UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

v.

WILLIAM P. BARR, Attorney General of the United States, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California, No. 3:19-cv-04072 (Tigar, J.)

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

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STATEMENT OF AMICI'S INTEREST[1]

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

SUMMARY OF THE ARGUMENT

The new third country asylum rule is inconsistent with the text, structure, and history of the asylum provisions in the Immigration and Nationality Act (INA). The INA's framework prioritizes protection of asylum seekers from persecution in their home country. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (holding that an asylum claimant can demonstrate a "well-founded fear" by showing a ten percent chance that she would be "shot, tortured, or otherwise

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

persecuted" in her country of origin). The new rule conflicts with this priority on refugee protection by imposing a sweeping new categorical bar that disregards the safeguards Congress placed on *express* categorical asylum restrictions concerning the same topic.

The third country rule categorically bars the asylum claims of persons fleeing persecution in their home country who passed through virtually *any* third country—no matter how briefly—before claiming asylum in the United States. The government's asserted authority for the third country asylum rule violates the specificity canon, which counsels reading a general provision narrowly to mesh with more specific sections on concrete problems. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank,* 566 U.S. 639, 645 (2012) (Scalia, J.) (citing the "'commonplace of statutory construction that the specific governs the general'"). As authority for the new rule, the government cites a general subsection in the INA's asylum provision stating that "[t]he Attorney General may … establish additional limitations and conditions, *consistent with this section*." 8 U.S.C. § 1158(b)(2)(C) (emphasis added). Under the specificity canon, the requirement that a rule be "consistent with this section" entails reckoning with the asylum provision's specific limits. Instead of reconciling this authority with the asylum provision's specific guidance on asylum seekers' passage through third countries, the new rule disregards that guidance.

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

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

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

Similarly, the bar for safe third country agreements is high and requires an express agreement with a foreign state, along with findings by the United States that an asylum seeker will not face persecution in that state and that the state has built a fair system of asylum adjudication. 8 U.S.C. § 1158(a)(2)(A). The United States views these conditions as demanding; indeed, it has concluded such an agreement with only one country—Canada—whose commitment to rule of law institutions parallels our own.[2] The U.S.-Canada agreement includes robust safeguards and emerged from extensive consultation with the United Nations High Commissioner for Refugees (UNHCR).

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

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[2] *See* Agreement on Safe Third Country, U.S.-Can., Dec. 5, 2002, https://www.refworld.org/pdfid/42d7b9944.pdf.

ARGUMENT

I. THE INA PRIORITIZES PROTECTION OF ASYLUM SEEKERS

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

The preliminary screening criteria used by asylum officers reinforce this prioritization of protection from harm. To trigger further proceedings instead of removal, an asylum officer must find that a foreign national at the border who lacks a visa or has sought to enter through fraud has a "credible fear" of persecution in her country of origin. 8 U.S.C. § 1225(b)(1)(B)(ii). Congress crafted the "credible fear of persecution" standard used in initial screenings to filter out manifestly unfounded claims but preserve a full hearing before a Department of Justice Immigration Judge (IJ) for other asylum applications. A more demanding initial test would filter out too many colorable claims for asylum and increase the risk that the United States would return claimants to a country in

which they could be "shot, tortured, or otherwise persecuted"—the very outcomes that the Supreme Court in *Cardoza-Fonseca* said Congress wished to prevent. *Cardoza-Fonseca*, 480 U.S. at 440.

Reinforcing this protective priority in preliminary asylum screening, the INA defines the "credible fear" threshold as a "significant possibility" that the claimant "*could* establish eligibility for asylum." 8 U.S.C. § 1225(b)(1)(B)(v) (emphasis added). Notably, Congress did not require *certainty* at this preliminary stage that the claimant would ultimately obtain asylum, or even a preponderance of the evidence. Instead, Congress opted for a standard that prioritized safety for asylum seekers during preliminary screening.

II. THE THIRD COUNTRY ASYLUM RULE IS INCONSISTENT WITH THE STATUTORY SCHEME OF THE INA

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

The specificity canon is particularly compelling for statutes in specialized areas of law, such as immigration or bankruptcy, where Congress "'has enacted a

comprehensive scheme and has deliberately targeted specific problems with specific solutions.'" *RadLAX*, 566 U.S. at 645 (citation omitted). In a statute's specific provisions, Congress has balanced the interests of myriad stakeholders. *Id*. A judicial outcome or agency rule that construes a general term as prevailing over a more specific statutory provision risks upsetting that balance and injecting uncertainty into the legislative drafting process.

Interpreting the bankruptcy statute, the Supreme Court has recently invoked the specificity canon to maintain the balance that Congress struck between debtors and creditors. The Court read narrowly the bankruptcy court's power to approve plans that would eventually grant creditors the "equivalent" of their claims. *RadLAX*, 566 U.S. at 644-645. The broader reading of the plan-approval power urged by a debtor in bankruptcy would have allowed the bankruptcy court to force a creditor to contribute additional cash to purchase existing collateral, thus clashing with specific provisions of the bankruptcy statute that expressly gave the creditor the right to offset the purchase price by the amount the debtor *already* owed. *See id.* at 645 (terming the broader reading of the plan-approval power "hyperliteral and contrary to common sense").[3]

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[3] *See also Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 978, 984 (2017) (holding that a bankruptcy judge could not include terms in a *dismissal* of a Chapter 11 bankruptcy that disrupted the specific priorities set by Congress for payment among creditors in a bankruptcy *plan*).

If Congress intended such a "major departure" from the statutory scheme, one would expect to see "some affirmative indication of [Congress's] intent," not the amorphous contours of a general grant of authority. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 984 (2017) (explaining that Congress does not "'hide elephants in mouseholes'" (quoting *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001))). The same deference to specific language should govern interpretation of the INA's asylum provision, including the scope of the government's power to promulgate rules "consistent with this section." 8 U.S.C. § 1158(b)(2)(C). Demonstrating the role of the asylum provision's specific terms requires a closer look at Congress's express categorical bars addressing asylum seekers' passage through third countries: The firm resettlement and safe third country agreement provisions.

III. THE THIRD COUNTRY ASYLUM RULE DISREGARDS THE FIRM RESETTLEMENT DOCTRINE'S 70-YEAR HISTORY

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

nature, purposes, and application. *See Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 57 n.6 (1971) (noting that mere "stops along the way" in a refugee's journey to a final destination did not vitiate her claim for asylum).

A. Post-World War II Refugees And The Origins Of Firm Resettlement

Firm resettlement had its origins in the aftermath of World War II, in which decimated Central European capitals such as Vienna and Berlin teemed with hundreds of thousands of refugees and displaced persons. The victorious allies, including the United States, faced the problem of finding permanent homes for these survivors of the global conflict's carnage and the relentless persecution engineered by Nazi Germany and its collaborators. Acting through the new United Nations General Assembly, the United States and its allies, along with many other states, pooled their efforts in a multi-national entity called the International Refugee Organization (IRO). *See Displaced Persons in Europe*, S. Rep. No. 80-950, at 2 (as reported by S. Comm. on the Judiciary, Mar. 2, 1948).

Acting under this U.N. mandate, the IRO assumed responsibility for assisting refugees in finding new homes. To aid in resource allocation, the IRO fashioned the concept of firm resettlement, which allied powers such as the United States soon adopted in the enactment of domestic legislation for refugee aid. S. Rep. No. 80-950, at 9. The adjective "firm" is telling, since it connoted durable rights, possessions, and ties that were utterly foreign to refugees' tenuous

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

B. Congress Responds To The Post-War Crisis

Congress used the term "firmly resettled" in the Displaced Persons Act of 1948, S. Rep. No. 80-950, at 50, and continued to use that term in further legislation that addressed persistent refugee needs in the post-war era. For example, Congress again expressly included language covering those "not … firmly resettled" in its 1950 Act to Amend the Displaced Persons Act of 1948. Pub. L. No. 81-555, § 1, 64 Stat. 219 (1950) (amending § 2(c) of the Displaced Persons Act of 1948). Congress also expressly referred to the term in the Refugee Relief Act of 1953. Pub. L. No. 83-203, § 2(a), 67 Stat. 400.

Indeed, by the early 1950s, the contours of firm resettlement had crystallized in international law. The 1951 Convention Relating to the Status of Refugees, which the United States adopted when it ratified the 1967 Refugee Protocol, included the same focus on resource allocation that had driven the efforts of the IRO and informed Congress's efforts to aid displaced persons.[4] The 1951 Refugee

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[4] Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 ("1951 Refugee Convention"), https://treaties.un.org/doc/Publication/UNTS/Volume%20189/v189.pdf ; *see also* Sloane, *An Offer of Firm Resettlement*, 36 Geo. Wash. Int'l L. Rev. 47, 49-50 (2004) (discussing history).

Convention paired a functional and a formal approach to defining firm resettlement. Setting out a functional approach, the Convention excluded from coverage any "person who is recognized by the competent authorities of the country in which he has taken residence as having the *rights and obligations* which are attached to the possession of the nationality of that country." 1951 Refugee Convention, art. 1(E), at p.156 (emphasis added). In case this formulation was too vague, the Convention also presented a more formal alternative specifically tied to the acquisition of citizenship, which excluded any person who "has acquired a new nationality, and enjoys the protection of the country of his new nationality." *Id.*, art. I(C)(3), at p.154.

Under international law, firm resettlement's functional "rights and obligations" prong contemplated permanence and stability. Any more ephemeral or contingent test would have undermined the meaning of the firm resettlement criterion and eroded refugee protections.

Refugee protections in the 1950s and 1960s underscored the permanence and stability at the heart of the firm resettlement criterion; Congress *never* wavered. Indeed, the only dispute that arose in interpretation of statutory protections was whether Congress had, starting in 1957, turned to a *formal* definition of firm resettlement hinging on citizenship that would have *narrowed* the concept's application and thus provided even more expansive refugee

protections. The Supreme Court read the statute as retaining a functional focus. *See Rosenberg*, 402 U.S. at 55-56. In so doing, however, the Court highlighted the importance of stability in the definition of firm resettlement.

In *Rosenberg*, the Court noted that U.S. immigration agencies such as the Justice Department's Immigration and Naturalization Service (INS) continued to apply the functional approach, requiring that the foreign national had "established roots or acquired a residence in a country other than the one from which he fled." 402 U.S. at 51. Vacating and remanding a decision below that had viewed firm resettlement as irrelevant unless accompanied by the formality of citizenship, the Court cited to the functional "rights and obligations" language found in the 1951 Refugee Convention language and several other U.N. documents. *Id.* at 56 n.5.

Expanding on the criteria associated with the functional approach, the Court observed that the petitioner was a Chinese national who had fled China for Hong Kong several years after the Communist regime assumed power and had lived there for six years, starting a business that had led to promotional travel to the United States. *Rosenberg*, 402 U.S. at 50. The Court noted that the petitioner, while he was not a British or Hong Kong national, had "valid Hong Kong identity papers enabling him to return and live there." *Id.* at 56 n.5. According to the Court, these enduring rights could indicate that he was part of a fortunate group of individuals who formerly met the refugee definition, but were now firmly resettled,

because they had "found shelter in another nation and had begun to build new lives." *Id.* at 56.

In suggesting the possibility that the applicant in *Rosenberg* had resettled, the Court interpreted the term "fled" in the 1965 immigration amendments as distinguishing between those still in the *process* of flight and those whose flight had finally culminated in a new and permanent home. To stress the narrow scope of the firm resettlement bar, the Court recognized the peripatetic nature of refugees' reality. As the Court observed, firm resettlement "does not exclude from refugee status those who have fled from persecution and who make their flight in successive stages. … Certainly many refugees make their escape to freedom from persecution in successive stages and come to this country only after stops along the way. Such stops do not necessarily mean that the refugee's aim to reach these shores has in any sense been abandoned." 402 U.S. at 57 n.6.

C. Firm Resettlement Through The Prism Of Congress's Repeated Efforts To Aid Refugees After World War II

Perhaps the best indication that Congress fully appreciated the difficulty of firm resettlement was the pattern of legislative efforts over time to resolve the refugee crisis caused by World War II. President Truman predicted in his signing statement for the 1948 legislation that—given the challenges that the global

conflict had created—Congress's first foray into this area would be but a first step.[5] Indeed, President Truman criticized as unduly rigid the restrictions Congress had imposed on refugee assistance and Congress's reluctance to loosen the national origin quotas that made special refugee legislation imperative. *See* Truman 1948 Signing Statement 21.

Amendments by Congress in 1950 were an acknowledgment of President Truman's prescience, as they expanded refugee protections. Rather than limit protections to victims of persecution who had entered allied zones in Germany, Austria, or Italy by December 1945—a cut-off date that President Truman had criticized as arbitrary—the 1950 Act protected persons who had found their way to the allied zones by January 1, 1949. *See* Act to Amend the Displaced Persons Act of 1948, § 1, 64 Stat. 219. However, more work remained, as President Eisenhower declared in *1960*, in surveying the ongoing European crisis that he knew so well from his wartime experience. *See Message from the President Relative to Urging the Liberalization of Some of Our Existing Restrictions upon Immigration*, H.R. Doc. No. 86-360, at 2 (1960). In conjunction with the United Nations, President Eisenhower declared 1960 to be World Refugee Year. As the Senate Judiciary Committee Report accompanying the 1960 Refugee Fair Share

[5] *See Signing of the Displaced Persons Act of 1948–Statement by the President*, 19 Dep't St. Bull. 21-22 (1948) ("Truman 1948 Signing Statement").

Act, Pub. L. No. 86-648, 74 Stat. 504, observed, "[t]here remain in Europe at the present time a residue of displaced persons and refugees" covered by the UNHCR's *1950* mandate. *See* S. Rep. No. 86-1651, at 5 (1960).

Addressing this persistent "residue" required an "internationally concerted effort … to find resettlement opportunities." S. Rep. No. 86-1651, at 5-6. Congress's "primary purpose," which it shared with the United Nations, was to "close the several refugee camps still maintained after the *15 years* which have elapsed since the end of World War II." *Id.* at 6 (emphasis added). The need for continued congressional action 15 years after the end of the war illustrated the difficulty of the resettlement task. Indeed, the ongoing need to address refugees' persistent problems is the ineluctable backdrop for all firm resettlement efforts.

D. Case Law And Current Statute And Regulations

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

whether an outstanding offer of resettlement is available to the applicant in a third country and the public interest involved in the specific case." *Id.* at 315.

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

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

Id. at 473-474.

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

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

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

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

By issuing the third country asylum rule, the government has in one fell swoop decimated these finely crafted exceptions, as well as the firm resettlement doctrine's focus on safety and permanence. Indeed, the new rule devastates the overall system of asylum adjudication established by Congress, precluding asylum for anyone who has entered or sought to enter the country at the southern border. It strains credulity to believe that Congress would have regarded such a sea change in asylum adjudication as "consistent with this section." 8 U.S.C. § 1158(b)(2)(C).

IV. THE THIRD COUNTRY ASYLUM RULE FAILS TO MEET THE RIGOROUS CRITERIA REQUIRED FOR SAFE THIRD COUNTRY AGREEMENTS

Just as the third country rule sidesteps the constraints of the well-established definition of firm resettlement, the new rule subverts the safe third country agreements authorized by Congress in 8 U.S.C. § 1158(a)(2)(A). The United States has been exceptionally sparing in entering into such agreements, concluding a pact with only one country: Canada. *See* Agreement on Safe Third Country, U.S.-Can., Dec. 5, 2002 ("Canada Third Country Agreement"), *supra* note 2. That agreement features exhaustive safeguards for asylum seekers and methodical monitoring from both parties to ensure that removal of foreign nationals under the agreement will comply with Congress's goal of protection from persecution and "access to a full and fair procedure for determining a claim to asylum." 8 U.S.C. § 1158(a)(2)(A). The new rule circumvents all of these protections.

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

In addition, each party will provide: (1) "an opportunity for the applicant to understand the basis for the proposed determination"; (2) a chance to correct the record and offer further information; and (3) review by an independent decisionmaker. Canada Third Country Agreement (Statement of Principles No. 4). Both Canada and the United States have also committed to a latticework of oversight mechanisms. In Canada's case, these mechanisms include access to Canada's Federal Court, a formal dispute resolution mechanism for the two countries, and "partnership" with the UNHCR. *See* U.S. Citizenship & Immigration Services, *Report: U.S.-Canada Safe Third Country Agreement*, Ch.

4(A)(3) (Nov. 16, 2006) ("*U.S.-Canada Agreement Review*"), https://www.uscis.gov/unassigned/us-canada-safe-third-country-agreement.

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

In sum, the Canada Third Country Agreement pooled the efforts of two states with longtime commitments to the rule of law. It relied on close collaboration with UNHCR, the world's leader on refugee protections. Moreover, it provided a systematic process for adjudication of exceptions to the agreement, backed up by strong procedural protections and consultation with established outside actors.

Unlike the safe third country agreements authorized under § 1158, the new third country asylum rule does not entail an agreement between states or U.S. findings that a third country will be safe for refugees and will employ "full and fair" procedures in adjudicating asylum or other protection. Instead, the rule bars asylum for those who have not filed for protection in a third country, without any bilateral agreement or findings about whether that country can protect asylum seekers from persecution or establish a fair and thorough system for adjudicating asylum claims. Under the new rule, mere ratification of the principal international agreements on refugees suffices to wipe out otherwise meritorious claims, despite the marked variations noted by the district court in the fairness of third countries' asylum procedures as well as the status and safety they provide to refugees. *See East Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 952-955 (N.D. Cal. 2019).

The new rule's departure from previous practice surrounding the United States' current safe third country agreement with Canada—the one and only such agreement to date—is even more pronounced. The new rule contains none of the safeguards of that robust agreement. For example, the new rule does not mandate consultation with rigorous interlocutors such as the UNHCR, who have decades of experience in assessing refugees' claims dating back to the aftermath of World War II. Indeed, as the district court observed, the UNHCR has identified "strong

obstacles to accessing the asylum procedure" in Mexico—the third country most relevant to the new rule. *East Bay*, 385 F. Supp. 3d at 954. Those obstacles include the "'absence of proper protection screening protocols'" such as the U.S. "credible fear" process, the need for claimants to take "'dangerous routes'" controlled by criminal gangs to reach asylum offices, and the risk of "'sexual and gender-based violence'" for women and girls. *Id.*

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

Tellingly, the government does not even attempt to argue that its third country rule includes the safeguards of either safe third country agreements or firm resettlement under § 1158. Instead of asking whether the new rule undermines the effect of the specific provisions that Congress enacted, *RadLAX*, 566 U.S. at 645, appellants ask only whether the INA expressly "prohibits [the] rule." U.S. Br. 3 (Dkt. 34-1). That narrow test for inconsistency does not fit the specificity canon, which—like all interpretive canons—applies precisely when the text does not provide a clear answer. Scalia & Garner, *Reading Law* 59 (noting that "[p]rinciples of interpretation are guides to solving the puzzle of textual

meaning"); *see also id.* at 183 (specificity canon operates "when conflicting provisions simply cannot be reconciled"). Indeed, resort to the canon is unnecessary when a statute *expressly prohibits* the proposed rule. Instead, the touchstone for the specificity canon is the new categorical rule's *effects*, which would disrupt Congress's handiwork on asylum adjudication.

The new rule's categorical approach undermines the effect of the INA's limitations on safe third country agreements and firm resettlement and therefore disrupts Congress's comprehensive framework for asylum protection. It thus exceeds the government's discretion under 8 U.S.C. § 1158(b)(2)(C) to promulgate only rules that are "consistent with" the INA's asylum provision.

CONCLUSION

For the aforementioned reasons, this Court should uphold the preliminary injunction against the third country asylum rule issued by the district court.

Respectfully submitted,

/s/ Alan E. Schoenfeld

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FOR THE NINTH CIRCUIT

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APPENDIX

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I hereby certify that on this 14th day of October, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: October 14, 2019

/s/ Alan E. Schoenfeld
ALAN E. SCHOENFELD