[ORAL ARGUMENT NOT YET SCHEDULED]

No. 19-5272

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

O.A., *ET AL.*,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, *ET AL.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia, No. 18-cv-02718-RDM
Before the Honorable Judge Randolph D. Moss

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

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August 3, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

A. Parties And Amici Curiae

Except for the amici joining this brief and any other amici who had not yet entered an appearance in this case as of the filing of the appellants' brief, all parties, intervenors, and amici appearing before the district court and this Court are listed in the appellants' brief.

B. Rulings Under Review

References to the ruling at issue appear in the appellants' opening brief.

C. Related Cases

The only related case of which undersigned counsel is aware appears in the appellants' opening brief.

D. Statutes and Regulations

Pertinent statutes and regulations are contained in the Statutory Addendum filed by Appellants, Doc. No. 1843476

/s/ David Lesser
DAVID LESSER

August 3, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amici curiae state that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

D.C. CIRCUIT RULE 29(d) STATEMENT

The amici joining in this brief are filing a separate brief from other amici.

The amici joining this brief have a unique perspective—that of 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 Accordingly, a separate brief is necessary.

/s/ David Lesser
DAVID LESSER

August 3, 2020

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STATEMENT OF INTEREST AND SOURCE OF AUTHORITY[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 are:[2]

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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.

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INTRODUCTION

The plain language, plan, and structure of both the Refugee Act of 1980 ("Refugee Act"), Pub. L. No. 96-212, § 208, 94 Stat. 102, 105, and the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101 *et seq.*, support threshold eligibility for asylum for any foreign national "at a land border *or* port of entry." Refugee Act § 208(a), 94 Stat. at 105 (emphasis added); *see* 8 U.S.C. § 1158(a)(1) (providing that "*[a]ny alien* … who arrives in the United States (*whether or not at a designated port of arrival*) … may apply for asylum" (emphases added)). The Department of Homeland Security (DHS) rule and presidential proclamation clash with this statutory language and Congress's commitment to eligibility for all arriving asylum seekers.

The language of the INA did not emerge in a vacuum. Rather, it was the end-product of a lengthy procession of committee hearings, bipartisan deliberations, and consultations with the White House. The resulting compromise reflected legislators' understanding that asylum was "a cherished thing." *See Proposals to Reduce Illegal Immigration and Control Costs to Taxpayers: Hearing on S. 269 Before the S. Comm. on the Judiciary*, 104th Cong. 23 (1995) (statement of Sen. Alan K. Simpson) ("Simpson Stmt."). Yet the current language at 8 U.S.C. § 1158(a)(1) also illustrates some legislators' keenness for stricter asylum procedures, including more summary processing, increased detention of arriving

foreign nationals, and time-limits for asylum claims. *See Immigration in the National Interest Act of 1995: Hearing on H.R. 1915 Before the H. Comm. on the Judiciary*, 104th Cong. 2 (1995) (statement of Rep. Lamar Smith) ("Smith Stmt.").

The restrictions in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 were controversial—they engendered opposition on legal and policy grounds that continues to the present day. In this case, that controversy is precisely the point. IIRIRA represented a hard-fought compromise to achieve both access to asylum and stricter procedure. The DHS rule seeks to undo the compromise Congress reached.

As Congress heard in deliberations on what ultimately became the Refugee Act of 1980, preserving all arriving asylum-seekers' threshold eligibility serves vital humanitarian purposes. In testimony before the House Foreign Relations Committee, David A. Martin, a State Department lawyer who subsequently served as a senior government attorney on immigration and became a leading immigration scholar, explained that people flee persecution through any means available to them, and "one way or another, arrive on our shores" seeking refuge. *The Refugee Act of 1979: Hearing on H.R. 2816 Before the H. Subcomm. on Int'l Operations, Comm. on Foreign Affairs*, 96th Cong. 72 (1979) (statement of David A. Martin) ("Martin Stmt."). The logic of Professor Martin's comment and the INA's long

textual commitment to the principle of threshold eligibility for all arriving asylum seekers is clear: Asylum seekers cannot simply choose the location of their arrival. Since asylum seekers often flee for their lives and may travel through third countries that are also unsafe, the particular location of the asylum seekers' arrival "on our shores" has no necessary relation to either the asylum seekers' character or to the merits of their claims.

In Congress's scheme, preserving asylum-seekers' *threshold* eligibility leaves room for denials on categorical grounds recognized by Congress and for the exercise of case-by-case discretion. For example, IIRIRA imposes categorical bars hinging on an applicant's criminal record and ongoing threat to the country, threat to national security, and resettlement in another country prior to arriving in the United States. 8 U.S.C. § 1158(b)(2)(A)(ii)-(iv), (vi).

In addition to the categorical bars, IIRIRA provides that "[t]he Attorney General may by regulation establish additional limitations and conditions, *consistent with this section*." 8 U.S.C. § 1158(b)(2)(C) (emphasis added). While further exercises of official discretion have a valuable ongoing role in asylum determinations, that discretion is not boundless. The statute's requirement that discretion be "consistent with this section" includes adherence to the underlying principle of *threshold* eligibility for all arriving aliens.

As an agency precedent held over thirty years ago, an applicant's manner of entry should influence discretion on a case-by-case—not categorical—basis. A decisionmaker should treat manner of entry as "one of a number of factors," including whether the claimant has sought asylum in another country before applying in the United States. *Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987), *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). Manner of entry "should not be considered in such a way that the practical effect is to deny relief in virtually all cases." *Id*.

Ignoring this longtime practice, the DHS rule imposes a categorical bar that results in denial of asylum claims filed by foreign nationals arriving at undesignated border points at the southern border. In place of asylum, the DHS rule would limit foreign nationals seeking refuge to withholding of removal or relief under the Convention Against Torture (CAT), which impose much higher standards of proof on the applicant fleeing harm and do not provide lasting protection against removal. When it considered this question earlier this year, the Ninth Circuit agreed that the DHS rule's categorical denial of asylum is therefore not "consistent with" the INA. *See East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1272 (9th Cir. 2020). For the same reason, the Proclamation accompanying the rule is beyond the President's power under 8 U.S.C. § 1182(f).

ARGUMENT

I. THE DHS RULE RUNS COUNTER TO THE PLAIN MEANING OF THE INA'S ASYLUM PROVISIONS

In the IIRIRA, Congress expressly provided that foreign nationals fleeing persecution can "apply for asylum" at any point along a U.S. land border, "*whether or not at a designated port of arrival*." 8 U.S.C. § 1158(a)(1) (emphasis added). IIRIRA's provision for arriving asylum-seekers' threshold eligibility reinforced plain language in the Refugee Act of 1980. Refugee Act of 1980 § 208(a), 94 Stat. at 105 (authorizing asylum applications "at a land border" of the United States). The legislative text is thus manifestly inconsistent with the DHS rule's categorical denial of asylum for foreign nationals who arrive at undesignated border locations. Moreover, the rule's effort to force asylum seekers toward more contingent remedies such as withholding of removal and relief under the CAT is inconsistent with both the plain meaning of the asylum provisions and Congress's deliberate prioritizing of asylum over withholding and CAT relief.

A. Plain Meaning

As part of the Refugee Act of 1980's effort to "provide a permanent and systematic procedure for the admission … of refugees," Pub. L. No. 96-212, § 101(b), 94 Stat. at 102, Congress authorized asylum claims by any foreign national "physically present in the United States *or* at a land border or port of entry." *Id*. § 208(a), 94 Stat. at 105 (emphasis added). This language reflected

Congress's explicit decision not to condition eligibility for asylum on an applicant's manner of entering the United States. Under this section, any foreign national "physically present in the United States" could establish asylum eligibility regardless of whether the individual entered without inspection (EWI). *See id.* § 208(a), 94 Stat. at 105; *see also* 8 U.S.C. § 1158(a)(1). The section's inclusion of persons "at a land border *or* port of entry" also recognized the importance of broad access to asylum.

Congress amended this text in 1996 to reinforce its adherence to the threshold eligibility of asylum seekers who arrived at *any point* along a land border. Much of IIRIRA reflected Congress's keenness for stricter asylum procedures. Nevertheless, the 1996 legislation balanced an array of stricter procedures with even clearer language about locational asylum eligibility. For example, the 1996 text of § 1158(a)(1) provided that "[a]ny alien who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival* and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum." (Emphasis added). *See also East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1272 (9th Cir. 2020).

Compared with the already clear text of the Refugee Act, IIRIRA's language is even more compelling evidence of Congress's commitment to threshold

eligibility of asylum seekers arriving at any border location. The 1996 provision provided a meticulous catalog of arriving asylum seekers. That careful catalog demonstrates Congress's express commitment to the principle of threshold eligibility for asylum seekers who have "one way or another, arrive[d] on our shores," seeking refuge from persecution. *See* Martin Stmt. 72.

B. Congress's Intentional Distinction Between Asylum And Withholding

As the Court explained in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), Congress carefully distinguished in the text of the INA between asylum and the more demanding and contingent remedy of withholding of removal. *Id*. at 436-441. Compared with asylum, withholding of removal—and CAT relief, the other remedy under the new DHS rule available to asylum seekers arriving at an undesignated border point—is both harder to get and easier to lose. *Id.* at 440-441. In addition, only asylum provides a successful applicant with a chance for family reunification. 8 U.S.C. §§ 1158(b)(3)(A), 1157(c)(2)(A). The functional differences between asylum on the one hand, and withholding and CAT relief on the other, demonstrate that Congress's provision for asylum eligibility in § 1158(a)(1) was entirely intentional. By relegating certain asylum seekers to these lesser remedies, the new DHS rule undermines that legislative choice.

The Supreme Court has held that an applicant can satisfy the INA's "well-founded fear" standard by showing a 10% probability of persecution. *See*

Cardoza-Fonseca, 480 U.S. at 440 (holding that "[t]here is simply no room in the…definition [of asylum] for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted … he or she has no 'well-founded fear' of the event happening"). Congress based the 1980 Refugee Act's low standard of proof for asylum "directly" on international law and "intended … [that the asylum standard] be construed consistent" with internationally accepted refugee protections. *See* S. Rep. No. 96-590, at 20 (1980) (cited in *Cardoza-Fonseca*, 480 U.S. at 437). In a telling observation, the Court observed that a preponderance standard requiring a probability of persecution greater than 50% conflicted with Congress's plan. *See Cardoza-Fonseca*, 480 U.S. at 431 (explaining that "[o]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place").

The standard of proof for withholding and CAT relief is far higher than the standard for asylum. Both withholding and relief under the CAT require an applicant to show by a preponderance of the evidence—more than 50%—that she would be subject to persecution (or torture in the case of the CAT) upon return to her country of origin. *See Cardoza-Fonseca*, 480 U.S. at 430 (noting that applicant for withholding must "demonstrate a 'clear probability of persecution'"); *see also DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1965 n.5 (2020) (observing that "[t]o obtain withholding or CAT relief…[the applicant] would need to show 'a greater

likelihood of persecution or torture at home than is necessary for asylum'" (citation omitted)).

Explaining its conclusion that asylum requires a lower standard of proof, the *Cardoza-Fonseca* Court cited a vivid example from the work of a leading scholar of refugee law, who had written that "well-founded fear" would logically follow if "it is known that in the applicant's country of origin *every tenth adult male* person is either put to death or sent to some remote labor camp." 480 U.S. at 431 (emphasis added). DHS's new rule ignores Congress's acknowledgment that a 10% standard of proof fits the exigencies that refugees encounter.

When compared with asylum, withholding and CAT relief are also inherently more contingent and fleeting remedies, providing at best provisional protection for refugees. Reflecting the durability of an asylum grant, an asylee may after one year adjust to lawful permanent resident (LPR) status, providing protection from removal and an eventual pathway to naturalization. 8 U.S.C. § 1159(a)(1)-(2). A grant of asylum also aids family reunification. Congress provided that the spouse and children of an asylee may also be granted asylee status when "accompanying, or following to join" a recipient of asylum. *Id.* §§ 1158(b)(3)(A), 1157(c)(2)(A).

In contrast, withholding and CAT relief are far more tenuous remedies. Neither withholding nor CAT relief vitiates an already-entered removal order or

permits the applicant to adjust to LPR status. *See Nasrallah v. Barr*, 140 S. Ct. 1683, 1687 (2020) (explaining that if a CAT applicant proves "that he likely would be tortured if removed to … [DHS's] designated country of removal, then he is entitled to CAT relief and may not be removed to that country (although *he still may be removed to other countries*)" (emphasis added)); *Thuraissigiam*, 140 S. Ct. at 1965 n.5 (noting that successful withholding or CAT applicant who showed probability of harm in specific country, e.g., Sri Lanka, "would not avoid removal, only removal to Sri Lanka"); *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 216 (3d Cir. 2018) (holding that withholding or CAT relief "would not prohibit … [the applicant's] removal from the United States to an alternative, non-risk country."). Recipients of withholding and CAT relief also lack the statutory opportunity for family reunification that the INA grants to asylees.

As the Ninth Circuit recognized in *East Bay*, withholding and CAT relief are inadequate substitutes for asylum. *East Bay Sanctuary Covenant*, 950 F.3d at 1277. Congress was surely aware of this stark difference when it authorized broad threshold eligibility for asylum seekers arriving at any point along the border. In confining asylum seekers arriving at an undesignated border point to more contingent and demanding remedies such as withholding and CAT relief, the DHS rule clashes with the INA's overall scheme.

II. IIRIRA'S CONJUNCTION OF DETAILED PROCEDURAL LIMITS ON ASYLUM WITH THRESHOLD ELIGIBILITY FOR ARRIVING ASYLUM SEEKERS OCCUPIES THE FIELD THAT THE NEW DHS RULE PURPORTS TO COVER

IIRIRA was a fraught and hard-fought compromise between the threshold eligibility for asylum affirmed in § 1158(a)(1) and rigorous procedural limits on asylum secured by legislators who contended that the border was in "crisis." *See* Smith Stmt. 2. The legislative deal emerged from multiple congressional hearings featuring representatives from a myriad of stakeholders, followed by intensive negotiations and consultation with the White House. *See* Schmitt, *Bill to Limit Immigration Faces a Setback in Senate*, N.Y. Times (Mar. 14, 1996) (discussing complex legislative maneuvering prior to IIRIRA's passage), https://www.nytimes.com/1996/03/14/us/bill-to-limit-immigration-faces-a-setback-in-senate.html. The DHS rule disrupts that exacting legislative agreement.

In 1996, Congress—even as it enacted the clear language on threshold eligibility for asylum—enacted significant procedural curbs. Most importantly, Congress authorized expedited removal for foreign nationals arrested at or near a U.S. border or port of entry, 8 U.S.C. § 1225(b)(1)(A)(i), (ii), required detention of foreign nationals arrested at or near the border, *id.* § 1225(b)(1)(B)(ii), limited the time in which to file asylum applications, *id*. § 1158(a)(2)(B), and authorized the U.S. government to enter into agreements with foreign countries to safely house

asylum applicants pending a "full and fair" adjudication in those countries of the individual's claim for asylum or related protection, *id.* § 1158(a)(2)(A).

Many legislators accepted these restrictions with great reluctance,[3] with each of the restrictions eliciting ongoing policy debate. Additional categorical restrictions not contemplated by Congress would distort the difficult compromise that Congress reached in 1996.

A. Expedited Removal

The most prominent procedural restriction on asylum in IIRIRA is its provisions for "expedited removal" of certain foreign nationals. Expedited removal directly addresses the border pressures that concerned Congress. Under these provisions, immigration officers who apprehend a foreign national arriving in the United States without a visa may summarily order the removal of that person "*without further hearing or review*." 8 U.S.C. § 1225(b)(1)(A)(i) (emphasis added); *see also Thuraissigiam*, 140 S. Ct. at 1964-1965 (discussing expedited removal process). Apprehended individuals receive no hearing of any kind before an immigration judge in the Department of Justice's Executive Office for Immigration Review (EOIR). Instead, U.S. immigration officers may on an

[3] *See* 142 Cong. Rec. 26,669, 26,703 (Sept. 30, 1996) (remarks of Sen. Leahy) (arguing that World War II refugees could have been "summarily excluded" from United States under expedited removal provisions).

expedited basis determine that migrants are removable and may then effectuate that removal.

Removal power is subject to only one caveat, which is relevant to the legality of the rule. The expedited removal provisions require additional procedures for an arriving foreign national who "indicates either an intention to apply for asylum under section 1158 … or a fear of persecution." 8 U.S.C. § 1225(b)(1)(A)(ii); *accord Thuraissigiam*, 140 S. Ct. at 1964-1965. In such instances, further steps are necessary. Importantly, this statutory exception expressly tracks the INA's language on threshold eligibility for asylum. First, the caveat on expedited removal provides a cross-reference to § 1158 (the asylum procedure provision), which includes express mention of threshold eligibility. Second, and even more clearly, Congress in the *very first subsection* of the expedited removal provisions inserted language that is virtually identical to the language it used in § 1158, making the provision applicable to an alien who is "present in the United States" or who "arrives in the United States (*whether or not at a designated port of arrival* …)." 8 U.S.C. § 1225(a)(1) (emphasis added).

Under expedited removal, persons asserting a claim for asylum "whether or not at a designated port of arrival" get an interview with an asylum officer, who determines whether the applicant has a "credible fear" of persecution. 8 U.S.C. § 1225(b)(1)(B)(ii). If the asylum officer decides that the applicant lacks a

credible fear, the asylum officer shall order the removal of the applicant "without further hearing or review." *Id.* § 1225(b)(1)(B)(iii)(I).

The only procedural safeguard provided in this situation is a hearing before an immigration judge—held very quickly and often with no counsel present for the applicant—after the determination of no credible fear, consistent with the statutory requirement to conduct the review "as expeditiously as possible." 8 U.S.C. § 1225(b)(1)(B)(iii)(III). An applicant only receives a full hearing before an immigration judge with an opportunity to seek counsel if the asylum officer first determines that the applicant *has* a "credible fear" of persecution. *Id.* § 1225(b)(1)(B)(ii). Moreover, the asylum seeker may be detained for the pendency of the EOIR proceeding. *Id.* The rigorous procedural gauntlet established by Congress's detailed expedited removal process indicates that Congress was fully mindful of the issue of border inflow that the DHS rule purports to address.

B. The 1-Year Rule For Asylum Applications

As part of its extensive web of detailed procedural restrictions on asylum, IIRIRA also imposed a significant temporal limit on filing of asylum applications. Absent "changed … or extraordinary circumstances," an applicant has to file for asylum "within 1 year" of the applicant's arrival in the United States. *See* 8 U.S.C. § 1158(a)(2)(B), (D). The one-year rule drastically narrows the relief available to

persons who entered the United States at an undesignated border point. *See* Schrag et al., *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum*, 52 Wm. & Mary L. Rev. 651, 666 (2010).

Under the 1-year rule, a foreign national in the United States, including one who has entered the United States at an undesignated border location (EWI) has only a year to file an asylum claim "affirmatively" (initiating a claim with an application to the asylum office) or assert an asylum claim "defensively" (to obtain relief in removal proceedings). Congress was well aware that EWIs filed asylum claims after their entry. *See* Simpson Stmt. 23. Congress's imposition of the time limit shows that Congress chose to preserve threshold eligibility but subject it to significant restraints. Again, the DHS rule undermines Congress's carefully calibrated compromise.

C. Provisions For Safe Third Country Agreements

Yet another procedural limitation in IIRIRA is contingent but potentially momentous regarding the border: the provision for establishment of "[s]afe third country" agreements. 8 U.S.C. § 1158(a)(2)(A). Under this provision, the United States would be able to remove an asylum applicant to another country, if the United States and that country had entered into a bilateral agreement to that effect or each was a party to a multilateral agreement on the subject. Removal under this provision would require a finding by the Attorney General that the country

receiving transferees would not threaten them with persecution. In addition, transfer would have to include access to a "full and fair procedure" for adjudicating the applicant's asylum petition. *Id.* Because of these rigorous standards, until July 2019, only Canada had concluded a safe third country agreement with the United States, based on extensive consultation with the United Nations High Commissioner for Refugees. *See* U.S. Citizenship & Immigr. Servs., *U.S.-Canada Safe Third Country Agreement* (Nov. 16, 2006), https://www.uscis.gov/archive/us-canada-safe-third-country-agreement.[4]

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[4] On July 22, a Canadian federal court held that the U.S-Canada agreement violated the Canadian Charter of Rights and Freedoms (Canada's Constitution). According to the court, the agreement endangered asylum seekers sent from Canada to the United States by exposing them to unsafe detention conditions and an excessive risk of return to persecution in their countries of origin. *See Canadian Council for Refugees v. Minister of Immigration, Refugees and Citizenship*, 2020 FC 770, ¶¶ 94-154 (Ontario, July 22, 2020). The Canadian government has six months to respond to this ruling.

Starting in July 2019, the United States concluded "asylum cooperative agreements" (ACAs) with three Central American countries—Guatemala, Honduras, and El Salvador. *See* U.S. Dep't of Homeland Security, *Fact Sheet: DHS Agreements with Guatemala, Honduras, and El Salvador*, https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf (visited July 31, 2020). Through an interim final rule, DHS and the Department of Justice have established a process for making findings on the 2019 ACAs that track findings required for safe third country agreements under 8 U.S.C. § 1158(a)(2)(A). *See* U.S. Dep't of Homeland Security & U.S Dep't of Justice, *Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act*, 84 Fed. Reg. 63,994 (Nov. 19, 2019), https://www.govinfo.gov/content/pkg/FR-2019-11-19/pdf/2019-25137.pdf; McHenry, Director, Exec. Office for Immigr. Rev., U.S. Dep't of Justice, *Guidelines Regarding New Regulations Providing for the*

The rigorous standards that apply to safe third country agreements highlight Congress's focus on threshold asylum eligibility in cases when a safe third country agreement *cannot* be reached. It is no accident that until July 2019 only Canada—a country whose commitment to fairness and consistency in legal process rivals that of the United States—had joined in such an agreement. In sum, given the level of detail in Congress's restrictions, the additional categorical limits on threshold eligibility in the DHS rule are simply not "consistent" with the INA's asylum provisions, as the statute requires. *See* 8 U.S.C. § 1158(b)(2)(C).

III. BASED ON THE STATUTORY SCHEME AND PAST PRACTICE, THE EXERCISE OF DISCRETION TO DENY ASYLUM BASED ON AN APPLICANT'S MANNER OF ENTRY SHOULD BE CASE-BY-CASE, NOT CATEGORICAL

Based on past practice, immigration officials have viewed discretion as applying on a case-by-case basis. As asylum law has matured since 1980, certain uses of discretion have hardened into categorical bars, often with express statutory authorization. However, longtime administrative precedent indicates that an

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Implementation of Asylum Cooperative Agreements (Nov. 19, 2019), https://www.justice.gov/eoir/page/file/1218516/download. A challenge to implementation of the 2019 ACAs is now before the U.S. District Court for the District of Columbia, asserting that the ACAs are invalid under the INA and that Guatemala, Honduras, and El Salvador cannot protect refugees or fairly decide their legal claims. *See* Amicus Brief of the States California, et al. in Support of Plaintiffs' Motion for Summary Judgment and Permanent Injunction, *U.T. v. Barr*, Civ. No. 20-00116 (EGS) (filed Mar. 6, 2020), https://ag.ny.gov/sites/default/files/u.t._v._barr_.pdf. *Amici* express no opinion on the validity of the 2019 ACAs, which do not supersede the rule challenged in the present case.

applicant's manner of entry into the United States should be considered on a case-by-case basis, not as a categorical bar. *See Matter of Pula*, 19 I&N Dec. at 473.

Outside of statutory bars such as disqualification of an applicant who has committed a "particularly serious crime," 8 U.S.C. § 1158(b)(2)(A)(ii), agency practice has disfavored categorical bases for denial. For example, in *Matter of A-H-*, 23 I&N Dec. 774, 780-783 (OAG 2005), the Attorney General determined that the exercise of discretion to deny asylum was appropriate regarding a former senior political official in an Algerian organization that collaborated with groups notorious for terrorist violence. Yet, even in this charged setting, the Attorney General considered the "equities that weigh in respondent's favor," including his United States-citizen children. *Id*. at 783. It would be incongruous to exercise case-by-case discretion in cases of political violence, yet resort to categorical rules to deny asylum seekers who merely arrive at undesignated border locations.

Indeed, the asylum regulations even restrict *case-by-case* discretionary denials. For example, the regulations require that when an applicant receives withholding of removal *after* a discretionary denial of asylum, the denial of asylum "shall be reconsidered." 8 C.F.R. § 208.16(e). The regulation requires reconsideration to minimize hardship to the applicant's "spouse or minor children," who in the event of an asylum grant would be able to join the applicant in the United States. *See id*.; *see also* 8 U.S.C. § 1158(b)(3)(A) (granting asylum status

to spouse and children "accompanying, or following to join," the asylee); *cf. Matter of Pula*, 19 I&N Dec. at 474 (noting that exercise of discretion to deny an asylum claim triggers "particular concern" when a claimant meets the "well-founded fear" for asylum standard but "cannot meet the higher burden required for withholding of deportation[,] … [d]eportation to a country where the alien may be persecuted thus becomes a strong possibility"). To be sure, this regulation does not *mandate* that the decisionmaker reverse a prior discretionary denial. Yet, the reconsideration that the rules require illustrates the agency's well-established awareness of the adverse and lasting consequences of discretionary denials and their tension with statutory protections, including provisions for prompt family reunification. The DHS rule, promulgated without prior notice and comment, has jettisoned the regulations' focus on these statutory goals.

The Board of Immigration Appeals (BIA) has held that manner of entry "should not be considered in such a way that the practical effect is to deny relief in virtually all cases." *Matter of Pula*, 19 I&N Dec. at 473. Because asylum seekers are often fleeing for their lives and cannot pick and choose their mode of border-crossing, categorical use of undesignated-entry-point arrival to deny asylum claims would risk barring a substantial number of valid claims. Consequently, the BIA has held that manner of entry should instead be considered as "only one of a number of factors which should be balanced in exercising discretion." *Id.* If

decisionmakers should temper the exercise of negative discretion even, as in *Matter of Pula*, when addressing the use of fraudulent exit documents, then past practice surely counsels similar care regarding arrival at an undesignated entry point, which does not in itself involve fraud at all. The DHS rule's abrupt pivot to categorical denial of asylum is thus inconsistent with longtime administrative construction of the statutory scheme.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 5,126 words.

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/s/ David Lesser
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August 3, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia 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.

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