NOS. 19-16487, 19-16773

In the United States Court of Appeals for the Ninth Circuit

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

v.

WILLIAM P. BARR, et al.,
Defendants-Appellants.

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

No. 3:19-CV-04073
Hon. Jon S. Tigar

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

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INTEREST OF AMICUS CURIAE[1]

This case requires the Court to consider the lawfulness of a recent and substantial restriction of asylum access under United States law. As 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), the Office of the United Nations High Commissioner for Refugees ("UNHCR") has a direct interest in this matter. Consistent with UNHCR's role and interest, the Supreme Court and lower federal courts 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).

[1] All parties consent to the filing of this brief provided that it is timely filed and otherwise consistent with the rules of the Court. No person other than UNHCR and its outside counsel authored this brief in whole or in part or provided funding related to it. 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.

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 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 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 the federal courts of the United States. This authoritative guidance is informed by UNHCR's nearly seven decades of experience assisting refugees and supervising the treaty-based system of refugee protection.

UNHCR submits this brief out of concern that the Interim Final Rule at issue in this case, Asylum Eligibility and Procedural Modifications ("IFR"), 84 Fed. Reg. 33,829 (July 16, 2019), significantly

restricts access to asylum in a way that is at variance with two international law protections: the right to seek asylum and the principle of *non-refoulement*.[2] UNHCR has a strong interest in ensuring that United States asylum policy remains consistent with the international treaty obligations that the United States 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 the plaintiffs serve.

[2] The principle of *non-refoulement* refers to a "refugee's right not to be expelled from one state to another, esp. to one where his or her life or liberty would be threatened." Black's Law Dictionary 1157 (9th ed. 2009). Article 33(1) of the 1951 Convention provides that "[n]o Contracting State shall expel or return ('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."

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. Essential to both treaties are core procedural and substantive rights that parties must uphold, and which the United States Congress incorporated into domestic statutory law through the Refugee Act of 1980 ("Refugee Act"), Pub. L. No. 96-212, 94 Stat. 102.

UNHCR—the organization charged with supervising the implementation of the 1951 Convention and 1967 Protocol—is concerned that the IFR substantially restricts the availability of asylum in a manner that is at variance with the United States' obligations under both treaties.

In particular, the IFR denies the right to seek asylum to virtually all asylum-seekers who have traveled through another country en route to the United States' southern border, leaving large numbers of refugees without any possibility of establishing refugee status in the United States. When implemented in conjunction with

the removal provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq., the IFR may lead to these individuals' removal, including to the very countries whence they have fled.

The IFR's denial of access to the asylum process is at variance with two fundamental principles of international refugee law: the right to seek asylum given effect through Article 1 of the 1951 Convention and Article I of the 1967 Protocol; and the principle of *non-refoulement* enshrined in Article 33(1) of the 1951 Convention. Though states may, consistent with the 1951 Convention and 1967 Protocol, transfer adjudicatory responsibility for asylum claims to other states, such transfers are permissible only in limited circumstances and with adequate safeguards that the IFR does not provide.

The IFR is not consistent with the United States' obligations under the 1951 Convention and 1967 Protocol. Given its responsibility to supervise the implementation of international refugee treaties and advise state parties of their duties thereunder, UNHCR respectfully encourages the Court to take into consideration the United States' international law obligations when evaluating the legality of the IFR.

ARGUMENT

I. The United States Is Bound by the 1951 Convention and the 1967 Protocol.

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 nearly 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 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 under the 1967 Protocol and 1951 Convention, Congress passed the Refugee Act, which amended the 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).

II. UNHCR Provides Authoritative Guidance on the Meaning of the 1951 Convention and the 1967 Protocol.

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; Submission of UNHCR as Intervener ¶ 89, *R v. Sec'y of State for Foreign & Commonwealth Affairs* [2006] EWCA Civ 1279 (Eng.), *reprinted in* 20 Int'l J. Refugee L. 675, 697 (2008).

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 drafted in 1979, and which sets forth authoritative guidance on the 1951 Convention and 1967 Protocol.

This Court has 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. *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005); *accord, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 436–39, 439 n.22. That is because "Congress was aware of the criteria articulated in [UNHCR's] Handbook when it passed the [Refugee] Act in 1980, and . . . it is [thus] appropriate to consider the guidelines in the Handbook as an aid to the construction of the Act." Status of Perss. Who Emigrate for Econ. Reasons Under the Refugee Act of 1980, 5 Op. O.L.C. 264, 266 (1981) (Theodore B. Olson); *see also* Note, *American Courts & the U.N. High Commissioner for Refugees*, 131 Harv. L. Rev. 1399, 1419 (2018) (observing that "UNHCR was already engaged in monitoring and interpretive activities at the time that the United States joined the international refugee regime by signing the [1967] Protocol").

III. The IFR Is at Variance with the United States' Obligations Under the 1951 Convention and the 1967 Protocol.

The 1951 Convention and 1967 Protocol set forth rights for refugees that states are bound to respect and uphold. Chief among these are two core safeguards—the right to seek asylum and the principle of *non-refoulement*—that ensure asylum-seekers' protection and are thus critical to refugees' full enjoyment of the other rights guaranteed by the 1951 Convention and 1967 Protocol. The IFR, which denies the right to seek asylum to nearly all refugees who transit through a third country and fail to "apply for protection and receive a final denial [there] prior to entering [the United States] through the southern border," *E. Bay Sanctuary Covenant v. Trump*, 385 F. Supp. 3d 922, 935 (N.D. Cal. 2019)—thereby leaving affected refugees vulnerable to *refoulement*—is at variance with these fundamental protections.[3]

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[3] Under the IFR, "any alien who enters, attempts to enter, or arrives in the United States across the southern land border . . . after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence en route to the United States, shall be found ineligible for asylum." 8 C.F.R. § 208.13(c)(4). Only certain trafficking victims and individuals who have

The IFR's denial of the asylum process to large numbers of individuals is inconsistent with the United States' obligation under the 1951 Convention and 1967 Protocol to provide *all* asylum-seekers with a fair and efficient procedure for establishing their refugee status. Though states may, consistent with this duty, enter into arrangements to transfer adjudicatory responsibility for asylum claims to third countries, they may do so only under limited circumstances and with adequate safeguards, neither of which the IFR contemplates.

By denying access to the asylum system without adequate safeguards, the IFR is likely to result in the *refoulement* of refugees given the INA's removal provisions.[4] This is so notwithstanding the

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been denied asylum in a transit country are exempted. *Id.* § 208.13(c)(4)(i)–(ii). Though the IFR does not apply to those who have transited through only countries that are not party to the 1951 Convention, 1967 Protocol, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Feb. 4, 1985, 1465 U.N.T.S. 113; *see* 8 C.F.R. § 208.13(c)(4)(iii), Mexico, the only country that shares the United States' southern land border, is party to all three agreements.

[4] The INA provides for the removal of non-resident aliens who, like those affected by the IFR, are ineligible for asylum. *See* 8 U.S.C. §§ 1225, 1227(a), 1231. Such individuals may be removed to any number of countries, including their country of origin, unless they are

availability of withholding of removal, which, as discussed below, is not available to all refugees.

A. The IFR's Restriction of the Right to Seek Asylum Is at Variance with the 1951 Convention and the 1967 Protocol.

The 1951 Convention and 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 on account of a "well-founded fear" of persecution "for reasons of race, religion, nationality, membership of a particular social group or political opinion." 1967 Protocol art. I(2)–(3); 1951 Convention art. 1(A)(2). 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.

The 1951 Convention and 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-

able to satisfy the additional requirements of entitlement to withholding of removal or protection under CAT. *See id.* § 1231(b).

seekers. *Id.* ¶ 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 1967 Protocol.[5] Handbook ¶¶ 44, 192; UNHCR Exec. Comm., Conclusion No. 8 (XXVIII) ¶ (e) (1977).[6]

The IFR fails to uphold the right to seek asylum because it prevents access to asylum to virtually all asylum-seekers who travel through another country during their effort to find safety in the United

[5] "[R]efugee status must normally be determined on an individual basis . . . ." Handbook ¶ 44. Although states may grant refugee status to groups of individuals in urgent circumstances where it is "not . . . possible for purely practical reasons to carry out an individual determination . . . for each member of the group," *id.*, this allowance for group-based protection does not permit states to *deny* refugee status to groups of individuals without individualized consideration.

[6] 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. At present, 102 states are members of the Executive Committee; the United States has been a member continuously since 1951.

States. With the IFR in place, large numbers of asylum-seekers have no way to establish their refugee status in the United States, which is fundamentally incompatible with the United States' obligation to provide each asylum-seeker with an individualized, fair, and efficient process for establishing his or her need for protection.

UNHCR notes that the IFR goes well beyond the limited exclusions from the refugee definition and protections that are codified in the 1951 Convention. The 1951 Convention makes refugee protection unavailable to persons for whom there are serious reasons to believe have engaged in war crimes, crimes against humanity, or acts contrary to the purposes and principles of the United Nations. 1951 Convention art. 1(F); *see also* 8 U.S.C. § 1158(b)(2)(A)(i), (iii). Refugee protection is also unavailable for certain individuals who pose a danger to national security or the community, or who have already been firmly resettled elsewhere.[7] *See* 1951 Convention arts. 1(E),

[7] Under the 1951 Convention and 1967 Protocol, the firm-resettlement bar may not be applied to individuals who could have taken up residence in a country but did not, or to individuals who merely visited, transited, or were present in a country for a temporary or short-term stay. UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention Relating to the Status of Refugees ¶¶ 9–10 (2009).

33(2); *see also* 8 U.S.C. § 1158(b)(2)(A)(ii), (iv)–(vi). The IFR is not consistent with any of these exclusion clauses, which, critically, require access to an individualized process in the first instance, which the IFR does not provide. *See, e.g.*, Handbook ¶ 149.

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 6 ¶ 16 (2019) [hereinafter UNHCR, Onward Movement Guidance]. 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. *Id.* at 2 ¶ 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*."[8] *Id.* at 4

[8] This is consistent with the 1951 Convention's drafters' own understanding of access to protection. As the House of Lords has explained, "there was universal acceptance [among the drafters] that the mere fact that refugees stopped while in transit [in another state] ought not deprive them of" protection in the country where they ultimately claim asylum. *R v. Asfaw* [2008] UKHL 31, [56] (Lord Hope of Craighead) (U.K.).

¶ 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 6 ¶ 17. Those safeguards—detailed below in Section III(D)—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.* at 6 ¶¶ 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.

B. The IFR May Return Refugees to Persecution, in Violation of Article 33 of the 1951 Convention.

The IFR's closure of the asylum system to large numbers of asylum-seekers, when implemented in conjunction with the INA's removal procedures, is likely to result in a return to persecution for

some refugees. Under the INA, refugees who are denied the right to seek asylum under the IFR, and who cannot satisfy the more stringent requirements for other forms of protection from removal, *see infra* § III(C), may be deported to the very countries they have fled due to persecution. *See supra* note 4. Such a refugee may be *refouled* to his or her home country either directly, or indirectly through return to a transit country where effective protection is not guaranteed, a process known as "chain *refoulement*." Such a return to a place of persecution, whether direct or indirect, is not consistent with Article 33(1) of the 1951 Convention.

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, Note on International Protection ¶ 11; Exec. Comm. of the High Commissioner's Programme, Note on *Non-Refoulement* ¶ 19, U.N. Doc. EC/SCP/2 (1977); Elihu Lauterpacht & Daniel Bethlehem, *The Scope & Content of the Principle of* Non-Refoulement, *in* Refugee Protection in International Law 87, 116–18 (Erika Feller et al. eds., 2003).

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. Note on International Protection ¶ 10; Handbook 9. 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." Note on International Protection ¶ 10. 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 ¶ 5 (Jan. 31, 1994); Lauterpacht & Bethlehem, *supra*, at 149–63.

The IFR does not comply with Article 33(1)'s prohibition against *refoulement*. By denying aliens the right to seek asylum for the sole reason that they have crossed through a third country en route to the United States, the new policy, in conjunction with the INA's removal provisions, places refugees at risk of deportation to the very states that they have sought to escape. *See* 8 U.S.C. § 1231(b). Such a return to persecution—whether direct or, through chain *refoulement*, indirect—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."[9] Note on International Protection ¶ 10; UNHCR Exec. Comm., Conclusion No. 6 (XXVIII) ¶¶ (a)–(c) (1977).

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[9] Article 33(2) does create narrow exceptions to Article 33(1)'s prohibition against *refoulement*, providing that the "benefit of [Article 33(1)] may not . . . be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community."

Importantly, Article 33(1) would not be satisfied even if those affected by the IFR were returned to third countries instead of their countries of origin. That is, as noted above, because the prohibition against *refoulement* applies even if the return to persecution occurs through "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.).

By permitting the removal of refugees to their countries of origin or to third countries without adequate *non-refoulement* protections, the IFR risks jeopardizing the United States' compliance with this fundamental tenet of international refugee law. Furthermore, it creates the risk that refugees will be denied their rights under the 1951

1951 Convention art. 33(2). However, a state relying on Article 33(2) must determine on an *individualized* basis whether a refugee falls into one of the exceptions, and Article 33(2) is invoked in regards to recognized refugees who had access to asylum procedures and were recognized as such. *See* Lauterpacht & Bethlehem, *supra*, at 136–37.

Convention through an arrangement that does not meet the applicable international standards.

C. Withholding of Removal Is Not a Substitute for the Asylum Process and Does Not Adequately Protect Against Refoulement.

The IFR purports to be consistent with the United States' international law obligations because it does not deny any alien the right to apply for withholding of removal under the INA. *See* IFR, 84 Fed. Reg. at 33,834–35. However, in UNHCR's opinion, withholding of removal does not provide an adequate substitute for the asylum process required to ensure access to rights conferred by the 1951 Convention and 1967 Protocol and does not fully implement Article 33(1)'s prohibition against *refoulement*.

Not all refugees are entitled to withholding of removal. To prove entitlement to withholding of removal under the INA, an applicant "must demonstrate that it is more likely than not that he would be subject to persecution" in his country of origin. *Huang v. Holder*, 744 F.3d 1149, 1152 (9th Cir. 2014) (quoting *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001)). By contrast, an alien is entitled to asylum—and, in UNHCR's view, to protection against *refoulement* under the 1951

Convention—if he makes the lesser showing of a well-founded fear of persecution or past persecution, which requires establishing "to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition [of a refugee] or would for the same reasons be intolerable if he returned there." *Cardoza-Fonseca*, 480 U.S. at 439 (quoting Handbook on Procedures & Criteria for Determining Refugee Status & Guidelines on International Protection, U.N. Doc. HCR/1P/4/ENG ¶ 42 (1st ed. 1979)). *See generally* Handbook ¶¶ 37–50. Accordingly, under the IFR, a refugee who can demonstrate a "well-founded fear of persecution" will be denied asylum and may be denied protection from *refoulement* if he or she cannot also surmount the "higher" bar for entitlement to withholding of removal.[10] *Huang*, 744 F.3d at 1152.[11]

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[10] This higher threshold is all the more difficult to reach given that many asylum-seekers in the United States are not represented by counsel.

[11] UNHCR notes that domestic law CAT protections, *see* 8 C.F.R. § 208.16(c), are also unavailable to all refugees who would otherwise qualify for asylum. Under United States law, aliens can invoke CAT protection only by satisfying a preponderance standard. *Id.* § 208.16(c)(2).

UNHCR recognizes that in *INS v. Stevic*, 467 U.S. 407 (1984), the Supreme Court, noting that withholding of removal reflects the INA's codification of Article 33(1)'s *non-refoulement* principle, held that withholding is available to only those who can prove that it is more likely than not that they will be persecuted on removal. *Id.* at 429–30. UNHCR's position is that Article 33(1) of the 1951 Convention prohibits the *refoulement* of any individual who can make the lesser showing of a "well-founded fear of persecution," during an asylum adjudication procedure. *See generally* Brief of UNHCR as Amicus Curiae at 12–29, *Stevic*, 467 U.S. 407 (No. 82-973). The decision in *Stevic* makes continued access to asylum process under United States law even more urgent.[12]

[12] Withholding of removal is an inadequate substitute for the asylum process that the IFR denies, as asylum is available to all individuals who can make the lesser showing of a "well-founded fear of persecution," even if they cannot satisfy the *Stevic* standard. *Cardoza-Fonseca*, 480 U.S. at 430–32. Accordingly, *Stevic* cannot justify the IFR's categorical denial of the right to seek asylum. UNHCR notes that withholding of removal also does not guarantee all of the rights to which refugees are entitled under domestic and international law, including family unification and permanent residency. *See* 1951 Convention art. 34; Handbook ¶¶ 182–83; U.S. Dep't of Justice, Fact Sheet: Asylum & Withholding of Removal Relief, Convention Against Torture Protections 1–8 (2009).

Though the grant of asylum under United States domestic law is characterized as discretionary in a given case, in enacting the Refugee Act, "Congress intended to protect refugees to the fullest extent of [the United States'] international obligations." *Yusupov*, 518 F.3d at 203. Under the 1951 Convention and 1967 Protocol, scope to deny access to asylum procedures for those seeking international protection is limited to properly arranged transfers under agreements with third safe countries that, as discussed below, require close scrutiny to protect refugees' rights. Such agreements must ensure that a number of procedural safeguards are in place and that standards are met. *See infra* § III(D). International refugee law does not otherwise give states discretion to deny access to asylum procedures and refugee status to those meeting the definition of a refugee set forth in Article I of the 1967 Protocol.[13] *See* Handbook ¶¶ 28–31; *M.S.S. v. Belgium &*

[13] As noted above, the 1951 Convention and 1967 Protocol provide for the exclusion of refugees found to have met the criteria for persecution (the "inclusion" criteria), but found to be barred from that status for certain serious acts (the "exclusion" criteria). *Supra* pp. 14–15. Such exclusions are not discretionary denials of asylum, but rather the outcome of a fair and efficient asylum procedure which first assesses the criteria for inclusion as a refugee and then goes on to assess the criteria for exclusion.

Greece, 2011-II Eur. Ct. H.R. 255, 272 (2011); *see also* Onward Movement Guidance 13 ¶ 40 ("Under no circumstances . . . can a State, by way of a penalty for not coming directly . . . prevent asylum seekers or refugees . . . from applying for asylum or accessing an asylum procedure, or impose procedural or other requirements or preconditions which would in practice prevent refugees from applying or accessing such a procedure.").

D. The IFR Is Inconsistent with Principles Permitting Transfers of Responsibility for Asylum Claims & Refugee Protection.

In its briefing, the United States has justified the IFR by arguing that the IFR is similar to permissible multilateral agreements that, with procedural safeguards, protect the rights of refugees and advance the principle of international burden-sharing. *See* Appellant Br. 19 (No. 19-16487) (suggesting that the IFR is "in keeping with the efforts of other liberal democracies to prevent forum-shopping by directing asylum-seekers to present their claims in the first country in which they arrive" (quoting IFR, 84 Fed. Reg. at 33,840)). However, there are important differences between permissible burden-sharing agreements among states and the IFR, which is not such a permissible

arrangement, is being implemented in the absence of such an arrangement enshrining the applicable international standards, and thus remains significantly at variance with international legal principles.

UNHCR acknowledges that the onward movement of asylum-seekers can pose significant challenges for states receiving large numbers of claims. *See* Onward Movement Guidance 3 ¶10. Although primary responsibility for an asylum claim rests with the country to which the claim is made, and though "[t]here is no obligation under international law for a person to seek international protection at the first effective opportunity," refugees do not enjoy an unfettered right to choose their country of asylum. *Id.* at 5 ¶ 14. Accordingly, in limited circumstances and with sufficient procedural safeguards, states may, through bilateral or multilateral agreements, arrange for another country to assume responsibility for adjudicating individual asylum claims. *Id.* at 6 ¶ 17.

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. at 6 ¶¶ 17–18; 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 2 ¶ 4 (2018) [hereinafter UNHCR, 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 1967 Protocol is not sufficient to validate a transfer. *See* UNHCR, Third Country Legal Considerations 4 ¶ 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.[14] UNHCR, Onward Movement Guidance 8 ¶ 22.

The IFR lacks the aforementioned safeguards that would allow the United States to transfer responsibility for asylum claims to third

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[14] In some circumstances, transfers of asylum-seekers under a bilateral or multilateral arrangement have been carried out in the absence of an individual assessment. UNHCR, Onward Movement Guidance 8 ¶ 22. However, transfers under such arrangements are permissible only with "both the existence and availability of . . . objective standards of protection in the third state," and only where the states involved have similar asylum systems and safeguards. UNHCR, Third Country Legal Considerations 2 ¶ 5; UNHCR, Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees & Asylum-Seekers 3 ¶ 13 (2002). Moreover, individualized inquiries are always required in cases of particularly vulnerable groups, including unaccompanied and separated children. UNHCR, Onward Movement Guidance 8 ¶ 22.

countries. Fundamentally, the IFR 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 should 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 IFR may be removed to any number of states, including the very states whence 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.

Nor would the IFR satisfy the requirements for permissible claim-transfers even if it contained a mechanism for transferring asylum claims to a third country. Nothing in the IFR examines whether third countries will guarantee asylum-seekers access to asylum process, will in fact able to ensure their physical safety, or will provide them treatment consistent with the 1951 Convention. The IFR is also being implemented in a way that fails to conduct such an

examination on an individualized basis. UNHCR, Onward Movement Guidance 7 ¶ 22.

In its briefing, the United States observes that UNHCR acknowledged aspects of the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities ("Dublin Convention"), June 15, 1990, 1997 O.J. (C 254), as a "commendable effort[] to share and allocate the burden of review of refugee and asylum claims" among states. Appellant Br. 19 (No. 19-16487) (quoting IFR, 84 Fed. Reg. at 33,840).[15] However, the IFR differs from the Dublin Convention in important ways.

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[15] The quoted portion of the IFR in turn quotes from a 1991 UNHCR guidance, the UNHCR Position on Conventions Recently Concluded in Europe (Dublin & Schengen Conventions), 3 Eur. Series 2, 385 (1991). This document is one in a series of UNHCR documents relevant to European Union refugee law. In the exercise of its supervisory responsibility, UNHCR has worked closely with the European Union and its member states and has repeatedly offered expertise on ways in which common asylum agreements, such as the Dublin Convention, can be implemented in accordance with international law. In this engagement, UNHCR has routinely reasserted the principles of permissible transfer agreements that protect underlying refugee rights described in this brief. *See, e.g.*, UNHCR, Revisiting the Dublin Convention: Some Reflections by UNHCR in Response to the Commission Staff Working Paper (2001).

First, unlike the IFR—which is a mechanism for denying access to asylum and returning asylum-seekers to countries of origin or third states without a guarantee of effective protection or a fair and efficient asylum process—the Dublin Convention provided for the transfer of asylum-seekers to specific third states within Europe that were both willing and able to provide transferred individuals with protection, support, and a fair and efficient asylum process. *See T.I. v. United Kingdom*, 2000-III Eur. Ct. H.R. 435, 446 (2000).

Second, the states party to the Dublin Convention had generally similar resources and asylum systems, and the transfer mechanism was mutual, not unidirectional. These features of the Dublin Convention, which was concluded in the context of a broader European integration and cooperation framework, helped to advance, rather than undermine, the principle of international burden-sharing. By contrast, by enabling the United States to deport refugees to other states, the IFR unilaterally shifts the burden for asylum adjudication to states that may, in relation to the United States, have a lesser capacity to "receive refugees, address their basic needs and provide

them with international protection." UNHCR, Onward Movement Guidance 17 ¶ 53.

Third, the Dublin Convention was implemented within the framework of the European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221, giving asylum-seekers the opportunity to contest transfer decisions. *See, e.g.*, *T.I.*, 2000-III Eur. Ct. H.R. at 456–57. The IFR does not provide for such a right, and, as noted above, withholding of removal is not an adequate substitute as it is not available to all refugees.

UNHCR fully recognizes that, in some circumstances, states may need to turn to other countries to respond to the "significant challenges posed by onward movement of refugees and asylum-seekers." UNHCR, Onward Movement Guidance 3 ¶ 9. However, as "unilateral responses motivated by a desire to deter the arrival of people who have moved onward run the risk of simply deflecting or exacerbating the problem," states must respond in a manner that both protects asylum-seekers' basic right to seek asylum and advances principles of international burden-sharing. *Id.* at 17 ¶ 53. The implementation of the IFR does not comply with these requirements.

CONCLUSION

UNHCR is concerned that the new asylum policy reflected in the IFR is at variance with the United States' obligations under international law, and respectfully requests the Court to consider those obligations when evaluating the legality of the policy and the propriety of the injunction issued by the district court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rules of Appellate Procedure 29 and 32, the foregoing Brief of Amicus Curiae is printed in a proportionally spaced, serif typeface of 14-point, and contains 6,487 words, excluding words in sections identified as exempted in Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I certify that on October 15, 2019, I caused the foregoing Brief of Amicus Curiae to be filed with the Clerk of the United States Court of Appeals for the Ninth Circuit through the Court's CM/ECF system. Counsel in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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