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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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

v.

WILLIAM P. BARR, Attorney General; et al.,  
*Defendants-Appellants.*

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On Appeal from the United States District Court  
for the Northern District of California, No. 3:19-cv-04073-JST (Tigar, J.)

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**MOTION FOR LEAVE TO FILE BRIEF FOR PROFESSORS OF  
IMMIGRATION LAW AS AMICI CURIAE IN SUPPORT OF  
PLAINTIFFS-APPELLEES AND IN OPPOSITION TO THE  
GOVERNMENT’S REQUEST FOR A STAY OF THE INJUNCTION**

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August 5, 2019

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\* University affiliations are listed solely for informational purposes.

Proposed amici curiae Professors of Immigration Law<sup>1</sup> respectfully move for leave to file an amicus brief in support of Plaintiffs-Appellees' Response to the Government's Emergency Motion for Stay Pending Appeal. Counsel for all parties have consented to the timely filing of an amicus brief half the length of the principal party's briefs. Out of an abundance of caution, amici curiae also file this motion for the Court's leave to file an amicus brief.

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.

2. Although all parties consented to the filing of this amicus brief, amici file this motion out of an abundance of caution because neither the Federal Rules of Appellate Procedure nor this Court's rules expressly address the filing of an amicus brief in connection with a motion for stay pending appeal.

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<sup>1</sup> A complete list of amici is set forth in the appendix to this motion. University affiliations are listed solely for informational purposes.

3. The Federal Rules of Appellate Procedure and this Court's rules do not provide a deadline or word limit for such an amicus brief. This Court ordered that Plaintiffs-Appellees file their opposition by Monday, August 5, 2019, and that Defendants-Appellants file their optional reply on Tuesday, August 6, 2019. Amici request leave to file their brief on the same date as the Plaintiffs-Appellees' opposition is due.

4. Amici's proposed brief is less than 2,600 words, which is half the length of the party's briefs and the word limit to which parties have consented.

### CONCLUSION

Amici respectfully request that this Court grant them leave to file the amicus brief attached hereto.

Respectfully submitted,

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August 5, 2019

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## INTEREST OF AMICI<sup>1</sup>

Amici curiae are law professors who teach and publish scholarship about United States immigration law and, accordingly, maintain an abiding interest in the proper interpretation and administration of the Nation’s immigration laws.

### 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 statute expressly provides broad eligibility for asylum seekers, stating that “[a]ny alien who is physically present in the United States or who arrives in the United States ... irrespective of such alien’s status, may apply for asylum.” 8 U.S.C. § 1158(a)(1) (emphasis added). By imposing a categorical bar on persons fleeing persecution who have entered the United States at our southern border for anyone who passed through another country before entering the United States, the new rule exceeds the parameters that Congress set for two express statutory bars on asylum: claims by asylum seekers who have “firmly resettled” in another country prior to their seeking protection in the United States, 8 U.S.C. § 1158(b)(2)(A)(vi), and claims by foreign nationals covered by safe third country agreements, *id.*

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<sup>1</sup> Amici state that all parties have consented to their timely filing of this brief. 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.

§ 1158(a)(2)(A). While these two mandatory bars can have adverse effects on asylum seekers, the safe third country agreement and firm resettlement bars include important constraints that the new rule ignores. *See Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 57 n.6 (1971) (noting that firm resettlement doctrine does not preclude asylum claim by victim whose flight from persecution includes mere “stops along the way” prior to finding a permanent haven from harm).

## ARGUMENT

### I. 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 Immigration and Nationality Act (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.

#### 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 concept 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. *See* Pub. L. No. 81-555, § 2(c), 64 Stat. 219 (1950). 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.<sup>2</sup> The 1951 Refugee 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.” 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. 1(C)(3), at p.154.

Refugee protections in the 1950s and 1960s underscored permanence and stability at the heart of the firm resettlement criterion. *See Rosenberg v. Yee Chien*

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<sup>2</sup> Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (“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).

*Woo*, 402 U.S. 49, 55-56 (1971). In *Rosenberg*, the Court noted 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. *Id.* at 50. The Court observed 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.

To stress the narrow scope of the firm resettlement bar, the Court addressed the reality of refugees’ travails. 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. ... [c]ertainly 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. The third country rule would bar many of today’s refugees, who have also had “stops along the way” in their flight from persecution.

### **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.<sup>3</sup> Indeed, President Truman criticized as unduly rigid restrictions Congress had imposed on refugee assistance and Congress's reluctance to loosen the national origin quotas that made special 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, § 2(c)(1), 64 Stat. 219. However, more work remained, as President Eisenhower declared in 1960, in surveying the ongoing European crisis that he

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<sup>3</sup> *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").



knew so well from his wartime experience. *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 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**

Congress enacted this provision in 1996, and in so doing reinforced the firm resettlement doctrine’s longtime values of permanence and safety. The current language of the INA provides that 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). 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 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, 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. The new third country asylum rule thus ignores the statutory, regulatory and judicial decisions that guide firm resettlement and instead superimposes a rule that clashes with the INA.

## **II. 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”).<sup>4</sup> That agreement features exhaustive safeguards for asylum seekers and methodical monitoring from both parties that 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.” *See* 8 U.S.C. § 1158(a)(2)(A). The new rule circumvents all of these protections.

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<sup>4</sup> *See* Agreement on Safe Third Country, U.S.-Can., Dec. 5, 2002, <https://www.refworld.org/pdfid/42d7b9944.pdf>.

The U.S.-Canada 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." Each party asserted that it was "determined to safeguard ... access to a full and fair refugee status determination procedure." 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* Canada Third Country Agreement (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* USCIS, *Report: U.S.-Canada Safe Third Country Agreement*, Ch. 4(3) (Nov. 16, 2006).<sup>5</sup>

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<sup>5</sup> <https://www.uscis.gov/unassigned/us-canada-safe-third-country-agreement>.

In sum, the U.S.-Canada 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 is neither safe nor an agreement. Instead, the rule bars asylum for those who have not filed for asylum in a third country, without any inquiry or findings—general *or* specific—about whether that country can protect asylum seekers from persecution or establish a fair system for adjudicating asylum claims. The new rule thus provides no sound statutory basis for circumventing the INA asylum provision's current safeguards with a unilaterally imposed categorical bar. In fact, that new categorical bar undermines the safeguards that Congress painstakingly built into 8 U.S.C. § 1158.

### **CONCLUSION**

For the aforementioned reasons, this Court should deny the government's request for a stay of the injunction.

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(a)(7)(B), the brief contains 2,540 words, and amici have requested leave to file a 2,600-word brief.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Alan E. Schoenfeld  
ALAN E. SCHOENFELD

August 5, 2019

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 5th day of August, 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.

/s/ Alan E. Schoenfeld

ALAN E. SCHOENFELD