

No. 22-592

IN THE
Supreme Court of the United States

ARIZONA, ET AL.,
Petitioners,

v.

ALEJANDRO MAYORKAS,
SECRETARY OF HOMELAND SECURITY,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals for
the District of Columbia Circuit**

**BRIEF OF AMICUS CURIAE UNITED NATIONS
HIGH COMMISSIONER FOR REFUGEES IN
SUPPORT OF RESPONDENTS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

INTEREST OF AMICUS CURIAE..... 1

SUMMARY OF THE ARGUMENT2

ARGUMENT.....3

 I. UNHCR PROVIDES “SIGNIFICANT GUIDANCE” ON THE CONVENTION AND ITS PROTOCOL4

 II. NON-REFOULEMENT, A KEY PRINCIPLE OF REFUGEE LAW, DOES NOT PERMIT RESTRICTIONS BASED ON GENERAL PUBLIC-HEALTH CONCERNS6

 A. The Refugee Convention and Protocol Require Adherence to the Foundational Principle of Non-Refoulement.....6

 B. Authoritative UNHCR Guidance Reflects States’ Requirements to Identify Refugees and Prevent Refoulement 10

 C. A Summary Expulsion Policy Violates the Principle of Non-Refoulement..... 12

 III. TITLE 42 ORDERS PUT THE UNITED STATES OUT OF STEP WITH SIMILARLY SITUATED COUNTRIES 13

CONCLUSION 15

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>I.N.S. v. Aguirre-Aguirre</i> , 526 U.S. 415 (1999)	1, 6
<i>I.N.S. v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	1, 4, 5, 6
<i>N-A-M- v. Holder</i> , 587 F.3d 1052 (10th Cir. 2009)	4
<i>Negusie v. Holder</i> , 555 U.S. 511 (2009)	4
<i>Sale v. Haitian Ctrs. Council</i> , 509 U.S. 155 (1993)	4
Constitution	
U.S. Const. art. I. § 10, cl. 1	3
Other Authorities	
Ctrs. for Disease Control & Prevention, Public Health Assessment and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 86 Fed. Reg. 42828 (Aug. 2, 2021)	12, 13
Convention Relating to the Status of Refugees, 19 U.S.T. 6259, 189 U.N.T.S. 150 (July 28, 1951)	<i>passim</i>

Other Authorities—continued

CORNELIS W. WOUTERS, INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION FROM REFOULEMENT (2009).....	11
Executive Comm. of the High Commissioner's Programme, <i>Gen. Conclusion on Int'l Protection, Rep. of Exec. Comm. on Its Fortieth Session</i> , U.N. Doc. A/44/12/Add.1 (Oct. 13, 1989), https://www.unhcr.org/en-us/excom/exconc/3ae68c43c/generalconclusion-international-protection.html	6
G.A. Res. 49/169, U.N. Doc. A/RES/49/169 (Dec. 23, 1994)	4
JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW (2005).....	9, 10
Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, 606 U.N.T.S. 267 (Jan. 31, 1967).....	<i>passim</i>
Sir Elihu Lauterpacht & Daniel Bethlehem, <i>The Scope and Content of the Principle of Non-Refoulement: Opinion</i> , in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION (Erika Feller et al. eds., 2003).....	8

Other Authorities—continued

- Statute of the Office of the UNHCR,
G.A. Res. 428(V), U.N. Doc. A/RES/428(V)
(Dec 14, 1950) 1, 4
- UNHCR, *Advisory Opinion on the Extraterritorial
Application of Non-Refoulement Obligations under
the 1951 Convention relating to the Status of
Refugees and its 1967 Protocol* (Jan. 26, 2007),
[https://www.refworld.org/
docid/45f17a1a4.html](https://www.refworld.org/docid/45f17a1a4.html) 7
- UNHCR, *Conclusion of the Executive Committee
No. 8 on Determination of Refugee Status - 1977*
(Oct. 12, 1977), [https://www.refworld.org/do-
cid/3ae68c6e4.html](https://www.refworld.org/docid/3ae68c6e4.html) 11
- UNHCR, *Conclusion of the Executive Committee on
International Protection and Durable Solutions in
the Context of a Public Health Emergency*
(Oct. 2021), [https://www.refworld.org/do-
cid/617a510e6.html](https://www.refworld.org/docid/617a510e6.html) 5
- UNHCR, *Handbook and Guidelines on Procedures
and Criteria for Determining Refugee Status Under
the 1951 Convention and the 1967 Protocol Relating
to the Status of Refugees*, U.N. Doc
HCR/1P/4/ENG/REV.3 (2011) *passim*

	Page(s)
Other Authorities—continued	
UNHCR, <i>Key Legal Considerations on Access to Territory for Persons in need of International Protection in the Context of the Covid-19 Response</i> (Mar. 16, 2020), https://www.refworld.org/docid/5e7132834.html	5, 11, 12, 15
UNHCR & Inter-Parliamentary Union, <i>A Guide to International Refugee Protection and Building State Asylum Systems: Handbook for Parliamentarians N° 27</i> (Dec. 31, 2017), https://www.unhcr.org/3d4aba564.pdf	8, 11

INTEREST OF AMICUS CURIAE¹

The Office of the United Nations High Commissioner for Refugees (“UNHCR”) is responsible for the promotion and supervision of compliance with international refugee law. G.A. Res. 428(V), U.N. Doc. A/RES/428(V), ¶¶ 1, 8(a) (Dec. 14, 1950) (“UNHCR Statute”). There are two key treaties in this area: (i) the 1951 Convention Relating to the Status of Refugees, 19 U.S.T. 6259, 189 U.N.T.S. 150 (July 28, 1951) (the “Convention”); and (ii) the Refugee Convention’s 1967 Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, 606 U.N.T.S. 267 (Jan. 31, 1967) (the “Protocol”). The United States is a party to the Protocol, and parties to the Protocol are bound by articles 2 through 34 of the Convention. Protocol art. I. As such, the United States is required to “co-operate with” UNHCR “in the exercise of its functions,” and to “facilitate [UNHCR’s] duty of supervising the application” of refugee law. *Id.* art. II.

In that light, this Court has looked to UNHCR’s published views on the treaty obligations that pertain under the Convention and its Protocol, as “‘one of Congress’ primary purposes’ in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol.” *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (quoting *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987)).

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or their counsel made a monetary contribution to this brief’s preparation or submission.

U.S. treaty obligations apply to all domestic law and government policy, whether it be that of the federal government or state governments. In this case, certain U.S. states are seeking to intervene, over the objection of the federal government, in order to take a position on a matter of U.S. federal law at odds with the treaty obligations of the United States. For that reason, UNHCR wishes to provide the Court a summary of its published views on the Convention and its Protocol, so that the Court may evaluate Petitioners' intervention request in that context.

SUMMARY OF THE ARGUMENT

Title 42 orders—which Petitioners seek to defend if they are permitted to intervene—violate fundamental tenets of the Refugee Convention and its Protocol and conflict with UNHCR's consistent and authoritative interpretations.

The relevant treaties to which the United States is a party (and are thus U.S. law) permit the United States to manage specific risks to public health, such as the COVID-19 pandemic, but it cannot lawfully implement a *blanket* expulsion policy for potential refugees and asylum seekers. Instead, the Convention and its Protocol require *individualized* evidence that a *particular* individual presents a specific security risk to the United States—and, even then, steps must be taken to avoid “refoulement” (*i.e.*, direct or indirect return to a country in which a refugee faces serious threats of persecution or harm). Insofar as a blanket expulsion policy results in the forcible return of refugees, that policy amounts to a clear violation of obligations under the Refugee Convention and its Protocol.

In that light, it is unsurprising that other States party to the Convention did not and do not endorse expulsion policies similar to Title 42 orders, especially since (as members of this Court have recognized) “the emergency on which those orders were premised [the COVID-19 pandemic] has long since lapsed.” No. 22A544, Slip. Op. 3 (Gorsuch, J., joined by Jackson, J., dissenting from grant of application for stay). Even when countries with economies and asylum systems that are similarly situated to the United States introduced temporary travel restrictions directly after the start of the pandemic, they specifically created exceptions for asylum seekers. This includes the United Kingdom, which *never* prohibited asylum seekers from seeking refuge within its borders, and most members of the European Union. Moving forward, the United States should strike a similar balance, recognizing that non-refoulement obligations cannot be suspended in blanket fashion for public health reasons.

ARGUMENT

When it comes to U.S. obligations under the treaties on refugee law, the federal government has a paramount interest in ensuring its responsibilities are met. U.S. Const. art. I, § 10, cl. 1. In this case, certain U.S. states are seeking to intervene, over the objection of the federal government, in order to take a position at odds with the treaty obligations of the United States. The Court should evaluate the intervention request in that light.²

² As noted, and consistent with the Convention itself, this Court has looked to the UNHCR’s published views as providing

I. UNHCR PROVIDES “SIGNIFICANT GUIDANCE” ON THE CONVENTION AND ITS PROTOCOL

The Convention delineates the basic rights of refugees and asylum seekers under international law. For more than seven decades since its 1951 enactment, the Convention has served as the “cornerstone of the international system” for refugee protection. G.A. Res. 49/169 (Dec. 23, 1994). In carrying out its mandate to “supervis[e] the[] application” of the Convention and Protocol, UNHCR Statute ¶¶ 1, 8(a); Refugee Convention art. 35; Protocol art. II, UNHCR issues guidance on the interpretation of the Refugee Convention, the Protocol, other relevant international law instruments, and customary international law. Among UNHCR’s most-authoritative and most-cited guidance—including by this Court—is the Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, prepared at the behest of the United States and other Contracting States. See UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, U.N. Doc HCR/1P/4/ENG/REV.3 (2011), at Foreword ¶ IV [hereinafter “UNHCR Handbook”]. Indeed, as this Court has explained, the UNHCR Handbook provides “significant guidance” on interpreting

authoritative guidance on the scope of treaty obligations under the Convention and its Protocol. E.g., *Negusie v. Holder*, 555 U.S. 511, 536-37 (2009); *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993); *Cardoza-Fonseca*, 480 U.S. at 439; see also *N-A-M- v. Holder*, 587 F.3d 1052, 1061-62 (10th Cir. 2009) (Henry, J., concurring) (collecting cases).

U.S. obligations under refugee law. *Cardoza-Fonseca*, 480 U.S. at 439 n.22.³

Two relatively recent UNHCR pieces of guidance—a March 2020 analysis titled “Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response” (“Key Legal Considerations”), and the October 2021 “Conclusion of the Executive Committee on International Protection and Durable Solutions in the Context of a Public Health Emergency” (“Executive Committee COVID-19 Conclusion”)—are particularly relevant here.⁴

The analyses in both documents reflect a reasoned interpretation of unquestioned, foundational principles of international refugee law in the context of COVID-19. Executive Committee conclusions are particularly probative, as they are adopted by consensus among the 107 State members of UNHCR’s Executive Committee, including the United States, which has

³ UNHCR periodically supplements the guidance set forth in the UNHCR Handbook and elsewhere by publishing “Guidelines,” “Guidance Notes,” “Advisory Opinions,” and other practical, contemporary legal analyses.

⁴ UNHCR, *Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response* (Mar. 16, 2020), <https://www.refworld.org/docid/5e7132834.html> (last visited Feb. 8, 2023); UNHCR, *Conclusions of the Executive Committee on International Protection and Durable Solutions in the Context of a Public Health Emergency* (Oct. 2021), <https://www.refworld.org/docid/617a510e6.html> (last visited Feb. 8, 2023).

been a member of the Committee since it was founded in 1958.⁵

II. NON-REFOULEMENT, A KEY PRINCIPLE OF REFUGEE LAW, DOES NOT PERMIT RESTRICTIONS BASED ON GENERAL PUBLIC-HEALTH CONCERNS

A. The Refugee Convention and Protocol Require Adherence to the Foundational Principle of Non-Refoulement

As this Court has observed, the United States became a party to the Protocol—and, by extension, the Convention—in 1968; and in 1980, Congress passed the Refugee Act in order “to implement the principles agreed to in the 1967 Protocol.” *Aguirre-Aguirre*, 526 U.S. at 427. In light of that objective, the Supreme Court has instructed the Refugee Act’s provisions must “be interpreted in conformance with the [Protocol’s]” provisions—and thus, by extension, the Convention’s. *Cardoza-Fonseca*, 480 U.S. at 437.

1. Under the Convention and its Protocol, the United States must identify and protect (i) “refugees”

⁵ Executive Committee conclusions reflect important “international guidelines” that UNHCR and States draw upon “when developing or orienting their policies on refugee issues.” Executive Comm. of the High Commissioner’s Programme, *Gen. Conclusion on Int’l Protection, Rep. of Exec. Comm. on Its Fortieth Session*, ¶ p, U.N. Doc. A/44/12/Add.1 (Oct. 13, 1989), <https://www.unhcr.org/en-us/excom/exconc/3ae68c43c/general-conclusion-international-protection.html> (last visited Feb. 8, 2023).

from (ii) “refoulement”—*i.e.*, the direct or indirect return to a country in which they face serious threats to their lives or freedoms.

The Convention defines “refugees” as persons who are “outside the country of [their] nationality and [are] unable or . . . unwilling” to return to such country “owing to” a “well-founded fear of being persecuted” based upon race, religion, nationality, membership of a particular social group, or political opinion. Convention art. 1(A)(2).

Under international law, the principle of non-refoulement prohibits States from allowing the “exp[ul]sion] or return (‘refouler’) [of] a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Convention art. 33(1) (emphasis added). Thus, a State may not send a refugee back to the refugee’s country of origin, or to another country where she or he fears persecution or serious harm, without violating the Convention. Given that a person is a refugee within the meaning of the Convention as soon as he or she fulfills the criteria contained in the refugee definition, even prior to formal recognition of that status, the principle of non-refoulement applies to asylum seekers as well as refugees.⁶

⁶ UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, ¶ 6, <https://www.unhcr.org/4d9486929.pdf> (last visited Feb. 8, 2023).

By prohibiting the return of a refugee to his or her country of origin or another country where s/he fears persecution or serious harm “[i]n any manner whatsoever,” the Convention also prohibits expulsion that *indirectly* leads to a refugee’s return. Convention art. 33(1). Indeed, refugee law prohibits not only direct refoulement, but also indirect or chain refoulement—*i.e.*, “the removal of a refugee or asylum seeker to a third State in circumstances in which there is a risk that he or she might be sent from there to a territory where he or she would be at risk.” Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION (Erika Feller et al. eds., 2003).⁷ If, for example, a non-Mexican refugee passes through Mexico to claim asylum at the U.S. border, and the United States expels him or her to Mexico, then the United States is jointly responsible under the Convention if Mexico returns him or her to his or her country of origin.

2. Combined with the definition of a refugee, the non-refoulement provision is critical to the protection of persons fleeing persecution. Moreover, the principle recognizes only limited exceptions: the Convention

⁷ See also UNHCR & Inter-Parliamentary Union, *A Guide to International Refugee Protection and Building State Asylum Systems: Handbook for Parliamentarians N° 27* (Dec. 31, 2017), <https://www.unhcr.org/3d4aba564.pdf> (last visited Feb. 8, 2023) [hereinafter “Guide on Building State Systems”] (discussing Article 33(1) and reaching the same conclusion).

makes *no* exception for public health; nor does it provide for any sort of *blanket* exceptions based on nationality, legal, or other status.

Consider Article 33(2) of the Convention. It provides that a person who qualifies as a “refugee”—and thus, who would otherwise be protected from expulsion or return “to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”—*may* be returned where “there are reasonable grounds for regarding [him] as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.” Convention art. 33(2).

Likewise, a more general provision, Article 9, provides for “provisional[]” suspension of some rights of *particular* individuals for reasons of national security, again mandating that such decisions be made in “the case of a particular person.”

Notably, neither of these articles and no other part of the Refugee Convention contains any exceptions or carve-out for public health. Nor do the national-security exceptions discuss or encompass public-health emergencies, or otherwise permit non-individualized derogation from general proscriptions.

To the contrary, the Convention’s drafters “considered, but rejected, an all-embracing power of derogation in time of national crisis,” with the American delegate insisting that “any exception to the duties owed

refugees be limited to ‘very special cases.’”⁸ Where the Convention includes carve-outs, it specifies that they must be exercised only on the basis of *individualized* assessment. Convention arts. 9, 33(2). *No* blanket exception—for public health or otherwise—authorizes expulsion without individualized assessment to ensure adherence to the non-refoulement principle.

B. Authoritative UNHCR Guidance Reflects States’ Requirements to Identify Refugees and Prevent Refoulement

Non-refoulement requires that, upon a non-national’s appearance at a State’s borders, the State must (i) identify whether the non-national is or may be a “refugee” (*i.e.*, whether they have a well-founded fear of persecution based on protected traits), and, if so, (ii) protect that non-national from return to his country of origin. The only exception is if, based on a *particularized assessment*, that particular non-national poses a specific security risk to the State.

In order to give effect to their obligations under the Convention, States must implement fair and efficient procedures to identify refugees. UNHCR Handbook ¶ 189. While the Convention defers to States to establish procedures consonant with their domestic systems, those procedures must satisfy a number of basic requirements aimed at allowing an individual assessment of an asylum application by competent authorities; and the State is required to consider, in good faith

⁸ JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 261-62 (2005) (*quoting* UNHCR, Statement of Louis Henkin, UN Doc.E/AC.32/SR. 34-35 (Aug. 14-15, 1950)).

and with due diligence, the individual’s circumstances. *Id.* ¶¶ 189-94; see also UNHCR, *Conclusion of the Executive Committee No. 8 on Determination of Refugee Status - 1977* (Oct. 12, 1977).⁹

Through decades of published guidance, UNHCR has assisted States in establishing fair and efficient asylum procedures. Starting from the person’s arrival, States have an affirmative obligation to elicit information that might reveal potential refugee status. See, e.g., Key Legal Considerations ¶ 3 (“States have a duty vis-à-vis persons who have arrived at their borders[] to make independent inquiries as to the persons’ need for international protection and to ensure they are not at risk of *refoulement*.”) (italics in original). Thus, if there is *any* reason to *suspect* that a non-national may fear return to his or her country of origin, or other country where he or she fears persecution or serious harm—regardless of any clearly articulated need for protection—the State has a “duty” to make “independent inquiries as to the person[’s] need for international protection.” *Ibid.*

If a State confirms that a person qualifies as a refugee—then the State *must* protect him or her from refoulement. See Guide on Building State Systems at 20; see also CORNELIS W. WOUTERS, INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION FROM REFOULEMENT 133 (2009).

Given these parameters, the UNHCR Handbook guides States on the design of refugee-identification procedures consistent with the applicable treaties—

⁹ <https://www.refworld.org/docid/3ae68c6e4.html> (last visited Feb. 8, 2023).

all of which make clear that the Title 42 orders which the states seek to defend violate international refugee law by instituting a blanket policy, since international law requires States to conduct an individualized assessment, *before* a person is expelled, to evaluate whether the individual is a qualifying “refugee.” E.g., UNHCR Handbook ¶ 192.

C. A Summary Expulsion Policy Violates the Principle of Non-Refoulement

Given the foregoing, UNHCR has concluded in published guidance that a summary-expulsion policy, such as the one codified in the orders that the states seeking intervention seek to defend, cannot be reconciled with the Convention and its Protocol.

The “cardinal protection principle” of non-refoulement prohibits State conduct that *could* “lead[] to” a refugee’s “return in *any* manner whatsoever’ to an unsafe foreign territory.” Key Legal Considerations ¶ 2 (citing Convention art. 33) (emphasis added). That certainly proscribes enactment and implementation of a blanket policy of “rejection at the [border] or non-admission to the territory,” because blanket rejection or non-admission clearly may subject a refugee to direct or indirect refoulement. *Id.*

As a result, the “suspension of” entry by (i) single adults and family units (ii) traveling from Canada or Mexico (regardless of their country of origin) (iii) “who would otherwise be held at [point of entry] and U.S. Border Patrol Stations” violates international law. Ctrs. for Disease Control, Public Health Assessment and Order Suspending the Right to Introduce Certain

Persons from Countries Where a Quarantinable Communicable Disease Exists, 86 Fed. Reg. 42828, 42829-30, 42838, 42841 (Aug. 2, 2021). That is because the procedure does not include a personalized assessment of refugee status, and does not adequately protect against direct or indirect refolement.

It is not sufficient that the Department of Homeland Security is authorized to make case-by-case exceptions “based on the totality of the circumstances, including consideration of significant law enforcement, officer and public safety, humanitarian, and public health interests.” *Id.* at 42841. Nor is it enough to provide for special screening of the subset of non-nationals who make an “affirmative, spontaneous[,] and reasonably believable claim that they fear being tortured in the country they are being sent back to” cure its fundamental defects.¹⁰ Under the Convention and its Protocol, it is the responsibility of the States to individually assess non-nationals to determine refugee status and, if a non-national *is* a refugee, to guarantee his or her safety from refolement.

III. TITLE 42 ORDERS PUT THE UNITED STATES OUT OF STEP WITH SIMILARLY SITUATED COUNTRIES

The Title 42 orders put the United States out of step with similarly situated countries around the world, including the United Kingdom, Canada, and those in the European Union. These States took steps to abide by non-refoulment obligations even during

¹⁰ See Joint App. (Doc. No. 1919200) at 212, *Huisha-Huisha v. Mayorkas*, No. 21-5200 (D.C. Cir. Oct. 12, 2021).

the height of the COVID-19 pandemic, and have collectively recognized that the worst of the COVID-19 pandemic has waned.

For instance, the United Kingdom, which functionally declared an end to its travel-related COVID-19 restrictions in February 2022, *never* prohibited asylum seekers from seeking refuge within its borders. And, by May 2022 when UNHCR stopped its global tracking COVID-19 restrictions affecting access to territory for asylum seekers, members of the European Union had overwhelmingly abandoned any COVID-19 restrictions on refugees. Bulgaria, for example, had exempted from its COVID-19 restrictions individuals entering the country for humanitarian reasons (such as asylum-seeking), while countries such as Austria, and Sweden explicitly exempted refugees from any COVID-19 restrictions that remained in place. Other E.U. member states are largely in accord.¹¹ And while Canada initially imposed some restrictions on asylum seekers after the pandemic began, the country lifted all such restrictions in November 2021.

Altogether, the actions taken by the countries mentioned above demonstrate that the COVID-19 pandemic has never provided a basis for ignoring state

¹¹ The following is a list of E.U. member states that as of May 2022 have permitted asylum seekers to enter their borders, subject to applicable COVID-19 testing and quarantine requirements that are carried out on an individual basis: Austria; Belgium; Bulgaria; Croatia; Cyprus; Denmark; Finland; France; Germany; Ireland; Italy; Latvia; Lithuania; Luxembourg; Netherlands; Portugal; Romania; Slovakia; Spain; and Sweden. Like its E.U. counterparts, Norway permits non-nationals to enter its borders for the purpose of seeking asylum, and it did so even at the height of the COVID-19 pandemic.

obligations under international refugee law. As UNHCR has asserted since the start of the pandemic, countries can adequately protect public health without violating obligations under the Refugee Convention and Protocol. Key Legal Considerations, pmb.

CONCLUSION

It is the view of UNHCR that Title 42 orders cannot be reconciled with the prohibition against refoulement that the United States is bound to follow. Intervention should therefore be denied to Petitioners who—over the objections of the United States itself—seek to violate U.S. treaty obligations in the proceedings below.

Respectfully submitted,

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