER LLP
1144 Fifteenth Street, Suite 3100
Denver, CO 80202-2848
reeves.anderson@arnoldporter.com
(303) 863-1000
(303) 863-2301 (fax)

Samuel M. Witten
Kaitlin Konkel
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Avenue NW
Washington, DC 20001
(202) 942-5000

Alice Farmer
OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
1800 Massachusetts Avenue NW
Washington, DC 20036
farmera@unhcr.org
(202) 243-7621

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 29(a)(5) because the brief contains 6,895 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Microsoft 365 in Times New Roman 14-point font.

Dated: October 5, 2023

/s/ R. Reeves Anderson
Robert Reeves Anderson

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2023, I electronically filed the foregoing brief with the Court via the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 5, 2023

/s/ R. Reeves Anderson
Robert Reeves Anderson