

1 DAVID C. MARCUS (SBN: 158704)
david.marcus@wilmerhale.com
2 WILMER CUTLER PICKERING
3 HALE AND DORR LLP
350 South Grand Avenue, Suite 2100
4 Los Angeles, CA 90071
Telephone: +1 213 443 5312
5 Facsimile: +1 213 443 5400

6 *Attorney for Amici Curiae*

7 Additional attorneys listed in signature block

8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**

12 EAST BAY SANCTUARY COVENANT
13 ET AL.,

14 Plaintiffs,

15 v.

16 DONALD J. TRUMP, PRESIDENT OF
17 THE UNITED STATES ET AL.,

18 Defendants.

Case No. 3:18-cv-06810-JST

**BRIEF OF PROFESSORS OF
IMMIGRATION LAW AS AMICI
CURIAE IN SUPPORT OF
PLAINTIFFS**

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES ii

INTEREST OF AMICI1

SUMMARY OF ARGUMENT1

ARGUMENT3

I The DHS Rule Runs Counter to the Plain Meaning of the INA’s Asylum Provisions3

 A. Plain Meaning4

 B. Congress’s Intentional Distinction Between Asylum and Withholding5

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 Cover7

 A. Expedited Removal8

 B. The 1-Year Rule for Asylum Applications9

 C. Provision for Safe Third Country Agreements10

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 Categorical11

CONCLUSION13

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

CASES

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)12

Guerrero-Sanchez v. Warden York County Prison, 905 F.3d 208 (3d Cir. 2018).....6

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)5, 6

Matter of A-H-, 23 I. & N. Dec. 774 (A.G. 2005)11

Matter of Pula, 19 I. & N. Dec. 467 (BIA 1987), *superseded in part by statute on other grounds as recognized in Andriasian v. I.N.S.*, 180 F.3d 1033 (9th Cir. 1999)3, 11, 12

Trump v. Hawaii, 138 S. Ct. 2392 (2018).....12

STATUTES, RULES, AND REGULATIONS

8 C.F.R. § 208.16.....11

8 U.S.C. § 1152.....12

8 U.S.C. § 1157.....5, 6

8 U.S.C. § 1158..... *passim*

8 U.S.C. § 1159.....6

8 U.S.C. § 1182.....3, 12

8 U.S.C. § 1225.....7, 8, 9

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.....2

Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952)12

Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980)1, 3, 4

OTHER AUTHORITIES

Immigration in the National Interest Act of 1995: Hearing on H.R. 1915 Before the H. Comm. on the Judiciary, 104th Cong. 2 (1995)1

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)1

1 *Refugee Act of 1979: Hearing on H.R. 2816 Before the H. Subcomm. on Int’l Operations, Comm.*
on Foreign Affairs, 96th Congress 72 (1979)2
2
3 *S. Rep. No. 96-590 (1980).....5*
4 *Schmitt, Bill to Limit Immigration Faces a Setback in Senate, N.Y. Times, Mar. 14, 1996.....7*
5 *Schrag et al., Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to*
Asylum, 52 Wm. & Mary L. Rev. 651 (2010).....9
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **INTEREST OF AMICI**

2 Amici curiae are law professors who teach and publish scholarship about United States
3 immigration law. Amici have collectively studied the implementation and history of the
4 Immigration and Nationality Act (“INA”) for decades, and have written extensively on the topic.
5 They accordingly have an abiding interest in the proper interpretation and administration of the
6 Nation’s immigration laws, particularly the INA.*

7 **SUMMARY OF ARGUMENT**

8 The plain language, plan, and structure of both the Refugee Act of 1980 (“Refugee Act”),
9 Pub. L. No. 96-212, 94 Stat. 102, 105 (1980), and the Immigration and Nationality Act (“INA”), 8
10 U.S.C. §1101 et seq., support threshold eligibility for asylum for any foreign national “at a land
11 border *or* port of entry.” Refugee Act of 1980 § 208 (emphasis added); *see* 8 U.S.C. § 1158(a)(1)
12 (providing that “[a]ny alien ... who arrives in the United States (*whether or not at a designated port*
13 *of arrival*) ... may apply for asylum”). This robust textual commitment to asylum eligibility
14 provides a stark comparison with the inadequate remedies that the new Department of Homeland
15 Security (DHS) rule reserves for arrivals between designated entry points.

16 The language of the INA did not emerge in a vacuum. Rather, it was the end-product of a
17 lengthy procession of committee hearings, bipartisan deliberations, and consultations with the White
18 House. The resulting compromise reflected legislators’ understanding that asylum was “a cherished
19 thing.” *See Proposals to Reduce Illegal Immigration and Control Costs to Taxpayers: Hearing on S.*
20 *269 Before the S. Comm. on the Judiciary*, 104th Cong. 23 (1995) (Statement of Sen. Alan K.
21 Simpson) [hereinafter Simpson Stmt.]. Yet the current language at 8 U.S.C. § 1158(a)(1) also
22 illustrates some legislators’ serious concerns that maintaining border security required stricter
23 asylum procedures, including more summary processing, increased detention of arriving foreign
24 nationals, and time-limits for asylum claims. *See Immigration in the National Interest Act of 1995:*
25

26 _____
27 * A complete list of amici is set forth in the appendix to this brief. University affiliations are listed solely for
28 informational purposes.

1 *Hearing on H.R. 1915 Before the H. Comm. on the Judiciary*, 104th Cong. 2 (1995) (Statement of
2 Rep. Lamar Smith) [hereinafter Smith Stmt.].

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

9 As Congress heard in deliberations on what ultimately became the Refugee Act of 1980,
10 preserving all arriving asylum-seekers’ threshold eligibility serves vital humanitarian purposes. In
11 testimony before the House Foreign Relations Committee, David A. Martin, a State Department
12 lawyer who subsequently served as a senior government attorney on immigration and became a
13 leading immigration scholar, explained that people flee persecution through any means available to
14 them, and “one way or another, arrive on our shores” seeking refuge. *The Refugee Act of 1979:*
15 *Hearing on H.R. 2816 Before the H. Subcomm. on Int’l Operations, Comm. on Foreign Affairs*, 96th
16 Congress 72 (1979) (Statement of David A. Martin) [hereinafter Martin Stmt.]. The logic of
17 Professor Martin’s comment and the INA’s long textual commitment to the principle of threshold
18 eligibility for all arriving asylum seekers is clear: Asylum seekers cannot simply choose the location
19 of their arrival. Since asylum seekers often flee for their lives and may travel through third countries
20 that are also unsafe, the particular location of the asylum seekers’ arrival “on our shores” has no
21 necessary relation to either the asylum seekers’ character or to the merits of their claims.

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

27 In addition to the categorical bars, IIRIRA provides that “[t]he Attorney General may by
28

1 regulation establish additional limitations and conditions, *consistent with this section.*” 8 U.S.C.
2 § 1158(b)(2)(C) (emphasis added). While further exercises of official discretion have a valuable
3 ongoing role in asylum determinations, that discretion is not boundless. The statute’s requirement
4 that discretion be “consistent with this section” includes adherence to the underlying principle of
5 *threshold* eligibility for all arriving aliens.

6 As a key agency precedent held over thirty years ago, an applicant’s manner of entry should
7 influence discretion on a case-by-case—not categorical—basis. A decisionmaker should treat
8 manner of entry as “one of a number of factors,” including whether the claimant has sought asylum
9 in another country before applying in the United States. *Matter of Pula*, 19 I. & N. Dec. 467, 473
10 (BIA 1987), *superseded in part by statute on other grounds as recognized in Andriasian v. I.N.S.*,
11 180 F.3d 1033, 1043-1044 & n.17 (9th Cir. 1999). Manner of entry “should not be considered in
12 such a way that the practical effect is to deny relief in virtually all cases.” *Id.*

13 Ignoring this longtime practice, the new DHS rule imposes a categorical bar that would result
14 in denial of virtually all asylum claims filed by foreign nationals arriving at undesignated border
15 points. In place of asylum, the new DHS rule would limit available remedies to withholding of
16 removal or relief under the Convention Against Torture (“CAT”), which impose exponentially
17 higher standards of proof on the applicant fleeing harm and do not provide lasting protection against
18 removal. DHS rule’s categorical denial of asylum is therefore not “consistent with” the INA. For
19 the same reason, the Proclamation accompanying the rule is beyond the President’s power under 8
20 U.S.C. § 1182(f).

21 ARGUMENT

22 **I The DHS Rule Runs Counter to the Plain Meaning of the INA’s Asylum Provisions**

23 In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”),
24 Congress expressly provided that foreign nationals fleeing persecution can “apply for asylum” at any
25 point along a U.S. land border, “*whether or not at a designated port of arrival.*” 8 U.S.C.
26 § 1158(a)(1) (emphasis added). IIRIRA’s provision for arriving asylum-seekers’ threshold
27
28

1 eligibility reinforced plain language in the Refugee Act of 1980. Refugee Act of 1980 § 208
2 (authorizing asylum applications “at a land border” of the United States). The trajectory of
3 legislative text toward more specific guarantees of threshold eligibility is manifestly inconsistent
4 with the new DHS rule’s categorical denial of asylum for foreign nationals who arrive at
5 undesignated border locations. Moreover, the new rule’s effort to force asylum seekers toward more
6 contingent remedies such as withholding of removal and relief under the CAT is inconsistent with
7 both the plain meaning of the asylum provisions and Congress’s deliberate prioritizing of asylum
8 over withholding and CAT relief.

9 **A. Plain Meaning**

10 As part of the Refugee Act of 1980’s effort to “provide a permanent and systematic
11 procedure for the admission ... of refugees,” Refugee Act § 101(b), Congress authorized asylum
12 claims by any foreign national “physically present in the United States *or* at a land border or port of
13 entry.” *Id.* § 208. This language clearly demonstrated Congress’s commitment to asylum-seekers’
14 threshold eligibility. First, Congress decided that any foreign national “physically present in the
15 United States” could establish asylum eligibility regardless of whether the individual entered without
16 inspection (“EWI”). *See id.*; *see also* 8 U.S.C. § 1158(a)(1). The clear text of the 1980 Refugee Act
17 reflects Congress’s explicit decision not to condition eligibility for asylum on an applicant’s manner
18 of entry. Indeed, Congress allowed individuals the ability to apply for asylum whether they entered
19 “at a land border *or* port of entry.”

20 Congress amended this text in 1996 to reinforce its adherence to the threshold eligibility of
21 asylum seekers who arrived at *any point* along a land border. Much of IIRIRA reflected Congress’s
22 abiding concern with border security. Nevertheless, the 1996 legislation balanced an array of stricter
23 procedures with even clearer language about locational asylum eligibility. For example, the 1996
24 text of § 1158(a)(1) provided that “[a]ny alien who is physically present in the United States or who
25 arrives in the United States (*whether or not at a designated port of arrival* and including an alien
26 who is brought to the United States after having been interdicted in international or United States
27 waters), irrespective of such alien’s status, may apply for asylum.” (Emphasis added.)
28

1 Compared with the already clear text of the Refugee Act, IIRIRA’s language is even more
2 compelling evidence of Congress’s commitment to threshold eligibility of asylum seekers arriving at
3 any border location. The 1996 provision provided a meticulous catalog of arriving asylum seekers.
4 That careful catalog demonstrates Congress’s express commitment to the principle of threshold
5 eligibility for asylum seekers who have “one way or another, arrive[d] on our shores,” seeking
6 refuge from persecution. *See* Martin Stmt. 72.

7 **B. Congress’s Intentional Distinction Between Asylum and Withholding**

8 As the Court explained in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), Congress carefully
9 distinguished between asylum and the more demanding and contingent remedy of withholding of
10 removal. *Id.* at 436-41. Compared with asylum, withholding of removal—and CAT relief, the other
11 remedy under the new DHS rule available to asylum seekers arriving at an undesignated border
12 point—is both harder to get and easier to lose. *Id.* at 440-41. In addition, only asylum provides a
13 successful applicant with a chance for family reunification. 8 U.S.C. §§ 1158(b)(3)(A);
14 1157(c)(2)(A). The functional differences between asylum on the one hand, and withholding and
15 CAT relief on the other, demonstrate that Congress’s provision for asylum eligibility in § 1158(a)(1)
16 was entirely intentional. The new DHS rule undermines that legislative choice.

17 The standard of proof for withholding and CAT relief is far higher than the standard for
18 asylum. The 1980 Refugee Act’s lesser quantum of proof for asylum is “based directly” on and
19 “intended to be construed consistent” with international law. *See* S. Rep. No. 96-590, at 20 (1980)
20 (cited in *Cardoza-Fonseca*, 480 U.S. at 437). Both withholding and relief under the CAT require an
21 applicant to show by a preponderance of the evidence that she would be subject to persecution (or
22 torture in the case of the CAT) upon return to her country of origin. *See Cardoza-Fonseca*, 480 U.S.
23 at 430 (noting that applicant for withholding must “demonstrate a ‘clear probability of
24 persecution’”). In contrast, the Supreme Court has held that an applicant can more readily satisfy
25 asylum’s “well-founded fear” standard. *Id.* at 431 (explaining that “[o]ne can certainly have a well-
26 founded fear of an event happening when there is less than a 50% chance of the occurrence taking
27 place.”).

1 Explaining its conclusion that asylum requires a lower standard of proof, the *Cardoza-*
2 *Fonseca* Court cited a vivid example from the work of a leading scholar of refugee law, who had
3 written that “well-founded fear” would logically follow if “it is known that in the applicant’s country
4 of origin *every tenth adult male* is either put to death or sent to some remote labor camp.” 480 U.S.
5 at 431 (emphasis added). Parsing the international law standard on which Congress had relied in the
6 1980 Act, the Court found that “[t]here is simply no room in the United Nations’ definition [of
7 asylum] for concluding that because an applicant only has a 10% chance of being shot, tortured, or
8 otherwise persecuted ... he or she has no ‘well-founded fear’ of the event happening.” *Id.* at 440
9 (citation omitted). According to the Court, Congress clearly believed that a standard higher than
10 10% was unduly onerous. Particularly since a refugee must often leave a place of danger hurriedly
11 and must then reconstruct past events thousands of miles away to gain asylum, insistence on a
12 preponderance standard would provide inadequate protection.

13 Withholding and CAT relief are inherently more contingent and fragile. Neither withholding
14 nor CAT relief vitiate an already-entered removal order or permit the applicant to adjust to lawful
15 permanent resident (LPR) status. *See Guerrero-Sanchez v. Warden*, 905 F.3d 208, 216 (3d Cir.
16 2018). In contrast, an asylee may after one year adjust to LPR status. 8 U.S.C. § 1159(a)(1)-(2).

17 In addition, a grant of asylum, as opposed to withholding or CAT relief, has significant
18 consequences for family reunification. Congress provided that the spouse and children of an asylee
19 may be granted the very same lawful status when “accompanying, or following to join” a recipient
20 of the asylum. 8 U.S.C. §§ 1158(b)(3)(A), 1157(c)(2)(A). Recipients of withholding and CAT relief
21 lack this statutory opportunity.

22 Withholding and CAT relief are thus inadequate substitutes for asylum. Congress was surely
23 aware of this stark difference when it authorized broad threshold eligibility for asylum seekers
24 arriving at any point along the border. In relegating asylum seekers arriving at an undesignated
25 border point to more contingent and demanding remedies such as withholding and CAT relief, the
26 new DHS rule clashes with the INA’s overall scheme.

1 **II IIRIRA’s Conjunction Of Detailed Procedural Limits On Asylum With Threshold**
 2 **Eligibility For Arriving Asylum Seekers Occupies The Field That The New DHS Rule**
 3 **Purports To Cover**

4 IIRIRA was a fraught and hard-fought compromise between the threshold eligibility for
 5 asylum affirmed in § 1158(a)(1) and rigorous procedural limits on asylum secured by legislators who
 6 contended that the border was in “crisis.” *See* Smith Stmt. 2. The legislative deal emerged from
 7 multiple congressional hearings featuring representatives from a myriad of stakeholders, followed by
 8 intensive negotiations and consultation with the White House. *See* Schmitt, *Bill to Limit*
 9 *Immigration Faces a Setback in Senate*, N.Y. Times, Mar. 14, 1996, at B12 (discussing complex
 10 legislative maneuvering prior to IIRIRA’s passage); *see also* Simpson Stmt. 13 (noting that in the
 11 “early 1980’s [in preparation for enactment of the Immigration and Control Act of 1986] we held 22
 12 hearings” and asserting that, “I don’t want to have that many again”). The new DHS rule disrupts
 13 that exacting legislative agreement.

14 In 1996, Congress—even as it enacted the clear language on threshold eligibility for
 15 asylum—enacted significant procedural curbs. Most importantly, Congress authorized expedited
 16 removal for foreign nationals arrested at or near a U.S. border or port of entry, 8 U.S.C.
 17 §§ 1225(b)(1)(A)(i), (ii), required detention of foreign nationals arrested at or near the border, *id.*
 18 § 1225(b)(1)(B)(ii), limited the time in which to file asylum applications, *id.* § 1158(a)(2)(B), and
 19 authorized the U.S. government to enter into agreements with foreign countries to safely house
 20 asylum applicants pending a “full and fair” adjudication in those countries of the individual’s claim
 21 for asylum or related protection, *id.* § 1158(a)(2)(A). Each of these restrictions flowed from
 22 Congress’s concern that the absence of such restrictions would increase unauthorized border
 23 crossings, particularly along the boundary between the United States and Mexico.

24 Many legislators accepted these restrictions with great reluctance.¹ Each of the restrictions
 25 has elicited ongoing policy debate, and at least two of the curbs—expedited removal and mandatory
 26 detention—continue to face legal challenges. The debate about including these restrictions

27 ¹ *See* 142 Cong. Rec. 26703 (Sept. 30, 1996) (remarks of Sen. Leahy) (arguing that World War II refugees could
 28 have been “summarily excluded” from United States under expedited removal provisions).

1 highlights the perils of construing IIRIRA as authorizing additional atextual restrictions imposed
2 unilaterally by the executive branch. Additional categorical restrictions not contemplated by
3 Congress would distort the difficult compromise Congress reached in 1996. That risk is even more
4 dire when the executive branch’s curbs modify IIRIRA’s clear language on asylum eligibility.

5 **A. Expedited Removal**

6 The most prominent procedural restriction on asylum in IIRIRA is its provisions for
7 “expedited removal” of arriving foreign nationals. Expedited removal directly addresses the border
8 pressures that concerned Congress. Under the provisions, immigration officers who apprehend a
9 foreign national arriving in the United States without a visa may summarily order the removal of that
10 person “*without further hearing or review.*” 8 U.S.C. § 1225(b)(1)(A)(i) (emphasis added).
11 Apprehended individuals receive no hearing of any kind before an immigration judge in the
12 Department of Justice’s Executive Office for Immigration Review (EOIR). Instead, U.S.
13 immigration officers may on an expedited basis determine that migrants are removable and may then
14 effect that removal.

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

26 Under expedited removal, persons asserting a claim for asylum “whether or not at a
27 designated port of arrival” get only an interview with an asylum officer, who determines whether the
28

1 applicant has a “credible fear” of persecution. 8 U.S.C. § 1225(b)(1)(B)(ii). If the asylum officer
2 decides that the applicant lacks a credible fear, the asylum officer shall order the removal of the
3 applicant “without further hearing or review.” *Id.* § 1225(b)(1)(B)(iii)(I).

4 The only procedural safeguard provided in this situation is a nonadversarial hearing before an
5 immigration judge, held very quickly after the determination of no credible fear, consistent with the
6 statutory requirement to conduct the review “as expeditiously as possible.” 8 U.S.C.

7 § 1225(b)(1)(iii)(III). Applicants only receive an adversarial hearing before an immigration judge if
8 the asylum officer determines that the applicant *has* a “credible fear” of persecution. *Id.*

9 § 1225(b)(1)(B)(ii). Moreover, the asylum seeker may be detained for the pendency of the EOIR
10 proceeding. *Id.* The rigorous procedural gauntlet established by Congress’s detailed expedited
11 removal process indicates that Congress was fully mindful of the issue of border inflow that the new
12 DHS rule purports to address.

13 **B. The 1-Year Rule for Asylum Applications**

14 As part of its extensive web of detailed procedural restrictions on asylum, IIRIRA also
15 imposed a significant temporal limit on filing of asylum applications. Absent “changed ... or
16 extraordinary circumstances,” an applicant has to file for asylum “within 1 year” of the applicant’s
17 arrival in the United States. *See* 8 U.S.C. §§ 1158(a)(2)(B), (D). The one-year rule drastically
18 narrows the relief available to persons who entered the United States at an undesignated border
19 point. *See* Schrag et al., *Rejecting Refugees: Homeland Security’s Administration of the One-Year*
20 *Bar to Asylum*, 52 Wm. & Mary L. Rev. 651, 666 (2010).

21 Under the 1-year rule, a foreign national in the United States, including one who has entered
22 the United States at an undesignated border location (EWI) has only a year to file an asylum claim
23 “affirmatively” (i.e., on his or her own initiative) or assert an asylum claim “defensively” to gain
24 relief in removal proceedings. Congress was well aware that EWIs filed asylum claims after their
25 entry. *See* Simpson Stmt. 23. If Congress wished to categorically curtail these post-entry asylum
26 applications by EWIs, it could have simply precluded *all* such claims. Moreover, legislators would
27 likely have viewed enactment of the one-year rule as less urgent if Congress had empowered
28

1 immigration officials to categorically deny EWIs' asylum claims, as the new DHS rule provides.
2 Congress's choice of the time limit, instead of direct curbs on asylum-seekers' manner of entry,
3 shows that Congress chose to preserve threshold eligibility but subject it to significant restraints.
4 Again, the new DHS rule undermines Congress's carefully calibrated compromise.

5 **C. Provision for Safe Third Country Agreements**

6 Yet another procedural limitation in IIRIRA is contingent but potentially momentous
7 regarding the border: the provision for establishment of "[s]afe third country" agreements. 8 U.S.C.
8 § 1158(a)(2)(A). Under this provision, the United States would be able to remove an asylum
9 applicant to another country, if the United States and that country had entered into a bilateral
10 agreement to that effect or each was a party to a multilateral agreement on the subject. Removal
11 under this provision would require a finding by the Attorney General that the country receiving
12 transferees would not threaten them with persecution. In addition, transfer would have to include
13 access to a "full and fair procedure" for adjudicating the applicant's asylum petition. *Id.*

14 Congress clearly intended the safe third country concept to provide a potential safety valve
15 for pressure from border inflows. *See* Simpson Stmt. 23 (criticizing "people fleeing ... just wanting
16 to get out of their country ... [t]hey go through three or four other countries and get here and say
17 they are seeking asylum"). An agreement with another country that met the conditions set out above
18 would relieve pressure at U.S. borders. Although the provision does not identify any possible third
19 countries by name, the contiguity of Mexico with the United States suggests strongly that legislators
20 contemplated Mexico as a plausible partner with the United States on such arrangements.

21 As with the other procedural restrictions mentioned in this part, the safe third country
22 provision has elicited widespread criticism from refugee advocates and legal scholars. Congress was
23 willing to take this risk to ease pressure on the border. Here, too, however, the detailed nature of
24 Congress's restriction illuminates Congress's reinforcement of threshold eligibility in cases when a
25 safe third country agreement cannot be reached. Given the level of detail in Congress's restrictions,
26 the additional categorical limits on threshold eligibility in the new DHS rule are simply not
27 "consistent" with the INA's asylum provisions, as the statute requires. 8 U.S.C. § 1158(b)(2)(C).

1 **III Based On The Statutory Scheme And Past Practice, The Exercise Of Discretion To**
2 **Deny Asylum Based On An Applicant’s Manner Of Entry Should Be Case-by-Case, Not**
3 **Categorical**

4 Based on past practice, immigration officials have viewed discretion as applying on a case-
5 by-case basis. As asylum law has matured since 1980, certain uses of discretion have hardened into
6 categorical bars, often with express statutory authorization. However, longtime administrative
7 precedent indicates that an applicant’s manner of entry into the United States should be considered
8 on a case-by-case basis, not as a categorical bar. *See Pula*, 19 I. & N. Dec. at 473.

9 Outside of statutory bars such as disqualification based on a “particularly serious crime,” 8
10 U.S.C. § 1158(b)(2)(A)(ii), agency practice has disfavored categorical bases for denial. For
11 example, in *Matter of A-H-*, 23 I. & N. Dec. 774, 780-83 (A.G. 2005), the Attorney General
12 determined that the exercise of discretion to deny asylum was appropriate regarding a former senior
13 political official in an Algerian organization that collaborated with groups notorious for terrorist
14 violence. Yet, even in this charged setting, the Attorney General considered the “equities that weigh
15 in the respondent’s favor,” including his United States-citizen children. *Id.* at 783. It would be
16 incongruous to exercise case-by-case discretion in cases of political violence, yet resort to
17 categorical rules to deny asylum seekers who merely arrive at undesignated border locations.

18 Indeed, the asylum regulations even restrict *case-by-case* discretionary denials. For example,
19 the regulations require that when an applicant receives withholding of removal *after* a discretionary
20 denial of asylum, the denial of asylum “shall be reconsidered.” 8 C.F.R. 208.16(e). The regulation
21 requires reconsideration to minimize hardship to the applicant’s “spouse or minor children,” who in
22 the event of an asylum grant would be able to join the applicant in the United States. *See id.*; *see*
23 *also* 8 U.S.C. § 1158(b)(3)(A) (granting asylum status to spouse and children “accompanying, or
24 following to join,” the asylee); *cf. Pula*, 19 I. & N. Dec. at 474 (exercise of discretion to deny an
25 asylum claim triggers “particular concern” when a claimant proves “well-founded fear” for asylum
26 but “cannot meet the higher burden required for withholding of deportation... [d]eportation to a
27 country where the alien may be persecuted thus becomes a strong possibility”). To be sure, this
28 regulation does not *mandate* that the decisionmaker reverse a prior discretionary denial. Yet, the

1 reconsideration that the rules require illustrates the agency’s well-established awareness of the
2 adverse and lasting consequences of discretionary denials and their tension with statutory
3 protections, including provisions for prompt family reunification. The new DHS rule, promulgated
4 without prior notice and comment, has jettisoned the regulations’ focus on these statutory goals.

5 Past practice has particularly disfavored categorical rules regarding an asylum applicant’s
6 manner of entry. The Board of Immigration Appeals (BIA) has held that manner of entry “should
7 not be considered in such a way that the practical effect is to deny relief in virtually all cases.”
8 *Matter of Pula*, 19 I. & N. Dec. at 473. Because asylum seekers are often fleeing for their lives and
9 cannot pick and choose their mode of border-crossing, categorical use of undesignated-entry-point
10 arrival to deny asylum claims would risk barring a substantial number of valid asylum claims.
11 Consequently, the BIA has held that manner of entry “should not be considered in such a way that
12 the practical effect is to deny relief in virtually all cases,” but should instead be considered as “only
13 one of a number of factors which should be balanced in exercising discretion.” *Id.* If
14 decisionmakers should temper the exercise of negative discretion, as in *Pula*, even when addressing
15 the use of fraudulent exit documents, then past practice surely counsels similar care regarding arrival
16 at an undesignated entry point, which does not in itself involve fraud at all. The new DHS rule’s
17 abrupt pivot to categorical denial of asylum is thus inconsistent with longtime administrative
18 construction of the statutory scheme.

19 The specificity of the statutory scheme rules out any additional increment of authority for the
20 President under 8 U.S.C. § 1182(f). When Congress has enacted a specific scheme that is later in
21 time than an earlier, more amorphous provision, the later, more specific scheme should govern. *See*
22 *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). Here Congress enacted the
23 current language on threshold asylum eligibility in 1996, forty-five years after enactment of
24 § 1182(f). *See* Pub. L. No. 82-414, § 212, 66 Stat. 163, 188 (1952).

25 In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court read § 1182(f) broadly.
26 However, that broad construction flowed from the Court’s view that the INA’s nondiscrimination
27 provision, 8 U.S.C. § 1152(a)(1)(A), should be read narrowly to bar only discrimination in the
28

1 issuance of immigrant visas, not decisions about who should enter the United States. *Id.* at 2414-15.
2 In contrast, the threshold asylum eligibility language in § 1158(a)(1), read together with IIRIRA’s
3 expedited removal provisions containing virtually identical phrasing, demonstrates Congress’s
4 enactment of a specific framework that covers the field. The INA’s asylum provision already
5 provides for executive discretion, as long as that discretion is “consistent with this section.” *Id.*
6 § 1158(b)(2)(C). Under the circumstances, resorting to § 1182(f) to broaden the scope of executive
7 discretion would upset the framework that Congress labored to craft in 1996.

8 **CONCLUSION**

9 For the foregoing reasons, Plaintiffs’ motion for a preliminary injunction should be granted.

10
11 DATED: December 5, 2018

Respectfully submitted,

12
13 PETER S. MARGULIES (*pro hac vice*)
14 Roger Williams University School of Law*
15 10 Metacom Avenue
16 Bristol, RI 02809
17 Telephone: 401 254 4564

By: /s/ David C. Marcus
DAVID C. MARCUS (SBN: 158704)
david.marcus@wilmerhale.com
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 South Grand Avenue, Suite 2100
Los Angeles, CA 90071
Telephone: 213 443 5312
Facsimile: 213 443 5400

16 SHOBA SIVAPRASAD WADHIA (*pro hac vice*)
17 Penn State Law*
18 329 Innovation Blvd., Suite 118
19 University Park, PA 16802
20 Telephone: 814 865 3823

21
22
23
24
25
26
27 * University affiliations are listed solely for informational purposes.

APPENDIX: LIST OF AMICI*

- 1
2 Sabrineh Ardalan, Assistant Clinical Professor of Law
Harvard Law School
3
4 Linda Bosniak, Professor of Law
Rutgers Law School
5
6 Jason Cade, Associate Professor of Law
University of Georgia School of Law
7
8 Jennifer M. Chacón, Professor of Law
UCLA School of Law
9
10 Gabriel J. Chin, Professor of Law
University of California, Davis School of Law
11
12 Marisa Cianciarulo, Professor, Associate Dean
Chapman University Dale E. Fowler School of Law
13
14 Alina Das, Professor of Clinical Law
New York University School of Law
15
16 Ingrid V. Eagly, Professor of Law
University of California, Los Angeles School of Law
17
18 Maryellen Fullerton, Interim Dean and Professor of Law
Brooklyn Law School
19
20 Denise L. Gilman, Clinical Professor
University of Texas at Austin School of Law
21
22 Pratheepan Gulasekaram, Professor of Law
Santa Clara University School of Law
23
24 Margaret Hu, Associate Professor of Law
Washington and Lee School of Law
25
26 Alan Hyde, Distinguished Professor of Law
Rutgers Law School
27
28 Kate Jastram, Professor of Law
University of California Hastings College of the Law

* University affiliations are listed solely for informational purposes.

- 1 Anil Kalhan, Professor of Law
Drexel University Thomas R. Kline School of Law
- 2
- 3 Daniel Kanstroom, Professor of Law
Boston College Law School
- 4
- 5 Linda Kelly, Professor of Law
Indiana University Robert H. McKinney School of Law
- 6
- 7 Stephen Legomsky, Professor Emeritus
Washington University Law
- 8
- 9 Matthew Lindsay, Associate Professor of Law
University of Baltimore School of Law
- 10
- 11 Peter S. Margulies, Professor of Law
Roger Williams University School of Law
- 12
- 13 M. Isabel Medina, Professor of Law
Loyola University New Orleans College of Law
- 14
- 15 Michael Olivas, William B. Bates Distinguished Chair in Law
University of Houston Law Center
- 16
- 17 Jaya Ramji-Nogales, Associate Dean for Academic Affairs
Temple Beasley School of Law
- 18
- 19 David Rubenstein, Professor of Law
Washburn University School of Law
- 20
- 21 Andrew Schoenholtz, Professor from Practice
Georgetown University Law Center
- 22
- 23 Anita Sinha, Assistant Professor of Law
American University Washington College of Law
- 24
- 25 Juliet Stumpf, Professor of Law
Lewis & Clark Law School
- 26
- 27 Philip L. Torrey, Lecturer on Law
Harvard Law School
- 28
- 29 Shoba Sivaprasad Wadhia, Professor of Law
Penn State Law