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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION AT RIVERSIDE

IMMIGRANT DEFENDERS LAW CENTER, et al.,

Plaintiffs,

vs.

CHAD WOLF, et al.,

Defendants.

Case No. 2:20-cv-09893-JGB-SHK

NOTICE OF MOTION AND MOTION OF REFUGEES INTERNATIONAL AND YAEL SCHACHER FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE*, AND TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

Assigned to: Honorable Jesus G. Bernal

Date: December 14, 2020
Time: 9:00 a.m.
Place: 1

officials, indicate that uniform treatment of asylum applicants regardless of the place of application was a critical objective of the Refugee Act. The historical sources and explanation presented in the brief of *amici curiae* could otherwise escape the Court's attention and will aid in the Court's analysis of issues in a matter of substantial public interest.

CONCLUSION

Amici curiae therefore respectfully request that this Court grant leave to file the proposed amicus brief.

Date: November 20, 2020

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Exhibit A

CORPORATE DISCLOSURE STATEMENT

Refugees International is a non-profit organization that has no parent corporation. It has no stock and hence no publicly held company owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE[2]

Refugees International is an independent, non-profit organization that advocates for lifesaving assistance and protection for refugees and other forcibly displaced people, including at the border of the United States. Refugees International promotes solutions to displacement crises, such as humanitarian aid, refugee resettlement, and asylum, and champions the human rights of refugees, especially those included in the United Nations Convention and Protocol Relating to the Status of Refugees. Refugees International's advocates conduct field missions to identify the needs of displaced people for basic services such as food, water, healthcare, housing, access to education, and protection from harm. Expert field reports provide the basis of Refugees International's advocacy.

Yael Schacher, Senior U.S. Advocate at Refugees International, spent much of the year 2019 monitoring the implementation of the Remain in Mexico policy and its endangerment and deprivation of asylum seekers at the southern U.S. border. An historian of U.S. asylum law and policy, she received her Ph.D. from Harvard University, was a postdoctoral fellow at the University of Texas at Austin, has taught at the University of Connecticut, and has lectured on immigration history and refugee policy at Harvard Law School, the University of Minnesota, and numerous academic conferences and public forums. She has, additionally, published several academic articles on the history of asylum in the United States.

Amici seek to bring to this Court's attention the historical context for the Refugee Act and illuminate congressional objectives using archival materials. Contemporary evidence from the papers of Rep. Holtzman and other key participants of the time, including State Department officials and INS officials, indicate that uniform treatment of asylum applicants regardless of the place of application was a

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SUMMARY OF ARGUMENT

The lack of uniform treatment of asylum seekers was a core problem that Congress intended to solve with the Refugee Act of 1980. As explained below, after the United States acceded to the Protocol to the U.N. Convention on the Status of Refugees in 1968, the nation lacked an administrative process for adjudicating Convention claims for applicants in or at the borders of the United States. In the early 1970s, President Richard Nixon issued an asylum policy guidance for government agencies, but allowed the Immigration and Naturalization Service (INS) to devise its own procedures, which changed over time, were inconsistent, and varied from place to place. Congress wanted to put an end to the variable policies the INS applied in the late 1970s, and make perfectly clear that those who arrived at a land border or in unlawful immigration status were eligible to apply for asylum, and that INS officers conduct individualized assessments of all claimants in a fair manner. In particular, the language of the Refugee Act codified at 8 U.S.C. § 1158(a)—"irrespective of such status," "at a land border," "a procedure"—was intended to bring uniformity and end the INS's practices of treating asylum applicants differently based on the arbitrary criteria of their place of application or immigration status. The contiguous territory provision of the 1996 law, which makes no reference to asylum seekers, cannot be interpreted as repealing so fundamental an objective of the contemporary U.S. asylum system as established by the Refugee Act.

ARGUMENT

I. The United States Did Not Have A Uniform Procedure for the Treatment of Asylum Applicants Before the Refugee Act.

A. The INS Treated Asylum Applicants Differently Based on Their Immigration Status.

Between the time that the Protocol to the U.N. Convention on the Status of Refugees became U.S. law in October 1968 and the first publication of asylum

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consideration of asylum applications. On their face, the instructions just said "any alien within the United States who requests asylum…shall be interviewed." But, INS General Counsel Charles Gordon insisted to Congress the following year, "there are some ambiguities in the U.N. protocol and the Convention…They are being litigated."[7] The main issue litigated in the federal courts at the time, Gordon explained in an internal INS letter, was whether "by virtue of the United States accession to the Protocol Relating to the Status of Refugees, a refugee alien illegally in the United States" is entitled to asylum.[8] Most of the cases involved Chinese seamen who overstayed their shore leave. The INS's position was that, aside from withholding of deportation or non-refoulement (Article 33 of the Convention), they were not entitled to the rights in the Convention (according to its Article 32-1, "The contracting states shall not expel a refugee lawfully in their territory").[9] William Douglas, the only Justice who wanted the Supreme Court to take up one of these cases in 1974, understandably was unsure as to what the INS's administrative practice in asylum cases was--especially whether the INS ruled on the merits of asylum requests regardless of the lawfulness of the requester's presence.[10]

In 1976, the INS proposed changing the regulations such that "certain classes" of asylum applications—by which it meant applications submitted by individuals in unlawful status—would not need to be considered by the State Department before the applicants were forced to depart the United States following the INS's denial of their

[7] Testimony of Charles Gordon, H.R. 981, W. Hemisphere Immigration," Hearings Before Subcomm. 1 of the Comm. of the Judiciary of the House of Reps., 93rd Congress, 1st Session, 160 (Apr. 12, 1973).
[8] Letter from Charles Gordon, General Counsel, I.N.S. to Chief, Admin. Regs. Section, Criminal Div., Dep't of Justice, re: *Tak Chak Lam v. Kleindienst & Bernard*, , No. 72-2344, INS file CO1011.3-C, RG 85, N.A.R.A. (E.D. Pa. Dec. 21, 1972).
[9] There was a disagreement among State Department officials as to whether Article 33 even applied to refugees unlawfully in the country. See Letter of E.E. Malmborg, Assistant Legal Advisor for Mgmt. & Consular Affairs to Stephen King, Assistant U.S. Atty., D.N.J., (re: *Kan Kan Lin v. Rinaldi*) (Feb. 27, 1973); Lawrence Dawson to Malmborg, Folder: Chinese Refugees, Subject Files Relating to Admin. and Program Activities and Supporting Historical and Economic Data Bearing Upon Refugee Interest, 1973 – 1974 RG 59, N.A.R.A. (Feb. 28, 1973).
[10] *Kan Kam Lin v. Rinaldi*, No. 73-1710, Bench Memo (Oct. 1, 1974) (Douglas, J.), container 681, William O. Douglas Papers, Library of Congress.

applications [11] Then, in 1978, the INS proposed new procedures that mandated different handling of asylum applications for those in unlawful status. According to the new procedures, only those in lawful status could apply for asylum to the INS District Director.[12]

B. The INS Treated Asylum Applicants Differently Based on Whether They Applied at a Land Border.

In late 1970, the Associate Commissioner of the INS first raised the question of whether accession to the Protocol made "it incumbent upon this Service to permit entry into the United States" of anyone alleging they would be subject to persecution if expelled or turned away. General Counsel Charles Gordon did "not want to answer" the question "at this time."[13] And, initial Operating Instructions issued by the INS in July 1972 ruled out admission of asylum applicants at the land border. "An applicant for admission at a border port…who requests asylum shall ordinarily be referred to the nearest American consulate. However, ports of entry…must remain alert to unusual cases which may involve sensitive factors."[14] Revised regulations effective January 1975, however, left out the alert regarding unusual cases.[15]

This was just at the time when a new protocol to the Refugee Convention—one on "territorial asylum"—was being drafted. The United States delegation in Geneva opposed a provision which required that a person seeking asylum should be admitted to the territory of a state pending determination of their claim.[16] The following year,

[11] 41 Fed. Reg. 8188-01 (Feb. 25, 1976).
[12] 43 Fed. Reg. 40802-02 (Sept. 13, 1978) (finalized at 44 Fed. Reg. 21253-59 (Apr. 10, 1979)).
[13] Letter of Jerome Greene to Charles Gordon attaching Gordon's non-reply, INS file CO243.30-P, RG 85, Nat'l Archives and Records Admin (Dec. 1 & 18, 1970).
[14] 8 C.F.R. § 108.1, Operations Instructions (July 12, 1972).
[15] 39 Fed. Reg. 41832-01 (Dec. 3, 1974).
[16] "Article 2, dealing with non-refoulement, i.e., not sending a refugee back to the State from which he had fled persecution, in general received the strong support of the United States. A problem arose, however, from the fact that the article defined non-refoulement in such broad terms as to include non-rejection at the frontier. This was linked with Article 4, which required that a person seeking asylum should be admitted to the territory of a State, or if already present in such territory allowed to remain there, pending a determination as to whether he satisfied the requirements of an asylee. The United States opposed the provisions of both Articles insofar as they

immigration judges could assess Convention claims.[20] After the INS shifted its policy to provide for an evidentiary hearing for asylum applicants in exclusion proceedings, it singled out claims by Haitian applicants for special short-shrift treatment. In 1978, Derian wrote the INS to request that Haitian "asylum seekers be informed of the existence of the UNHCR office in New York, and be gi

unlawfully present in Florida, Russian Jews and Polish visitors who wanted to seek asylum in New York City, and Chilean asylum seekers who entered at the southern U.S. border, Representative Elizabeth Holtzman complained that "there really are no specific procedures" or uniform "guidelines" for the INS's handling of asylum seekers. She indicated that too much was left to the discretion of "each individual district director." Rep. Holtzman noted that "as part of a bill dealing with the problem of refugees we ought to try to insure that due process will be granted" to asylum seekers, adding "when Congress creates a statutory scheme and does not really specify how that scheme is to be implemented it can be thwarted by the executive branch."[22]

Archival material in Representative Holtzman's papers provides evidence that uniform treatment of asylum applicants was a critical objective of the asylum provision she authored. Correspondence from Amnesty International suggested the language Holtzman incorporated into her bill's asylum provision allowing people at land borders to apply.[23] Also, among Holtzman's correspondence on the bill is a letter from the United Nations High Commissioner for Refugees recommending a "uniform" procedure for handling of asylum cases.[24] A letter from the Lawyer's Committee for International Human Rights stressed the flaws in INS regulations that distinguished asylum application procedures for those "maintaining a lawful status" and those out-of-status; the regulations also accentuated the difference between the international standards of the Convention and U.S. law and unduly limited the time given to prepare asylum applications. Determination of asylum, the letter suggested to Rep. Holtzman, needed to be made under a separate and uniform procedure apart from

[22] "Admissions of Refugees Into the United States," Hearings Before the Subcommittee on Immigration, Citizenship and International Law, Committee on the Judiciary, House of Representatives, 95th Congress, 1st Session, 126-127 (Apr. 22, 1977).
[23] Amnesty International's Proposals Regarding the Refugee Act of 1979, Folder 12: Refugee Bill Hearing, Box 155, May 16, 1979, Elizabeth Holtzman Papers, Schlesinger Library, Cambridge, Mass. (May 1979).
[24] Note on the Refugee Bill of 1979, U.N.H.C.R., Folder 10: Refugee Bill, Hearing May 3, 1979, Box 155, Holtzman Papers, Schlesinger Library (Mar. 1979).

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uniform asylum procedures; Kennedy suggested that the procedures should allow applicants in the United States and at the border to apply for asylum, give applicants support that would enable them to do so (including that of the UNHCR), and permit them to remain in the country pending a decision.[30]

In *I.N.S v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the Supreme Court found that adoption of the House version, rather than the Senate version, of the asylum provision was crucial to the meaning of the asylum standard.[31] This brief similarly argues that adoption of the House version of the asylum provision reveals that uniform treatment of asylum applicants regardless of the place of application was a critical objective of the Refugee Act.

The current version of the asylum statute, written in the 1996 law, retains the features of the 1980 Act. It merely changes "an alien" to "any alien" and "or at a land border or port of entry" to "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)." The "shall

[30] Letter from Senator Kennedy to Attorney General Civiletti, Folder 24: Refugee Bill, Senate-House Conf., Corr., Box 155, Papers of Lizabeth Holtzman, Schlesinger Library (Mar. 27, 1980).
State Department officials also wrote a letter to INS Commissioner David Crosland that supported many of these proposals. *See* Stephen E. Palmer Jr. to David Crosland, Folder: Chron, Dep't of State, Bureau of Human Rights and Humanitarian Affairs, Box 8, Papers of David Martin, Univ. of Va. Law Library (Mar 21, 1980)., Special Collections, Arthur J. Morris Law Library, Univ. of Va. Sch. of Law (Mar. 21, 1980).

[31] As Justice Stevens wrote in his opinion for the Court: "Both the House bill, H.R. 2816, 96th Cong., 1st Sess. (1979), and the Senate bill, S. 643, 96th Cong., 1st Sess. (1979), provided that an alien must be a "refugee" within the meaning of the Act in order to be eligible for asylum. The two bills differed, however, in that the House bill authorized the Attorney General, in his discretion, to grant asylum to any refugee, whereas the Senate bill imposed the additional requirement that a refugee could not obtain asylum unless "his deportation or return would be prohibited under section 243(h)." Although this restriction, if adopted, would have curtailed the Attorney General's discretion to grant asylum to refugees pursuant to § 208(a), it would not have affected the standard used to determine whether an alien is a "refugee." Thus, the inclusion of this prohibition in the Senate bill indicates that the Senate recognized that there is a difference between the "well founded fear" standard and the clear probability standard. The enactment of the House bill, rather than the Senate bill, in turn demonstrates that Congress eventually refused to restrict eligibility for asylum only to aliens meeting the stricter standard. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language."

establish a procedure" language was moved to a different section, 1158(d) ("The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a)."). The contiguous territory provision of the 1996 law, which makes no reference to asylum seekers, cannot be interpreted as violating so fundamental an objective of the contemporary U.S. asylum system established by the Refugee Act.

IV. The Refugee Act's Uniformity Principle Has Not Been Repealed.

In the wake of the passage of the 1980 Refugee Act, the INS regulation mandating that asylum seekers at land borders be referred to the nearest consulate was withdrawn, not to reappear again in asylum regulations over the next decade and a half.[32] During this time, those who asked for asylum at land borders were typically detained or released into the United States. The sparse archival evidence regarding the history of the contiguous territory provision indicates that it was intended to be applicable to non-asylum seeking Mexican and Canadian nationals who were not clearly admissible at land ports of entry.[33]

In a letter to the INS about regulations implementing the 1996 law, Congressman Lamar Smith of Texas—who had shepherded the bill and was particularly attuned to land border entries—did not refer to asylum seekers as subject to the contiguous territory provision. Smith's letter indicates that the 1996 law intended to detain asylum seekers who arrived at the land border; he suggests that subjecting certain other (non-asylum seeker) land border arrivals to the contiguous territory provision would free up detention space for that purpose.[34]

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[32] 46 Fed. Reg. 45117 (Sept. 10, 1981); 52 Fed. Reg. 32552-560 (Aug. 28, 1987); 55 Fed. Reg. 30674-01 (July 27, 1990); 59 Fed. Reg. 62297 (Dec. 5, 1994).

[33] The provision was intended to clarify the authority of the INS, as it faced opposition from immigration judges to its practice of return of, for example Mexican alien commuters. *See* In re Luis Alfonso Sanchez-Avila, https://www.justice.gov/sites/default/files/eoir/legacy/20

It is also relevant that, in 1997 and 1998, U.S. delegations to executive committee meetings of the United Nations High Commissioner for Refugees approved its Conclusions on International Protection that included language calling on States to respect the principle of non-refoulement "which includes no rejection at frontiers without access to fair and effective procedures for determining their status and protection needs."[35]

Against this backdrop, the contiguous territory provision of the 1996 law, which makes no reference to asylum seekers, cannot be interpreted as repealing the fundamental objective of uniformity established by the Refugee Act.

CONCLUSION

For the foregoing reasons, the Court should reject Defendants' interpretation of the 1996 foreign contiguous territory provision—the provision that gives rise to the Migration Protection Protocols—as authorizing disuniform treatment. Instead, it should grant Plaintiffs' motion.

Date: November 20, 2020

By:/s/ Naomi A. Igra

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[35] Conclusion on Int'l Protection, Exec. Comm. of the High Comm'rs Programme, U.N. GAOR, No. 85 (XLIX) (1998); General Conclusion on Int'l Protection, Exec. Comm. of the High Comm'rs Programme, U.N. GAOR, No. 81 (XLVIII) (1997).

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UNITED STATES DISTRICT COURT

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Case No. 2:20-cv-09893-JGB-SHK

[PROPOSED] ORDER GRANTING REFUGEES INTERNATIONAL AND YAEL SCHACHER'S MOTION FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE*, AND TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

Assigned to: Honorable Jesus G. Bernal

Date: December 14, 2020
Time: 9:00 a.m.
Place: 1

On November 20, 2020, Refugee International and Yael Schacher filed a motion for leave to participate as *amici curiae* and to file a brief as *amici curiae* in support of Plaintiffs' pending motion for preliminary injunction (Dkt. No. 55).

GOOD CAUSE showing, the Court **GRANTS** the motion.

Date: _____

By: _____
Honorable Jesus G. Bernal
Untied States District Judge