No.

In the Supreme Court of the United States

KRISTI NOEM, SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

AL OTRO LADO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

D. JOHN SAUER
Solicitor General
Counsel of Record
BRETT A. SHUMATE
Assistant Attorney General
CURTIS E. GANNON
Deputy Solicitor General
DREW ENSIGN
Deputy Assistant Attorney General
VIVEK SURI
Assistant to the Solicitor General
KATHERINE SHINNERS
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, provides that an alien who "arrives in the United States" may apply for asylum and must be inspected by an immigration officer. 8 U.S.C. 1158(b)(1)(A), 1225(a)(1) and (3). The question presented is whether an alien who is stopped on the Mexican side of the U.S.–Mexico border "arrives in the United States" within the meaning of those provisions.

PARTIES TO THE PROCEEDING

Petitioners (appellants below) are Kristi Noem, Secretary of Homeland Security; Rodney Scott, Commissioner, U.S. Customs and Border Protection (CBP); Diane Sabatino, Acting Executive Assistant Commissioner, Office of Field Operations, CBP; and the Executive Office for Immigration Review.*

Respondents (appellees below) are Al Otro Lado, Inc., and thirteen pseudonymous individuals (Abigail Doe, Beatrice Doe, Bianca Doe, Carolina Doe, César Doe, Dinora Doe, Emiliana Doe, Ingrid Doe, Juan Doe, Maria Doe, Roberto Doe, Úrsula Doe, and Victoria Doe), individually and on behalf of all others similarly situated.

RELATED PROCEEDINGS

United States District Court (S.D. Cal.):

Al Otro Lado, Inc. v. *Mayorkas*, No. 17-cv-2366 (Aug. 23, 2022)

United States Court of Appeals (9th Cir.):

Al Otro Lado v. *Wolf*, No. 19-56417 (Sept. 20, 2022)

Al Otro Lado v. *Wolf*, No. 20-56287 (Sept. 20, 2022)

Al Otro Lado v. *Noem*, No. 22-55988 (May 14, 2025)

---

* Commissioner Scott is automatically substituted for his predecessor. See Sup. Ct. R. 35.3.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Statutes and rule:

Statutes and rule—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No.

KRISTI NOEM, SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

AL OTRO LADO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The court of appeals' order and amended opinion (App. 1a-135a) are available at 2024 WL 5692756. The court's original opinion (App. 137a-250a) is reported at 120 F.4th 606. The district court's final judgment (App. 251a-256a) is available at 2022 WL 3970755. The court's opinion granting declaratory relief (App. 257a-295a) is reported at 619 F. Supp. 3d 1029. The court's order granting injunctive relief (App. 296a-361a) is available at 2022 WL 3142610. The court's order resolving the motions for summary judgment (App. 362a-423a) is available at 2021 WL 3931890. The court's order resolving the motion to dismiss (App. 424a-523a) is reported at 394 F. Supp. 3d 1168.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 2024. On January 8, 2025, the court *sua sponte* directed the parties to file briefs addressing whether the case should be reheard en banc (App. 135a-136a). On May 14, 2025, the court amended its opinion and denied rehearing (App. 2a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 8 U.S.C. 1158(a)(1) provides as follows:

> Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

2. 8 U.S.C. 1225(a)(1) provides as follows:

> An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.

3. 8 U.S.C. 1225(a)(3) provides as follows:

> All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers.

INTRODUCTION

Federal law provides that an alien "who arrives in the United States" may apply for asylum and must be inspected by immigration officers. 8 U.S.C. 1158(a)(1), 1225(a)(1). In the decision below, the Ninth Circuit held, at the behest of a border-wide class, that an alien stopped on the Mexican side of the U.S.–Mexico border "arrives in the United States." That decision is erroneous and warrants this Court's review.

The court of appeals' decision defies the plain text of the governing statutes. In ordinary English, a person "arrives in" a country only when he comes within its borders. An alien thus does not "arrive in" the United States while he is still in Mexico. But the court has effectively replaced the phrase used by Congress ("arrives in the United States," 8 U.S.C. 1158(a)(1)) with an alternative phrase of its own ("presents herself to an official at the border," App. 16a). Dissenting judges rightly described that interpretation as "breathtaking," *id.* at 43a (R. Nelson, J., dissenting), and "radical," *id.* at 121a (Bress, J., dissenting). No other court of appeals has adopted that reading in the asylum statute's 45-year history. See *id.* at 43a (Nelson, J., dissenting).

Moreover, the court of appeals' revision of the statutory text "has created—and will continue to create—untold interference with the Executive Branch's ability to manage the southern border." App. 115a (Bress, J., dissenting). Before this litigation, border officials had repeatedly addressed migrant surges by standing at the border and preventing aliens without valid travel documents from entering. The decision below declares that practice unlawful, on the theory that aliens stopped on the Mexican side of the border have a statutory right to apply for asylum in the United States and to be in-

spected by federal immigration officers. The decision thus deprives the Executive Branch of a critical tool for addressing border surges and for preventing overcrowding at ports of entry along the border.

Fifteen judges of the Ninth Circuit wrote or joined opinions at the panel and rehearing stages explaining that the decision below contradicts "decisive statutory language," App. 134a (statement of Bea, J.); "creates major impediments to the Executive Branch's ability to manage our nation's borders," *id.* at 130a (Bress, J., dissenting); and "needs to be corrected * * * by the Supreme Court," *id.* at 44a (Nelson, J., dissenting). Administrations of both parties have "strenuously opposed the panel's result and reasoning." *Id.* at 114a (Bress, J., dissenting). This Court should grant the petition for a writ of certiorari.

STATEMENT

A. Background

1. The Immigration and Nationality Act (INA or Act), 8 U.S.C. 1101 *et seq.*, provides that "[a]ny alien who is physically present in the United States or who arrives in the United States" "may apply for asylum." 8 U.S.C. 1158(a)(1). The Secretary of Homeland Security or Attorney General may grant asylum if the applicant faces persecution based on a protected trait and satisfies other eligibility criteria. See 8 U.S.C. 1158(b).

The INA also provides that "[a]n alien present in the United States who has not been admitted or who arrives in the United States" is "an applicant for admission." 8 U.S.C. 1225(a)(1). An applicant for admission "shall be inspected by immigration officers." 8 U.S.C. 1225(a)(3). If the immigration officer determines that the alien lacks valid travel documents, he generally may process the alien for expedited removal. See 8 U.S.C. 1225(b)(1)(A)(i).

But if the alien indicates an intent to seek asylum or a fear of persecution, the immigration officer must refer the alien to an asylum officer for an interview. See 8 U.S.C. 1225(b)(1)(A)(ii).

2. In 2016, U.S. Customs and Border Protection (CBP) faced a "massive surge" of illegal aliens seeking admission at ports of entry along the U.S.–Mexico border. App. 115a (Bress, J., dissenting). The "significant volume" of aliens "surpassed the physical capacity" of the ports, causing "tremendous strain" on CBP's personnel and resources. D. Ct. Doc. 308-3, at 2 (Oct. 15, 2019). Overcrowding at ports "seriously compromised" CBP's "ability to safely and humanely care" for aliens in its custody. *Ibid.*

In November 2016, during the Obama Administration, the Department of Homeland Security (DHS) responded to those problems by adopting a practice known as "metering." See App. 5a. That practice allowed CBP to address overcrowding at a port of entry by stopping aliens lacking valid travel documents before they entered the United States. See *ibid.* To implement that practice, CBP officers would stand on the U.S. side of the border and stop aliens before they crossed into the United States. See *ibid.* DHS gave ports of entry flexibility to apply metering based on "what worked best operationally and whether it was required on any given day or at any specific location." *Ibid.* (brackets omitted).

In 2018, during the first Trump Administration, DHS adopted a guidance memorandum formalizing that policy. App. 5a. The memorandum stated that CBP officers "may elect to meter the flow of travelers" when appropriate to ensure "security," "safe and sanitary conditions," and "orderly processing." D. Ct. Doc. 308-6, at 2 (Oct. 15, 2019). The memorandum acknowledged,

however, that "[o]nce a traveler is in the United States, he or she must be fully processed." *Ibid.*

In 2019, the Department of Justice and DHS also adopted a rule (the transit rule) setting new asylum eligibility criteria. See *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019) (interim final rule); *Asylum Eligibility and Procedural Modifications*, 85 Fed. Reg. 82,260 (Dec. 17, 2020). The transit rule generally precluded an alien from obtaining asylum in the United States if he failed to apply for protection while in a third country through which he transited en route to the United States. See 84 Fed. Reg. at 33,831; 85 Fed. Reg. at 82,260.

In November 2021, during the Biden Administration, DHS rescinded its metering guidance. See App. 10a. In 2023, the Department of Justice and DHS also rescinded the transit rule. See *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31,314, 31,319 (May 16, 2023).

B. Proceedings Below

1. In 2017, the immigrant rights organization Al Otro Lado and thirteen asylum seekers (respondents) sued the government in the U.S. District Court for the Southern District of California. See App. 6a. They claimed that the INA requires CBP to process asylum applications from, and to inspect, aliens who reach the Mexican side of the U.S.–Mexico border, and that CBP had unlawfully withheld that action, in violation of the Administrative Procedure Act (APA), 5 U.S.C. 706(1). See App. 7a. After the issuance of the transit rule, respondents claimed that the government may not apply the rule to aliens who had been subjected to metering before the rule took effect but who later returned to seek asylum after the rule took effect. See *id.* at 8a.

Respondents also raised other claims that are not directly at issue here. See App. 7a.

2. The district court granted in part and denied in part the government's motion to dismiss. App. 424a-523a. As relevant here, the court concluded that respondents had stated a valid claim that CBP, through metering, had unlawfully withheld agency action required by the INA. *Id.* at 465a-479a.

The district court later certified two classes that are relevant here. See App. 8a-9a. The first class relates to respondents' claim that metering violates the APA; it consists of "all noncitizens who seek or will seek to access the U.S. asylum process by presenting themselves at a Class A port of entry on the U.S.-Mexico border, and were or will be denied access to the U.S. asylum process by or at the instruction of CBP officials on or after January 1, 2016." *Id.* at 9a (brackets omitted). The second class relates to respondents' challenge to the application of the transit rule; it consists of "all non-Mexican asylum seekers who were unable to make a direct asylum claim at a U.S. port of entry before July 16, 2019, because of the U.S. Government's metering policy, and who continue to seek to access the U.S. asylum process." *Id.* at 8a (brackets omitted). For the sake of brevity, we refer to the first class as the metering class and the second class as the transit-rule class.

The district court granted a preliminary injunction to the transit-rule class, prohibiting the government from applying the transit rule to aliens who were subjected to metering before the rule took effect. App. 8a. The Ninth Circuit denied a stay of that order. 952 F.3d 999, 1003. Judge Bress dissented from the stay denial, stating that the decision "will unfortunately cause only greater difficulty and confusion at a border that desperately needs neither." *Id.* at 1017.

The district court eventually resolved the parties' cross-motions for summary judgment. App. 362a-423a. As relevant here, the court granted summary judgment to respondents on their claim that CBP, through metering, had unlawfully withheld inspection and processing of asylum applications from aliens who were traveling through Mexico and had reached the Mexican side of the U.S.–Mexico border. *Id.* at 379a-407a.

The district court entered a final judgment granting injunctive and declaratory relief to respondents. App. 251a-256a. First, the court granted one of the named plaintiffs, Beatrice Doe, an injunction requiring the government to "tak[e] the necessary steps to facilitate [her] entry into the United States" and to "ensure her inspection and asylum processing upon arrival." *Id.* at 253a. Second, with respect to the metering class, the court declared that, "absent any independent, express, and lawful statutory authority," the "denial of inspection or asylum processing to Class Members who have not been admitted or paroled, and who are in the process of arriving in the United States at Class A Ports of Entry, is unlawful regardless of the purported justification for doing so." *Ibid.* Third, the court granted the transit-rule class a permanent injunction that, among other things, prohibits the government from applying the transit rule to aliens who were subjected to metering before the rule took effect. See *ibid.*

3. A divided panel of the court of appeals affirmed in part and vacated in part. App. 137a-250a. After the parties responded to the court's *sua sponte* request for briefs about whether the case should be reheard en banc, see *id.* at 135a-136a, the court issued amended opinions, with the majority rewriting a section addressing the presumption against extraterritoriality and making minor changes to other sections. *Id.* at 1a-42a

(majority opinion), 43a-113a (R. Nelson, J., dissenting). Except where otherwise indicated, this petition cites and discusses the amended opinions.

As relevant here, the court of appeals affirmed the grant of summary judgment on respondents' challenge to metering. App. 11a-32a. The court first explained that, although DHS had by then rescinded its metering guidance, the case was not moot. *Id.* at 11a n.3. The court noted that the district court had granted "equitable relief to ameliorate past and present harms stemming from the policy" and that "the relief ordered imposes ongoing obligations on the Government." *Ibid.*

Turning to the merits, the court of appeals observed that, under 8 U.S.C. 1158, an "alien who is physically present in the United States or who arrives in the United States" "may apply for asylum." App. 13a (quoting 8 U.S.C. 1158(a)(1)). The court reasoned that, if the phrase "'arrives in the United States'" requires "stepping across the border," it would be "completely subsumed within the phrase 'physically present in the United States.'" *Id.* at 13a-14a. To avoid redundancy, the court interpreted the term "'arrives in the United States'" to include aliens "at the border, whichever side of the border they are standing on." *Id.* at 15a (citation omitted). It reasoned that "[t]o 'arrive' means 'to reach a destination,'" and that "[f]or a person coming to the United States to seek asylum, the relevant destination is the U.S. border." *Id.* at 16a.

The court of appeals then observed that 8 U.S.C. 1225 requires an immigration officer to inspect an applicant for admission—*i.e.*, an alien "present in the United States who has not been admitted or who arrives in the United States." App. 23a (quoting 8 U.S.C. 1225(a)(1)). The court noted that "[t]he definition of an 'applicant for admission' in § 1225(a)(1) is nearly identi-

cal to the language of § 1158(a)(1)." *Ibid.* For "the same reasons" that the court had articulated in interpreting Section 1158(a)(1), it concluded that "a noncitizen stopped by officials at the border is an 'applicant for admission' under § 1225(a)(1)." *Ibid.*

The court of appeals rejected the government's reliance on the presumption against extraterritoriality. In its original opinion, the court concluded that Sections 1158 and 1225 provide sufficiently clear indications of extraterritorial reach. See App. 160a-162a. In its amended opinion, the court abandoned that rationale, instead concluding that the presumption does not apply because "the conduct at issue in this case [is] a domestic application." *Id.* at 26a; see *id.* at 25a-26a.

Judge Ryan Nelson dissented. App. 43a-113a. He concluded that "an alien 'arrives in the United States' only when she crosses the border." *Id.* at 66a. In his view, the court of appeals' contrary reading of the statute conflicts with "[t]ext, history, precedent, and common sense" and violates the presumption against extraterritoriality. App. 45a; see *id.* at 45a-65a. He also stated that the court's "indefensible" decision "needs to be corrected en banc or by the Supreme Court." *Id.* at 44a, 77a.

4. The court of appeals, on its own motion, called for briefs addressing whether the case should be reheard en banc. App. 135a-136a. After receiving the parties' briefs, the court denied rehearing. *Id.* at 2a.

Judge Bress, joined by eleven other judges, dissented from the denial of rehearing. App. 114a-133a. Judge Bress described the panel opinion as "gravely wrong, breaking through numerous guardrails of clear statutory text and precedent." *Id.* at 133a. He also stated that the court of appeals' decision "will seriously harm our country's ability to manage its borders" and "has

already resulted in years of unwarranted disruption of Executive Branch border operations." *Ibid.*

Judge Bea, joined by two other judges, issued a statement respecting the denial of rehearing. App. 134a. As senior judges, those three judges could not "vote on calls for rehearing en banc or formally join a dissent from failure to rehear en banc." *Id.* at 134a n.1. Judge Bea nevertheless expressed "agreement with Judge Bress's dissent" and stated that he was "deeply disappointed that [the court of appeals] did not vote to rehear this problematic decision en banc." *Id.* at 134a.

5. Meanwhile, respondents filed a motion under Federal Rule of Civil Procedure 60(b) asking the district court to vacate its class-wide permanent injunction prohibiting the government from applying the transit rule to aliens who were subjected to metering before the rule took effect. See D. Ct. Doc. 842 (Dec. 27, 2024). After the court of appeals denied rehearing, the district court granted the motion. See D. Ct. Doc. 854 (June 4, 2025). Finding that "the purposes of the [class-wide] Permanent Injunction have been satisfied" and that "applying it prospectively is no longer equitable," the court vacated "the Permanent Injunction's requirements that the parties identify new class members." *Id.* at 2-3. The court's order did not affect the class-wide declaratory judgment or the individual injunction granted to Beatrice Doe, which remain in effect.

REASONS FOR GRANTING THE PETITION

The court of appeals' interpretation of the phrase "arrives in the United States" is "clearly wrong." App. 115a (Bress, J., dissenting). Its decision has already caused—and, if left in place, will continue to cause—"untold interference with the Executive Branch's abil-

ity to manage the southern border." *Ibid.* This Court should grant review.

A. The Ninth Circuit's Decision Is Incorrect

1. The INA provides, subject to exceptions that are not at issue here, that an alien "who arrives in the United States" may apply for asylum. 8 U.S.C. 1158(a)(1). It also provides that an alien "who arrives in the United States" is an applicant for admission who must be inspected by an immigration officer. 8 U.S.C. 1225(a)(1); see 8 U.S.C. 1225(a)(3). In applying those provisions, the court of appeals erred in holding that an alien who is stopped while still in Mexico "arrives in the United States." An alien "arrives in the United States" only when he actually crosses the border and enters the United States.

That conclusion follows from the statute's plain text. The verb "arrive" means "[t]o come to the end of a journey, to a destination, or to some definite place." 1 *The Oxford English Dictionary* 462 (2d ed. 1989) (def. 5.a). And the preposition "in" means "[w]ithin the limits or bounds of, within (any place or thing)." 7 *id.* 125 (def. 1.a). An alien therefore "arrives in" the United States only when he comes within the limits or bounds of the United States. An alien on the Mexican side of the border may be "close to the United States," and may even have "arrived *at* the United States border," but he has not "arrived in the United States." App. 53a (Bress, J., dissenting).

Common usage confirms that English speakers use "arrive in" to mean entering a specified location, not just coming close to it. Allied forces did not "arrive in" Normandy while they were still crossing the English Channel. A letter does not "arrive in" the mailbox while it is still in the postal worker's satchel. And a running

back does not "arrive in" the end zone when he is stopped at the one-yard line. Respondents "have not identified a single example of when 'arrives in' means anything besides physically reaching a destination." App. 43a (R. Nelson, J., dissenting).

Section 1158's surrounding context confirms what its text makes plain. The INA distinguishes between asylum under Section 1158 and admission as a refugee under 8 U.S.C. 1157. This Court has explained that Section 1157 "governs the admission of refugees who seek admission from foreign countries," and Section 1158 was added in order to establish "the process by which refugees *currently in the United States* may be granted asylum." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 433 (1987) (emphasis added). But the decision below collapses that distinction, allowing aliens on the Mexican side of the border to seek both asylum under Section 1158 and admission as a refugee under Section 1157. See App. 54a-55a (Nelson, J., dissenting); *id.* at 119a (Bress, J., dissenting).

Section 1225's context points in the same direction. Section 1225 provides that, if an immigration officer finds during an inspection that an alien is inadmissible, he "shall order the alien removed from the United States." 8 U.S.C. 1225(a)(1) and (b)(1)(A)(i). But an alien who is already located in Mexico cannot be removed from the United States because he is not "*in* the United States in the first place." App. 118a (Bress, J., dissenting) (citation omitted); see *id.* at 54a (Nelson, J., dissenting).

The INA demonstrates that Congress knows how to refer specifically to aliens who have drawn near the United States. For example, it provides that the government may, with a State's consent, deputize state law-enforcement officers to respond to "an actual or immi-

nent mass influx of aliens *arriving off the coast of the United States, or near a land border*." 8 U.S.C. 1103(a)(10) (emphasis added). Sections 1158 and 1225, by contrast, refer to aliens who arrive "in the United States," not aliens arriving "near a land border." "That is significant because Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *DHS* v. *MacLean*, 574 U.S. 383, 391 (2015); see Antonin Scalia & Bryan A. Garner, *Reading Law* § 25, at 170 (2012) ("[A] material variation in terms suggests a variation in meaning.") (emphasis omitted).

Other provisions of the INA reinforce that reading. One provision makes it a crime to bring an alien to the United States without authorization if "the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry." 8 U.S.C. 1324(a)(2)(B)(iii). That clause would make little sense if an alien's "arrival" could occur while he is still in Mexico. Another provision, which states that an alien "who arrives in the United States" at an unauthorized time or place is inadmissible, appears in a paragraph captioned "Illegal entrants and immigration violators" and in a subparagraph captioned "Aliens present without admission or parole." 8 U.S.C. 1182(a)(6) and (6)(A). Thus, that provision also suggests that an alien "arrives in the United States" only once he "ent[ers]" the country and is "present" here. *Ibid.*

The court of appeals' interpretation defies common sense too. In some parts of its opinion, the court stated that an alien arrives in the United States if he is "stopped at the border." App. 12a; see, *e.g.*, *id.* at 22a n.10. On that theory, an alien who approaches the border, but who is blocked by a natural or artificial barrier, nonetheless arrives in the United States. Elsewhere,

the court stated that an alien arrives in the United States if he is "stopped *by U.S. officials* at the border." *Id.* at 23a (emphasis added); see, *e.g.*, *id.* at 25a. But the court did not explain why the statutory phrase "arrives in the United States" distinguishes between an alien stopped by a border barrier and one stopped by U.S. officials.

Finally, the court of appeals' reading creates line-drawing problems. The statute that Congress enacted draws its own clear line—at the border. Aliens must be inspected and may apply for asylum if they are in the United States, but not if they are outside the United States. The court's interpretation, by contrast, lacks an obvious stopping point, as it is wholly unclear how close to the border an alien must come to "arrive in" the United States. The court's original opinion described the court's holding as applying to persons on the United States' "doorstep," App. 162a; the amended opinion omits that word but leaves the court's holding unchanged. "Of course, if the amended opinion is now extending our asylum and inspection laws to persons in Mexico even further away from the United States' 'doorstep,' the amended opinion has only aggravated a core ambiguity about how far into Mexico the court's decision reaches." *Id.* at 121a n.1 (Bress, J., dissenting).

2. The court of appeals' justifications for its departure from plain meaning are unpersuasive.

The court of appeals reasoned that "[t]o arrive means 'to reach a destination'" and that, for an asylum seeker, "the relevant destination is the U.S. border." App. 16a (citation omitted). Sections 1158 and 1225, however, do not use just the word "arrives"; they use the phrase "arrives in the United States." That phrase requires the alien to arrive "in the United States," 8 U.S.C. 1158(a)(1)(A), not just "at the border," App.

16a. The court's rationale also fails on its own terms. The "relevant destination" for an asylum seeker is not "the U.S. border," *ibid.*; asylum seekers do not trek to the border so that they can camp on the Mexican side. The relevant destination is the United States itself, and an asylum seeker who is still in Mexico has not yet arrived in the United States.

The court of appeals emphasized that Section 1158 refers to an "alien who is physically present in the United States or who arrives in the United States," 8 U.S.C. 1158(a)(1), and that Section 1225 refers to an "alien present in the United States who has not been admitted or who arrives in the United States," 8 U.S.C. 1225(a)(1). See App. 13a, 23a. In that court's view, if the phrase "'arrives in the United States'" required "stepping across the border," then it would be "completely subsumed" within the phrase "'present in the United States,'" creating a redundancy. *Id.* at 13a-14a. But under a longstanding doctrine in immigration law, "aliens who arrive at ports of entry" are "'treated'" as though they are still outside the United States, even if they are already "on U.S. soil." *DHS* v. *Thuraissigiam*, 591 U.S. 103, 139 (2020) (citation omitted). Congress may have referred separately to aliens who are "present" in the United States and those who "arrive in" the United States simply to make clear that, despite that legal fiction, aliens who have just crossed the border must be inspected and may apply for asylum. See App. 55a-56a (Nelson, J., dissenting); *id.* at 123a (Bress, J., dissenting).

In addition, "arriving aliens" are subject to special legal rules that do not apply to other aliens who are physically present in the United States. For instance, an "arriving alien who is a stowaway" is ineligible to apply for admission, 8 U.S.C. 1225(a)(2), and an "arriving

alien" who is suspected of being inadmissible on certain security-related grounds is subject to a special expedited-removal procedure, 8 U.S.C. 1225(c)(1). Given that arriving aliens form a distinct legal subcategory, it makes sense that Sections 1158 and 1225 would refer to them separately, despite potential overlap with the category of aliens "present in the United States."

In any event, "[r]edundancy is not a silver bullet." *Rimini Street, Inc.* v. *Oracle USA, Inc.*, 586 U.S. 334, 346 (2019). "[R]edundancies are common in statutory drafting—sometimes in a congressional effort to be doubly sure, sometimes because of congressional inadvertence or lack of foresight, or sometimes simply because of the shortcomings of human communication." *Barton* v. *Barr*, 590 U.S. 222, 239 (2020). The desire to avoid a potential redundancy cannot justify rewriting the phrase "arrives in the United States."

The court of appeals also relied on a parenthetical phrase in Section 1158(a), which refers to "[a]ny alien * * * 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)." 8 U.S.C. 1158(a)(1) (emphasis added); see App. 16a. The court stated that an alien who reaches the border has "'arrived * * * at a designated port of arrival,' whether she is standing just at the edge of the port of entry or somewhere within it." App. 16a (brackets omitted). But the parenthetical does not override the statutory requirement that the alien arrive "in the United States." 8 U.S.C. 1158(a)(1). The parenthetical instead simply clarifies that an alien can arrive in the United States either through a port of entry or in some other location. See App. 50a-51a (Nelson, J., dissenting); *id.* at 124a (Bress, J., dissenting). An alien who is still in Mexico

does not arrive in the United States, whether at a port of entry or elsewhere.

The court of appeals also overlooked a portion of the parenthetical that undercuts its reading—namely, the part specifying that "an alien who is brought to the United States after having been interdicted in international or United States waters" is an applicant for admission. 8 U.S.C. 1225(a)(1). The express inclusion of aliens who are interdicted at sea and then brought to the United States implies its exclusion of other aliens who are stopped before reaching U.S. soil. See *Esteras* v. *United States*, No. 23-7483 (June 20, 2025), slip op. 8 ("[E]xpressing one item of an associated group or series excludes another left unmentioned.") (brackets, citation, and internal quotation marks omitted).

Finally, the court of appeals invoked Section 1158's history, noting that an earlier version of the statute provided that "an alien physically present in the United States or at a land border or port of entry" may apply for asylum. App. 19a (quoting 8 U.S.C. 1158(a) (Supp. IV 1980)). The court read "the current 'arrives in' category" to have "essentially the same scope as the previous 'at a land border' category." *Id.* at 20a. But that argument is flawed on multiple levels. As an initial matter, the court of appeals' premise—that the 1980 version of the statute applied to aliens waiting near the border but outside the United States—is belied by this Court's decision in *Cardoza-Fonseca*. There, the Court concluded that the version of Section 1158 that was enacted in 1980—which referred to an alien "at a land border or port of entry," 8 U.S.C. 1158(a) (Supp. IV 1980)—was added to allow "refugees *currently in the United States*" to seek asylum. *Cardoza-Fonseca*, 480 U.S. at 433 (emphasis added); see *ibid.* ("Prior to the 1980 amendment, there was no statutory basis for granting

asylum to aliens who applied *from within the United States*.") (emphasis added). In any event, even if the 1980 statute were susceptible to the court of appeals' construction, that court should have focused on "the existing statutory text," "not the predecessor statutes." *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004). And it should have presumed that the later amendment had "real and substantial effect," *Intel Corp. Investment Policy Committee* v. *Sulyma*, 589 U.S. 178, 189 (2020) (citation omitted)—not, as the court of appeals supposed, that the amended statute has "essentially the same scope" as the previous statute, App. 20a. Indeed, that presumption would apply with added force here because the current text appeared in a provision captioned "Asylum Reform" as part of an act that made comprehensive amendments to INA. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 604(a), 110 Stat. 3009-690.

3. For the reasons discussed above, the plain text of Sections 1158 and 1225 forecloses the court of appeals' construction. But even assuming that the statutes are ambiguous, the presumption against extraterritoriality would require a court to resolve the ambiguity in the government's favor.

It is a "longstanding principle of American law" that a federal statute presumptively applies "'only within the territorial jurisdiction of the United States.'" *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) (citation omitted). A statute overcomes that presumption only if Congress "'clearly expresse[s]'" "'the affirmative intention' * * * to give [the] statute extraterritorial effect." *Ibid.* (citation omitted). The statutes at issue here provide no affirmative indication —let alone a clear indication—that they extend to aliens

outside the United States. To the contrary, they apply only to aliens who arrive "in the United States."

This Court's decision in *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), confirms that point. There, the Court held that the withholding-of-removal statute—which provided at the time that the Attorney General could not "return any alien" to a country where he faced persecution, *id.* at 170 (quoting the statute)—did not extend to aliens who were interdicted beyond the territorial seas of the United States, *id.* at 187. Invoking the "presumption that Acts of Congress do not ordinarily apply outside our borders," the Court read the statute "as applying only within United States territory." *Id.* at 173. Similar logic applies here.

In its original opinion, the court of appeals held that Sections 1158 and 1225 contain the "clear, affirmative indication" needed to overcome the presumption against extraterritoriality. App. 161a (citation omitted). That reading is implausible. If anything, the term "arrives in the United States" clearly shows that the statute does *not* apply outside the country. The court also discounted the presumption because "the arrival of noncitizens" necessarily "'originates outside the United States.'" *Id.* at 162a (citation omitted). But that theory conflicts with *Sale*, where this Court applied the presumption even though the interdicted aliens' journey toward the United States originated outside the United States. And that theory would "effectively exempt all immigration laws from the presumption against extraterritoriality, a remarkable proposition with no basis in law." *Id.* at 125a (Bress, J., dissenting).

The court of appeals abandoned those rationales in its amended opinion, which instead reasoned that the presumption against extraterritoriality does not apply here because "the U.S. officials' conduct of standing on

the U.S. side of the border and stopping people right before they crossed the border" is "domestic." App. 26a. But Section 1158 provides that an "*alien* * * * who arrives in the United States" may apply for asylum, 8 U.S.C. 1158(a)(1) (emphasis added), and Section 1225 provides that an "*alien* * * * who arrives in the United States" is an applicant for admission, 8 U.S.C. 1225(a)(1) (emphasis added). Those provisions focus on the location of the alien rather than the CBP official, and here, that location is in Mexico. The court also stated that the presumption against extraterritoriality "does not help address the threshold issue that is the core of this case: has a noncitizen encountering U.S. officials at the border 'arrived in the United States'?" App. 26a (brackets omitted). But the presumption often "help[s]" a court "determin[e] the scope of a statutory phrase." *Small* v. *United States*, 544 U.S. 385, 388 (2005); see, *e.g.*, *Sale*, 509 U.S. at 173-174. Here, the presumption confirms that the phrase "arrives in the United States" does not encompass aliens outside the United States.

B. The Question Presented Warrants This Court's Review, And This Case Is A Good Vehicle For Resolving It

1. This Court should grant review to correct the manifest errors in the court of appeals' decision. Fifteen judges of the Ninth Circuit wrote or joined opinions explaining that the decision should not be left standing. See App. 44a (Nelson, J., dissenting) ("[T]his decision needs to be corrected en banc or by the Supreme Court."); *id.* at 133a (Bress, J., dissenting) ("I sincerely regret that this decision remains the law of the Ninth Circuit."); *id.* at 134a (statement of Bea, J.) ("I am deeply disappointed that we did not vote to rehear this decision en banc.").

The court of appeals' decision is "clearly wrong." App. 115a (Bress, J., dissenting). The phrase "arrives in the United States" unambiguously requires arrival *in* the United States. In holding that an alien who is still in Mexico "arrives in the United States," the court flouted the most basic rules of statutory interpretation. Judge Ryan Nelson's dissent described that interpretation as "breathtaking" and "indefensible." *Id.* at 43a, 77a. Judge Bress's dissent described it as "remarkable," "radical," and "manifestly incorrect." *Id.* at 114a, 116a, 121a. And Judge Bea concluded that it conflicts with "decisive statutory language." *Id.* at 134a (statement respecting denial of rehearing en banc).

The court of appeals' legal error affects far more than the thirteen individuals who brought this suit. The district court certified a *border-wide* class consisting of "all noncitizens who seek or will seek to access the U.S. asylum process by presenting themselves at a Class A port of entry on the U.S.-Mexico border, and were or will be denied access to the U.S. asylum process by or at the instruction of CBP officials on or after January 1, 2016." App. 9a (brackets omitted). And even apart from that class certification, the precedential effect of the Ninth Circuit's published opinion governs operations along a substantial stretch of the U.S.–Mexico border, including all of California and Arizona. The scope of the court's decision underscores the need for this Court's review. Cf. *Labrador* v. *Poe*, 144 S. Ct. 921, 931 n.3 (2024) (Kavanaugh, J., concurring) ("The scope of the injunction may affect evaluation * * * of certworthiness.").

The court of appeals' serious error undermines the separation of powers. The Constitution entrusts the power to manage the border to the political branches, not the Judiciary. See *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). By rewriting the INA, the de-

cision below improperly "undercuts Congress's authority" to set asylum policy. App. 53a (Nelson, J., dissenting). It also "severely intrude[s] on the Executive Branch's prerogative to manage our country's borders." *Id.* at 116a (Bress, J., dissenting).

The court of appeals' error, moreover, has significant practical consequences. Managing the United States' 1900-mile border with Mexico is a "daunting task" even in normal times, *Hernández* v. *Mesa*, 589 U.S. 93, 107 (2020), and that task becomes even more arduous during the border surges that have repeatedly recurred in recent years. The record includes examples of the problems that CBP faced because of border surges in 2016. In California, the San Ysidro Port of Entry was "severely over" its "custody capacity," and aliens awaiting processing formed a queue that stretched from the port "clear south into Mexico." C.A. E.R. 751-752. In Arizona, overcrowding at the San Luis Port of Entry created "unsafe" and "unhealthy" conditions; there were aliens "who had been in [CBP's] custody for days and days who had not been medically screened, who were sleeping outside the port." *Id.* at 732. And in Texas, the El Paso Port of Entry had to provide "up to 1,000 meals per day using microwaves," even though "[t]he facility [wa]s not equipped" for that "volume." *Id.* at 582.

During the Obama Administration and the first Trump Administration, DHS sought to address those problems through metering the rate at which aliens flowed into ports of entry. The Biden Administration rescinded DHS's metering guidance in 2021, but this Administration should retain the option of reviving that practice when border conditions justify doing so. The court of appeals, however, held that the practice violates the APA and is contrary to law. See App. 32a. The court thus removed a critical tool from DHS's toolbox

for addressing border surges, "seriously harm[ing] our country's ability to manage its borders." *Id.* at 133a (Bress, J., dissenting).

The decision below also threatens practices other than metering. During the Biden Administration, for example, CBP developed a mobile application, the "CBP One" app, through which aliens could set up appointments at ports of entry. See 88 Fed. Reg. at 31,317. Under the logic of the decision below, CBP was not allowed to prevent the entry of an alien who came to the border without an appointment. Such an alien could claim, after all, that he has arrived "in the United States" and that the government accordingly must inspect him and process his asylum application—effectively allowing him to jump the queue.

Nor do the harmful practical consequences end there. The decision below subjects immigration officers to "vast court-created obligations," such as "interviewing aliens for asylum eligibility when they are not even in the United States." App. 131a (Bress, J., dissenting). In addition, the district court granted one of the named plaintiffs an injunction directing the government "to facilitate [her] entry into the United States," "by air if necessary." *Id.* at 253a. The court of appeals' affirmance of the injunction raises the prospect that, under the decision below, illegal aliens stopped on the Mexican side of the southern border could insist not only on being inspected and allowed to apply for asylum, but also on being allowed to enter the United States while the government reviews the alien's application.

In sum, "[t]his lawsuit has now foiled border operations for years." App. 131a (Bress, J., dissenting). And if left in place, the court of appeals' decision "will seemingly govern every future effort to limit the entry of undocumented aliens at important ports of entry on the

U.S.-Mexico border." *Id.* at 132a. Those far-reaching consequences help explain why Administrations of both political parties "have strenuously opposed the panel's result and reasoning." *Id.* at 114a. The decision below manifestly warrants this Court's review.

2. This case is an appropriate vehicle for resolving the question presented. The lower courts exhaustively addressed the question presented, including in the district court's opinions resolving the motion to dismiss and the motions for summary judgment, the court of appeals' original and amended opinions, and Judge Bress's and Judge Nelson's dissents. If this Court denies certiorari in this case, it is unlikely to have another opportunity to address the question. By certifying a border-wide metering class, the district court has pretermitted the need for similar challenges in other cases and effectively foreclosed a split of authority on the question. Cf. *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979) ("[N]ationwide class actions may * * * foreclos[e] adjudication by a number of different courts and judges.").

As the court of appeals and Judge Bress recognized, DHS's rescission of its metering guidance during the Biden Administration does not moot this case. See App. 11a n.3; *id.* at 132a (Bress, J., dissenting). First, as discussed above, the effects of the decision below extend far beyond metering. See p. 24, *supra*. Second, a "case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *MOAC Mall Holdings LLC* v. *Transform Holdco LLC*, 598 U.S. 288, 295 (2023) (citation omitted). This Court could grant effectual relief to the government by lifting the district court's injunctions and declaratory judgment, which subject the government to

"ongoing obligations." App. 11a n.3.* Third, "a defendant's 'voluntary cessation of a challenged practice' will moot a case only if the defendant can show that the practice cannot 'reasonably be expected to recur.'" *FBI* v. *Fikre*, 601 U.S. 234, 241 (2024) (citation omitted). The government has not attempted to make that showing here; to the contrary, it would likely resume the use of metering as soon as changed border conditions warranted that step.

The government also argued below that 8 U.S.C. 1252(f)(1) precluded class-wide relief, see App. 33a-34a, but that issue would not prevent this Court from reaching the question presented. Section 1252(f)(1) limits only a lower court's authority to grant certain remedies, not its subject-matter jurisdiction over the underlying case. See *Biden* v. *Texas*, 597 U.S. 785, 797-801 (2022). The statute thus does not "deprive this Court of jurisdiction to reach the merits of an appeal, where the lower court entered a form of relief barred by that provision." *Id.* at 798 (emphasis omitted). The district court here, moreover, granted both individual and class-wide relief. See App. 253a. Section 1252(f)(1) does not prevent relief "with respect to the application of [covered] provisions to an individual alien." 8 U.S.C. 1252(f)(1). Regardless of whether the class-wide relief was proper, therefore, the parties still have a dispute over the individual relief.

---

* See App. 253a (injunction requiring the government to process Beatrice Doe's request for asylum); *ibid.* (class-wide declaration that the government may not deny inspection or asylum processing to aliens "in the process of arriving"); *id.* at 253a-255a (class-wide injunction limiting the application of the transit rule and requiring various affirmative steps).

Finally, after securing favorable decisions from the court of appeals and district court, respondents asked the district court to vacate the injunction it had granted to the transit-rule class (*i.e.*, the injunction prohibiting the application of the transit rule to aliens who had been metered before the rule took effect). See D. Ct. Doc. 842. The district court granted their motion and vacated "the Permanent Injunction's requirements that the parties identify new class members." D. Ct. Doc. 854, at 2-3. "Given that plaintiffs fought vigorously for this injunction for years, it is hard to understand this strange maneuver as anything other than an attempt to forestall further review." App. 132a (Bress, J., dissenting); see *id.* at 44a (Nelson, J., dissenting). But that maneuver does not moot this case or reduce the need for this Court's intervention. See *id.* at 132a (Bress, J., dissenting). The district court did not lift either the declaration granted to the metering class or the individual injunction granted to Beatrice Doe. And while the court vacated the class-wide injunction's "requirements that the parties identify *new* class members," the court left in place the injunction's requirements with respect to already-identified class members. D. Ct. Doc. 854, at 3. Because those "ongoing" remedies "will continue to impose binding obligations on the United States," this case remains "an entirely proper vehicle" for resolving the question presented. App. 132a-133a (Bress, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

D. JOHN SAUER
Solicitor General
BRETT A. SHUMATE
Assistant Attorney General
CURTIS E. GANNON
Deputy Solicitor General
DREW ENSIGN
Deputy Assistant Attorney General
VIVEK SURI
Assistant to the Solicitor General
KATHERINE SHINNERS
Attorney

JULY 2025