19-16487, 19-16773

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EAST BAY SANCTUARY COVENANT; AL OTRO LADO; INNOVATION LAW LAB; CENTRAL AMERICAN RESOURCE CENTER,

Plaintiffs-Appellees,

—v.—

WILLIAM P. BARR, Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; JAMES MCHENRY, Director of the Executive Office for Immigration Review, in his official capacity; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; KEVIN K. MCALEENAN, Acting Secretary of Homeland Security, in his official capacity; U.S. DEPARTMENT OF HOMELAND SECURITY; KENNETH T. CUCCINELLI, Acting Director of the U.S. Citizenship and Immigration Services, in his official capacity; JOHN P. SANDERS, Acting Commissioner of U.S. Customs and Border Protection, in his official capacity; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; U.S. CUSTOMS AND BORDER PROTECTION; MATTHEW ALBENCE, Acting Director of Immigration and Customs Enforcement, in his official capacity; IMMIGRATION AND CUSTOMS ENFORCEMENT,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO

BRIEF FOR *AMICUS CURIAE* NATIONAL CITIZENSHIP AND IMMIGRATION SERVICES COUNCIL 119 IN SUPPORT OF APPELLEES

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* hereby certify that they have no parent corporations and that no publicly held company owns 10% or more of their stock.

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INTEREST OF *AMICUS CURIAE*[1]

The National Citizenship and Immigration Services Council 119 is a labor organization that represents over 13,500 bargaining unit employees of the United States Department of Homeland Security's U.S. Citizenship and Immigration Services ("USCIS"). Council 119's constituents include approximately seven hundred asylum officers and refugee officers—the men and women who are tasked with implementing the joint interim final rule promulgated by the Department of Justice (the "DOJ") and the Department of Homeland Security ("DHS") on July 26, 2019, entitled "Asylum Eligibility and Procedural Modifications," which is the subject of this litigation. The rule, which is also referred to as the "Third Country Transit Bar," categorically denies asylum to almost anyone crossing into the United States through the southern border without first having applied for and been denied asylum in any country through which she transited. The Third Country Transit Bar, in effect, eliminates asylum for virtually every asylum seeker—except for Mexican nationals—who enters through the southern border.

Amicus curiae has a special interest in this case for several reasons. First, Council 119's members have first-hand knowledge as to whether the Third

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(e), *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus curiae* and its counsel has made a monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this *amicus* brief. *See* Fed. R. App. 29(a)(2).

Country Transit Bar is necessary to deal with the flow of refugees at our southern border and whether it is consistent with our nation's asylum laws. Second, the Third Country Transit Bar requires Council 119's members to find in "credible-fear" screenings, which they conduct pursuant to federal asylum law, that asylum seekers do not have a credible fear of persecution if they had not applied for and been denied asylum in a third country that they transited through to reach our southern border. Lastly, the Third Country Transit Bar requires Council 119's members to deny asylum relief in the "affirmative asylum" context if the asylum seeker who has entered the United States through the southern border does not demonstrate that she applied for and was denied asylum in a third country.

This brief relies solely upon information that is publicly available, and it does not rely on any information that is confidential, law enforcement sensitive, or classified. It represents only the views of Council 119 on behalf of the bargaining unit, and does not represent the views of USCIS or USCIS employees in their official capacities.

SUMMARY OF ARGUMENT

The provision of a safe haven to persecuted people is etched into our nation's identity. Indeed, the country's roots sprouted from the Pilgrims who came

to America after fleeing religious persecution in Europe.[2] Like many refugees, the Pilgrims passed through a third country before arriving in a place where they could firmly and safely resettle. Four hundred years later, the promise of safety and an opportunity to build a permanent life without persecution remains a part of our nation's fabric. This identity is reinforced by our nation's laws, which establish a permanent, standardized, and agile system for identifying, vetting, and resettling refugees. That system provides the tools for addressing an increase in asylum seekers—no matter how large—at our borders, including those who transited through a third country before arriving at the U.S. border.

Recent years have seen an influx of migrants at our southern border, primarily from the Northern Triangle countries of Guatemala, Honduras, and El Salvador, as well as migrants from many other countries who arrive after passing through Central America and Mexico. Many seek asylum in the United States after having fled persecution in their home countries—just like the generations of refugees that our nation has welcomed throughout its history. Yet rather than leveraging the existing refugee protection framework with the necessary human and financial resources to address this surge in migration, the Administration has labeled the arrival of refugees a "crisis" warranting drastic solutions that run contrary to our tradition of protecting the persecuted. In the end, the "solutions"

[2] *See* William Bradford, *Of Plymouth Plantation* (Harold Paget ed. 2006).

that the Administration has implemented do not advance the stated goals but have the opposite effect of making the system more inhumane, chaotic, and inefficient.

The Third Country Transit Bar is the most inhumane and counterproductive measure yet. It is designed to slam the asylum door shut on virtually all refugees—including unaccompanied minors—entering the United States through our nation's southern border. It does so by proclaiming that these individuals are ineligible for asylum in the United States unless they demonstrate that they applied for and were denied asylum in a third country through which they transited en route to our southern border, no matter how serious the persecution they faced in their home country or in the third country.

The bar is implemented, in part, by a DOJ and DHS directive requiring asylum officers to make a "negative credible-fear finding" during the initial screening interview for an asylum seeker detained at the southern border if the individual cannot demonstrate that she applied for and was denied asylum in a third country that she transited through to reach our southern border. In other words, even if the asylum seeker establishes that she credibly fears persecution based on a protected characteristic or membership in a protected class in her home country and each third country that she transited through to reach our southern border, the Third Country Transit Bar requires the asylum officer to find that she

did not in fact establish a credible fear of persecution because she had not applied for and been denied asylum in a third country.[3]

This newly created basis for denying asylum is fundamentally contrary to our immigration laws. Specifically, Congress—and not the executive branch—has the right to determine whether an individual or group of individuals can be categorically prohibited from obtaining asylum in our country. Congress has set forth specific exceptions to asylum protection in the United States, including exceptions governing the circumstances where the potential availability of asylum in a third country may preclude someone from obtaining asylum in the United States. While Congress has delegated some authority to the executive branch to establish additional limitations on asylum, it has also decreed that those conditions must be "consistent" with our asylum law.

But the Third Country Transit Bar is not consistent with our asylum law. It is contrary to the two narrow circumstances that Congress has determined should lead to asylum ineligibility based on the potential for asylum in a third country: the "safe third country" bar and the "firm resettlement" bar. For the "safe third

[3] The directive also directs asylum officers to deny asylum relief in the "affirmative asylum" process—which involves adjudication of asylum applications by individuals who are not in removal proceedings and who file Form I-589 with the USCIS—to those individuals who entered the United States through the southern border but cannot establish that they applied for and were denied asylum in a third country that they transited through to reach the United States.

country" bar to be applicable, there must be a determination that an asylum seeker's life or freedom would not be threatened in the third country and that she would have access to a full and fair procedure for determining her asylum claim there. It cannot be credibly disputed that neither Mexico nor Guatemala—the third countries that a substantial majority of asylum seekers transit through to reach our border—qualify as safe third countries under the statutory exception. And the "firm resettlement" bar requires a careful consideration of the asylum seeker's specific ties to the third country—which must be more than the mere fact that she transited through it to reach our southern border. These narrow statutory exceptions to asylum eligibility carefully calibrate our nation's tradition of providing a safe haven to the persecuted while sharing the burdens of providing asylum with other countries that have the ability and means to ensure that asylum seekers will not face persecution. The Third Country Transit Bar runs afoul of the balance that Congress has struck.

The Third Country Transit Bar's conflict with federal asylum law is demonstrated by the absurd and unreasonable results that it yields. Under the new regime, for example, a war criminal who is statutorily barred from obtaining asylum relief could pass a credible fear screening if he demonstrates that he applied for and was denied asylum in a third country (perhaps because he is a war criminal), but an individual who demonstrates that she faces persecution based on a

protected class in her home country and the third countries that she transited through would fail the screening if she does not demonstrate that she applied for and was denied asylum in a third country. A rule that allows for these types of absurd results that defy the purpose and framework of our asylum system cannot be said to have any reasonable basis.

When Council 119's members enlisted to become asylum officers, they took a solemn oath to uphold the Constitution and the laws of the United States. They have been specifically charged with furthering our country's tradition of fulfilling its moral and legal obligations to protect those who were persecuted on the basis of a protected class. They did not sign up to carry out a policy that defies our nation's asylum laws and that rips at the moral fabric of our country.

ARGUMENT

I. THE THIRD COUNTRY TRANSIT BAR IS NOT THE APPROPRIATE MECHANISM TO DEAL WITH THE FLOW OF MIGRANTS AT OUR SOUTHERN BORDER

The Administration contends that the Third Country Transit Bar is necessary to deal with the dramatic increase in the number of asylum seekers encountered at the southern border who do not have a valid claim to asylum but who strain the resources of our system. But the flow of migrants could be addressed through other means that are consistent with our longstanding tradition of providing a safe haven to the persecuted and that are consistent with our nation's laws.

Our nation has faced influxes of refugees many times before. For instance, immediately after the Second World War, the United States admitted nearly 40,000 survivors of the Holocaust and over half million displaced persons and escapees from Communist-dominated countries.[4] Later, in 1956, the United States permitted entry of over 30,000 refugees fleeing persecution in Hungary.[5] And in 1957, it allowed for the resettlement of "refugee-escapees," defined as persons fleeing persecution in Communist or Middle Eastern countries.[6] Our country processed these people by, among other things, "setting up a complex organization" that vetted them before they entered the country.[7]

The process continued to adapt as new refugee crises emerged. After the Cuban Revolution in 1959, the United States admitted more than 58,000 Cubans fleeing persecution.[8] And in 1965, President Lyndon B. Johnson opened the

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[4] *See* Gil Loescher & John A. Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door 1945-Present* 4-6 (1986); Displaced Persons Act of 1948, ch. 647, Pub. L. No. 80-774, 62 Stat. 1009; Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400.

[5] Carl J. Bon Tempo, *Americans at the Gate: The United States and Refugees During the Cold War* 70-73 (2008).

[6] Refugee-Escapee Act of 1957, Pub. L. No. 85-316, 71 Stat. 639.

[7] *See* President Dwight D. Eisenhower, Special Message to the Congress Recommending Amendments to the Refugee Relief Act, May 27, 1955, available at https://ilw.com/articles/2004,0105-eisenhower.shtm.

[8] *See* U.S. Citizenship and Immigration Services, *Refugee Timeline*, https://www.uscis.gov/history-and-genealogy/our-history/refugee-timeline.

country to all Cubans seeking refuge from Fidel Castro's communist regime.[9] In order to more safely and efficiently bring Cubans to the United States, the federal government created an airlift program which brought more than 250,000 Cuban refugees to the United States.[10] And around the same time, our nation also welcomed thousands fleeing persecution from the Soviet Union, Eastern Europe, and Afghanistan.[11]

The end of the Vietnam War created a large flow of refugees, with about 300,000 Southeast Asians entering the United States between 1975 and 1980. The Indochinese Immigration and Refugee Act of 1975 funded their transportation and resettlement, and, in 1977, Congress enacted a law allowing Southeast Asian refugees who had entered the United States the opportunity to become lawful permanent residents.[12] In 1977, the Immigration and Naturalization Services ("INS") also created a special Office of Refugee and Parole to address global refugee crises and implement refugee policies.[13]

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[9] *Id*.

[10] *Id*. Later, in 1980, after the Castro regime announced that all Cubans wishing to go to the United States were free to board boats at the Port of Mariel, the United States allowed around 125,000 Cubans to enter the country under the Attorney General's parole authority. *Id*.

[11] Mark Gibney, *Global Refugee Crisis* 91-92 (2d ed. 2010).

[12] *Id*.

[13] *Id*.

Then, in 1990, the INS established an Asylum Corps, which comprises professional asylum officers trained in international law and with access to a center containing information on human rights.[14] This specialized training allows asylum officers to more accurately and efficiently assess asylum claims. Recognizing the value of this approach, Congress authorized funding to double the number of asylum officers in 1994.[15] The asylum program was further modified in 1995 and again in 1996 to allow asylum officers to process expedited removal of persons who cannot demonstrate a credible fear of persecution.[16]

Simply put, our country has dealt with the challenges posed by large swaths of refugees seeking a safe haven here by promulgating highly adaptable processes that effectively ensured protection to qualified asylum seekers while guarding against abuse of the system by bad actors. The agility and success of the system is perhaps best reflected in the sheer number of refugees absorbed into the United States since the Second World War—nearly five million—and the mechanisms that the country instituted to accommodate their arrival and processing.[17]

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[14] Gregg A. Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*, 9 Am. U. Int'l L. Rev. & Pol'y 43 (1994). *See also* 8 C.F.R. § 208.1(b) (1990).

[15] Steven Greenhouse, *U.S. Moves to Halt Abuses in Political Asylum Program*, N.Y. Times (Dec. 3, 1994), p. 8.

[16] 8 U.S.C. § 1225(b)(1)(B)(iii).

[17] David W. Haines, *Safe Haven?: A History of Refugees in America* 4 (2010).

II. THE THIRD COUNTRY TRANSIT BAR IS INCONSISTENT WITH OUR ASYLUM LAW

Subject to our nation's international treaty obligations, Congress has "plenary power" to make rules governing which group of aliens may be admitted or excluded from the United States. *Boutilier v. INS*, 387 U.S. 118, 123 (1967); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987). "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

Congress has decreed that an alien who is physically present in the United States or who arrives in the United States may apply for asylum in the United States, subject to specific and narrow exceptions. *See* 8 U.S.C. § 1158(a)(1). The first set of exceptions is set forth in section 1158(a)(2) of Title 8 of the United States Code, and they include, among others, the "safe third country" exception. The "safe third country" exception has its roots in the Preamble to the 1951 Convention Related to the Status of Refugees ("1951 Convention"), which acknowledges that "the grant of asylum may place unduly heavy burdens on certain countries, and [that] a satisfactory solution . . . therefore cannot be achieved without international co-operation."[18] The exception is designed to address "the phenomenon of refugees and asylum seekers 'who move in an irregular manner

[18] 1951 Convention Relating to the Status of Refugees Preamble, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

from countries ***in which they have already found protection***, in order to seek asylum or permanent resettlement elsewhere.'"[19]

The second set of exceptions is set forth in section 1158(b). That section provides that "[t]he Secretary of the Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established" by them under this section. Section 1158(b)(2)(A) provides that "Paragraph (1) shall not apply to an alien if the Attorney General determines that" an alien falls within six categories of individuals specified within that section: (i) have engaged in persecution themselves; (ii) were convicted of a serious crime in the United States; (iii) committed a serious nonpolitical crime outside the United States; (iv) present a danger to the security of the United States; (v) have engaged in terrorism or are affiliated with a terrorist organization; or (vi) were firmly resettled in another country prior to arriving in the United States. 8 U.S.C. § 1158(b)(2)(A). These exceptions stem from the "exclusion" and "cessation" clauses of the 1951 Convention, which set forth circumstances in which individuals are either not

[19] María-Teresa Gil-Bazo, *The Safe Third Country Concept in International Agreements on Refugee Protection*, 33/1, Netherlands Quarterly of Human Rights 42 (2015) (emphasis added) (quoting the Executive Committee of the UNHCR's Conclusion No. 58(XL)).

entitled to protection or no longer need protection.[20] In addition to creating six specific mandatory bars to asylum, Congress also delegated authority to the Attorney General to "establish additional limitations and conditions ***consistent*** with this section, under which an alien shall be ineligible for asylum under paragraph (1)." 8 U.S.C. § 1158(b)(2)(C) (emphasis added).

The Third Country Transit Bar is not consistent with our asylum laws because it runs afoul of the careful balance that Congress has struck in the "safe third country" and "firm resettlement" exceptions, which govern the circumstances in which the potential availability of asylum in a third country may bar that person from obtaining asylum relief.

The "safe third country" exception. In the "safe third country" exception, Congress carefully balanced the need to afford asylum to persecuted people against the need to share that burden with other countries that are willing and able to provide similar protection.[21] Congress did so by decreeing that, for the "safe third country" bar to apply, the Attorney General must "determine that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country . . . . in which the alien's life or freedom would not be threatened on account of [a

[20] *See* 1951 Convention Relating to the Status of Refugees arts. 1(E), 1(F), and 32(2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

[21] *See* María-Teresa Gil-Bazo, *The Safe Third Country Concept in Int'l Agreements on Refugee Protection*, 33/1, Netherlands Quarterly of Human Rights 42 (2015).

protected class], and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection . . . ." 8 U.S.C. § 1158(a)(2)(A). The "safe third country" bar does not apply to unaccompanied minors. *See* 8 U.S.C. § 1158(a)(2)(E).

But the Third Country Transit Bar applies to asylum seekers who do not meet the specific criteria that Congress has required in the "safe third country" exception. The Third Country Bar applies, for instance, to unaccompanied minors, even though the "safe third country" exception does not apply to such individuals. Moreover, the Third Country Transit Bar applies overwhelmingly to migrants from the Northern Triangle who pass through Mexico (and in some cases, Guatemala) to reach our southern border. However, neither country is safe for most refugees nor provides a full and fair procedure for determining asylum claims.

As to Mexico, the U.S. Department of State recently noted that the same gangs migrants flee to avoid persecution in their home countries continue to threaten them in Mexico.[22] According to an NGO report relied upon by the State Department, 5,824 crimes were reported against migrants in just five Mexican states, and only 1% of the reported crimes were resolved by the Mexican

[22] U.S. Dep't of State, *Mexico 2018 Human Rights Report*, at 19 (Mar. 13, 2019), available at https://www.state.gov/wp-content/uploads/2019/03/MEXICO-2018.pdf.

authorities.[23] The risk of persecution in Mexico is even higher for the most vulnerable segments of asylum seekers. Ethnic minorities from indigenous cultures face persecution in Mexico that is similar to the persecution they face in their home countries. Migrant women are also at risk of sexual assault. In one study, nearly one-third of women fleeing the Northern Triangle experienced sexual abuse during their journey through Mexico.[24] Sexual minorities also face high rates of persecution and violence in Mexico. According to the UNHCR, two-thirds of LGBTI asylum seekers from El Salvador, Guatemala, and Honduras reported having been victims of sexual violence in Mexico.[25]

Nor is Mexico capable of providing a full and fair procedure for determining a claim for asylum or an equivalent temporary protection. In Mexico, the principle of *non-refoulement* embodied in the 1951 Convention and 1967 Protocol Relating to the Status of Refugees ("1967 Protocol") is systematically violated.[26] There are

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[23] *Id.* at 20.

[24] Doctors Without Borders, *Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis* 5 (2017).

[25] U.S. Department of State, *Mexico 2018 Human Rights Report*, at 19-20 (Mar. 13, 2019), available at https://www.state.gov/wp-content/uploads/2019/03/MEXICO-2018.pdf.

[26] *See* Doctors Without Borders, *Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis* 5 (2017); Amnesty International, *Overlooked, Under-Protected: Mexico's Deadly Refoulement of Central Americans Seeking Asylum* (2018), available at https://www.amnestyusa.org/reports/overlooked-under-protected-mexicos-deadly-refoulement-of-central-

also "strong obstacles to accessing the asylum procedure,"[27] including: (i) the absence of proper screening protocols;[28] (ii) an unreasonable 30-day filing deadline; (iii) an ineffective appeals process; (iv) understaffing and backlogs; and (v) an insufficient number of asylum offices: four for the entire country.[29]

Guatemala does not fare better. Asylum seekers are at high risk of persecution and violence in Guatemala, which is one of the most dangerous countries in the world, not only due to their inherent vulnerabilities as migrants, but also on account of their race, nationality, gender, sexual orientation, gender identity and other reasons.[30] And Guatemala's asylum system suffers from similar shortcomings as Mexico's. According to the State Department, migration and police authorities in Guatemala lack adequate training regarding the rules for

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americans-seeking-asylum/.

[27] United Nations High Commissioner for Refugees, *Universal Periodic Review, Mexico* (2018), available at https://www.refworld.org/country,,UNHCR,, MEX,,5b57009a7,0.html.

[28] *Id*.

[29] Human Rights First, *Is Mexico Safe for Refugees and Asylum Seekers?* (2018), available at https://www.humanrightsfirst.org/sites/default/files/MEXICO_FACT_SHEET_PDF.pdf.

[30] *See* Human Rights First, *Is Guatemala Safe for Refugees and Asylum Seekers?* (June 2019), available at https://www.humanrightsfirst.org/sites/default/files/GUATEMALA_SAFE_THIRD.pdf.

establishing refugee status, and the identification and referral mechanisms for potential asylum seekers are inadequate.[31]

"Firm resettlement" bar. This bar applies only to individuals who have firmly resettled in another country. But the Third Country Transit Bar applies to any individual who has merely transited through a third country before reaching our southern border.

In sum, the Third Country Transit Bar fundamentally alters the careful balance that Congress struck, which sets forth specific circumstances in which the potential availability of asylum in a third country impacts an individual's ability to obtain asylum in the United States. It disregards the specific conditions and important protections that Congress established for ensuring that protection is truly available in the third country and to prevent denial of asylum to the most vulnerable refugees arriving at our borders. Thus, the Third Country Transit Bar is not "consistent" with our asylum law, and it is therefore void.

III. THE APPLICATION OF THE THIRD COUNTRY TRANSIT BAR IS CONTRARY TO OUR LONGSTANDING ASYLUM FRAMEWORK AND IT YIELDS ABSURD RESULTS

Asylum officers are dedicated public servants who carry out several functions within the asylum system, but their role is limited by statutory and

[31] U.S. Dep't of State, *Guatemala 2018 Human Rights Report*, at 13, available at https://www.state.gov/wp-content/uploads/2019/03/GUATEMALA-2018.pdf.

regulatory authority. Asylum officers are tasked with conducting "credible fear" screening interviews for asylum seekers referred to them by Customs and Border Protection agents. *See* 8 U.S.C. § 1225(b)(1)(B); 8 C.F.R. § 208.30. During this screening interview, the asylum officer must determine whether the asylum seeker has a "credible fear of persecution." 8 U.S.C. § 1225(b)(1)(B)(iii). During the same interview, asylum officers also inquire into the individual's credible fear of torture, for purpose of identifying potential bases for withholding of removal or protection under the Convention Against Torture (the "CAT").

Asylum officers do not grant asylum (or any other affirmative relief) during their credible fear screening interview. If a positive credible-fear finding is made with respect to an asylum seeker, withholding of removal, or CAT protection, the asylum seeker may move forward with her claims before an Immigration Judge in a full hearing. *See* 8 C.F.R. § 208.30(f). If a negative credible-fear finding is made, the asylum seeker is ordered removed. She may then appeal the asylum officer's finding to an Immigration Judge. *See* 8 C.F.R. § 208.30(g).

Although asylum officers are responsible for noting in an asylum seeker's file that a mandatory bar to eligibility ***may*** apply, prior to the Third Country Transit Bar, the statutory exceptions were not used as a basis to find that the asylum seeker lacks a "credible fear of persecution." *See* 8 C.F.R. § 208.30(e)(5)(i). Indeed, USCIS's website notes that "[t]he Asylum Officer does

not make a final determination whether an individual is subject to a mandatory bar to asylum or withholding of removal when determining whether an individual has established a credible fear of persecution or torture. The Asylum Officer will note in the officer's determination the possibility that a mandatory bar will apply."[32]

But the Third Country Transit Bar created two unprecedented exceptions to the general rules governing "credible fear" interview. First, application of the Third Country Transit Bar is a mandatory basis for a negative credible-fear finding. *See* 8 C.F.R. § 208.30(e)(5)(ii). Thus, even if the asylum seeker establishes that she has a credible fear of persecution based on a protected class in her home country (or any third country that she transited through to reach our southern border), the Third Country Transit Bar compels the asylum officer to find that she did not have a credible fear of persecution because she did not apply for asylum in a third country.

Second, for individuals subject to the Third Country Transit Bar, and *only* for those individuals, claims for withholding of removal and relief under the CAT must be evaluated in the screening using the more stringent "reasonable fear"—not "credible fear"—standard. 8 C.F.R. § 208.30(e)(5)(ii).[33] Prior to the Third

[32] U.S. Citizenship and Immigration Services, *Credible Fear FAQ*, https://www.uscis.gov/faq-page/credible-fear-faq#t12831n40013 (last visited Oct. 11, 2019).

[33] *See also* U.S. Dep't of Justice, Office of Immigration Review, Guidelines

Country Transit Bar, asylum officers applied the "reasonable fear" standard only in two specific situations: (1) after the reinstatement of a prior removal order; and (2) after a final administrative removal order, which ensues from certain felony convictions. There is a good reason why this standard was reserved for individuals with prior violations of our nation's laws: because it entails a higher burden of proof, it is an inappropriate standard for an initial screening interview following a person's first entry into the United States. But the Third Country Transit Bar requires the application of this standard in the "credible fear" screening process for those individuals who have been found to lack "credible fear of persecution" because they did not apply for and were denied asylum in a third country.

The new procedures promulgated under the Third Country Transit Bar are a dramatic departure from the screening process that was designed decades ago, and represent a stark re-interpretation of asylum officers' role. Never before have asylum officers been authorized (let alone directed) to make negative credible-fear findings based on the applicability of a mandatory bar. The Third Country Transit Bar changes that long-standing approach *only* with respect to asylum seekers entering our country through the southern border who had not applied for and been

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Regarding New Regulations Governing Asylum and Protection Claims (July 15, 2019), at 2, *available at* https://www.justice.gov/eoir/file/1183026/download.

denied asylum in a third country. *See* 8 C.F.R. § 208.30(e)(5)(ii); *see also* 8 C.F.R. § 208.13(c)(3).

The new protocol also leads to absurd and irrational results. Under the new regime, an individual who articulates a credible fear of persecution to an asylum officer, but who also admits to terrorism in her home country, will receive a positive credible-fear finding if he demonstrates that he applied for and was denied asylum in a third country. But a refugee fleeing political violence in South America who did not apply for asylum in Guatemala or Mexico during her journey to the United States will receive an automatic "negative credible-fear finding" notwithstanding the fact that she faced persecution based on a protected class in her home country, Guatemala, and Mexico. *See* 8 C.F.R. § 208.30(e)(5)(ii).

Even more, after making a negative credible-fear finding based on the Third Country Transit Bar, asylum officers must then apply a "reasonable fear" standard to assess the individual's claims for statutory withholding of removal or CAT protection.[34] This higher standard is applied in the screening interview ***only*** for individuals subject to the Third Country Transit Bar. *See* 8 C.F.R. § 230.30(e)(5)(ii). It does not apply to those suspected of terrorism, engaging in persecution, or those who present a threat to our national security, so long as they

[34] U.S. Dep't of Justice, Office of Immigration Review, Guidelines Regarding New Regulations Governing Asylum and Protection Claims (July 15, 2019), at 2-3, *available at* https://www.justice.gov/eoir/file/1183026/download.

are able to demonstrate that they applied for and were denied asylum in a third country. *See* 8 C.F.R. § 230.30(e)(2)-(3).

The fast-track application of the Third Country Transit Bar is not consistent with our asylum laws. If Congress intended that individuals who had not applied for and been denied asylum in a third country should not be afforded protections that are provided to nearly *every other* person seeking asylum—even those who represent a specifically identified threat to our national security—it would have said so. It did not. A rule that circumvents Congressional intent and policy and that yields absurd result should be stricken as null and void.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges the Court to affirm the preliminary injunction granted by the district court.

Respectfully submitted,

Dated: October 15, 2019

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Dated: October 15, 2019

PATTERSON BELKNAP WEBB & TYLER LLP

By: */s/ Muhammad U. Faridi*

Attorneys for *Amicus Curiae* National CIS Council 119

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I hereby certify that on October 15, 2019, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system. There are no unregistered participants.

s/ *Muhammad U. Faridi*
Muhammad U. Faridi
Dated: October 15, 2019