

No. 25-5

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*

REPLY BRIEF FOR THE PETITIONERS

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In the decision below, the Ninth Circuit held that an alien stopped on the Mexican side of the U.S.–Mexico border “arrives in the United States” and so may apply for asylum and must be inspected under 8 U.S.C. 1158(a)(1), 1225(a)(1) and (3). Respondents fail to reconcile that decision with the statutory text. They still “have not identified a single example of when ‘arrives’ in means anything besides physically reaching a destination.” Pet. App. 43a (R. Nelson, J., dissenting).

Respondents’ arguments that the decision below does not warrant certiorari likewise lack merit. Despite having “fought vigorously for [the decision] for years,” Pet. App. 132a (Bress, J., dissenting), they now insist (Br. in Opp. 17) that the decision “has little ongoing legal or practical significance.” But the decision deprives the Department of Homeland Security (DHS) of a tool

that Administrations of both parties have deemed critical for controlling the processing of inadmissible aliens during border surges. Respondents also emphasize that the question presented is not the subject of a circuit conflict, but they do not explain how such a conflict could arise now that the Ninth Circuit has resolved the issue for a border-wide class. This Court should grant the petition for a writ of certiorari.

A. The Court Of Appeals’ Decision Is Incorrect

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that an alien who “arrives in the United States” may apply for asylum, 8 U.S.C. 1158(b)(1)(A), and must be inspected by immigration officers, 8 U.S.C. 1225(a)(1) and (3). The court of appeals erred in concluding that an alien who is stopped on the Mexican side of the U.S.–Mexico border “arrives in the United States.”

Respondents observe that “‘arrive’ means ‘to come to an end of a journey, to a destination, or to some definite place,’” but they argue that the statute “does not identify where the relevant ‘destination’ or ‘definite place’ is.” Br. in Opp. 23 (citation omitted). The statute, however, does just that: It refers to an alien who “arrives *in the United States*.” 8 U.S.C. 1158(b)(1)(A) (emphasis added). Respondents effectively replace the destination specified by the INA (“in the United States”) with an alternative place of their own (“right at the border,” Br. in Opp. 24).

Respondents also emphasize (Br. in Opp. 23) that “Congress used the present tense ‘arrives’ rather than the past tense ‘arrived.’” But the tense does not change the statutory requirement that the arrival occur “in the United States.” 8 U.S.C. 1158(b)(1)(A). An ordinary English speaker would not use the phrase “arrives in

the United States” to describe someone who is stopped in Mexico.

2. Respondents invoke (Br. in Opp. 11) context. “But context is a tool to understand a law’s ordinary meaning, not a tool to replace it.” Pet. App. 45a n.1 (Nelson, J., dissenting). A court interpreting a statute “should always turn first to one, cardinal canon before all others”: Congress “says in a statute what it means and means in a statute what it says there.” *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254 (1992). When, as here, “the words of a statute are unambiguous,” “this first canon is also the last: ‘judicial inquiry is complete.’” *Id.* at 254 (citation omitted).

In any event, context confirms that “arrives in” means “arrives in.” For example, the INA distinguishes between refugee admission under 8 U.S.C. 1157, which is available to aliens “who seek admission from foreign countries,” and asylum under Section 1158, which is available to aliens “currently in the United States.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 433 (1987). The decision below collapses that distinction. Respondents reply that Section 1157 “establishes a fundamentally different and separate scheme” for refugees, Br. in Opp. 28 (citation omitted), but that is precisely the point. Respondents’ reading allows aliens outside the country to bypass the provision for them and instead invoke the distinct one that Congress prescribed for aliens in the United States.

Other contextual clues lead to the same result. For example, a separate provision refers to aliens “arriving off the coast of the United States, or near a land border,” 8 U.S.C. 1103(a)(10)—showing that, when Congress wanted to refer to aliens near but not in the United States, it knew how to do so. Another provision states that an alien who “is arriving in the United

States” but is found to be inadmissible must be removed “from the United States,” 8 U.S.C. 1225(b)(1)(A)(i)—which is possible only if the alien is “*in* the United States in the first place,” Pet. App. 118a (Bress, J., dissenting) (citation omitted). A third provision requires that an alien be “brought and presented to an appropriate immigration officer at a port of entry” “immediately” “upon arrival,” 8 U.S.C. 1324(a)(2)(B)(iii)—which would make little sense if an alien’s “arrival” could occur while he is still in Mexico. Respondents have no answer, apart from the conclusory assertion (Br. in Opp. 28) that those provisions “shed no light” on the meaning of the text at issue here.

3. Respondents’ contrary contextual arguments cannot overcome the text. Respondents invoke (Br. in Opp. 24) the parenthetical phrase in Section 1158, which refers to an alien “who arrives in the United States (*whether or not at a designated port of arrival* * * *).” 8 U.S.C. 1158(a)(1) (emphasis added). But “a parenthetical” “is typically used to convey an ‘aside’ or ‘afterthought.’” *Boechler, P.C. v. Commissioner*, 596 U.S. 199, 206 (2022) (citation omitted). It cannot override “unambiguous” “language outside the parenthetical,” *Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001). The relevant question, therefore, is not whether an alien stopped in Mexico “arrives ‘at a designated port of arrival.’” Br. in Opp. 24. It is whether he “arrives *in the United States* * * * at a designated port of arrival.” 8 U.S.C. 1158(a)(1) (emphasis added). He does not.

Respondents object (Br. in Opp. 25) that the government’s interpretation renders superfluous the statutory phrase “alien who is physically present in the United States or who arrives in the United States.” 8 U.S.C. 1158(a)(1). But as the government has shown (Pet. 16-17), the term “arrives in the United States” does work

by overcoming the legal fiction that aliens who arrive in the United States at ports of entry are not present in the United States, see *DHS v. Thuraissigiam*, 591 U.S. 103, 139 (2020), and by designating a subcategory of aliens subject to distinct legal rules, see, *e.g.*, 8 U.S.C. 1225(a)(2) and (c)(1). In any event, “the canon against surplusage is not an absolute rule,” and “it certainly does not require [courts] to favor ‘an unusual meaning that will avoid surplusage’ over a more natural one.” *Stanley v. City of Sanford*, 145 S. Ct. 2058, 2066 (2025) (citations omitted).

4. Even if the statutory text were ambiguous, the presumption against extraterritoriality would require courts to resolve the ambiguity in the government’s favor. Respondents contend (Br. in Opp. 29-30) that the presumption does not apply here because “the border officials to whom §§ 1158 and 1225’s inspection and asylum processing obligations attach are themselves on the U.S. side of the border,” meaning that “the application [of the statutes here] is domestic.” But to determine “whether [a] suit seeks a (permissible) domestic or (impermissible) foreign application” of a statute, a court must identify the statute’s “‘focus’”—*i.e.*, “‘the object of its solicitude.’” *Abitron Austria GmbH v. Hetronic International, Inc.*, 600 U.S. 412, 418 (2023) (citation omitted). Here, “the ‘object[s]’ of §§ 1158’s and 1225’s ‘solicitude’ * * * are quite obviously the aliens.” Pet. App. 129a (Bress, J., dissenting). Because the aliens are still in Mexico, the application of the INA is extraterritorial as to them. See *ibid.*

This Court’s decision in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993)—which invoked the presumption against extraterritoriality in holding that the withholding-of-removal statute did not extend to aliens interdicted in international waters—confirms the

presumption's applicability here. Respondents observe that the aliens in *Sale* were on the "high seas," Br. in Opp. 30 (citation omitted), while the aliens here are on the Mexican side of the U.S.–Mexico border, but they do not explain why that makes a difference. Either way, the aliens are outside the United States, so U.S. law presumptively does not extend to them.

5. Finally, respondents contend (Br. in Opp. 32) that the government's reading leads to "absurd" results by leaving immigration officers free to "bloc[k] asylum seekers from stepping on U.S. soil." But the INA does not grant aliens throughout the world a right to enter the United States so that they can seek asylum. To the contrary, it establishes a separate system for aliens outside the United States to seek admission as refugees, see 8 U.S.C. 1157, and it makes it unlawful for anyone, asylum seeker or not, to enter the United States without first obtaining a visa or other appropriate travel document, see 8 U.S.C. 1182(a)(7). It is not "absurd" that the INA allows the government to enforce federal immigration laws by "blocking" illegal immigrants "from stepping on U.S. soil." Br. in Opp. 32.

Respondents likewise err in arguing (Br. in Opp. 30) that DHS's interpretation of the INA "conflicts with its own regulations." The regulation they cite defines the term "arriving alien" to include "an *applicant for admission* coming or attempting to come into the United States at a port-of-entry." 8 C.F.R. 1001.1(q) (emphasis altered); see 8 C.F.R. 1.2 (same). The term "applicant for admission," in turn, means "[a]n 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) (emphasis added); see 8 C.F.R. 1001.1(a) (incorporating statutory definitions). The regulations therefore do not suggest

that an alien stopped in Mexico is an “arriving alien,” let alone one who has already arrived.

B. The Court Of Appeals’ Decision Warrants This Court’s Review

Respondents contend (Br. in Opp. 16) that the question presented is not “sufficiently important to warrant this Court’s review.” Their reasons are unsound.

First, respondents argue (Br. in Opp. 2) that this Court should deny review because the government “does not and cannot identify any circuit split.” That argument lacks force because the district court certified a border-wide class. This Court often grants review—or interim relief, which presupposes certworthiness—when a court of appeals rejects an immigration policy on a nationwide or border-wide basis, even in the absence of a circuit conflict. See, *e.g.*, *Noem v. National TPS Alliance*, 145 S. Ct. 2728 (2025); *Biden v. Texas*, 597 U.S. 785, 793, 797 (2022); *Wolf v. Innovation Law Lab*, 141 S. Ct. 617 (2020); *Trump v. Hawaii*, 587 U.S. 667, 681-682 (2018). That approach makes sense. When, as here, a court of appeals resolves an issue for a nationwide or border-wide class, it effectively precludes percolation of that issue in other circuits. 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 given that 15 Ninth Circuit judges wrote or joined opinions disagreeing with the decision below, see Pet. 4, there is no reason to expect that the other courts of appeals would agree with the Ninth Circuit’s analysis if they had the opportunity to consider the question presented.

Denying certiorari now could, in effect, permanently insulate the Ninth Circuit’s decision from this Court’s review. Respondents argue that courts in other circuits

could still consider *other* legal issues that were “not resolved by the Ninth Circuit’s decision,” such as whether DHS must process asylum claims from aliens “‘blocked by a natural or artificial barrier’ from crossing the border” or from aliens “not close enough to the border to present themselves to a border official on the U.S. side.” Br. in Opp. 33 (citation omitted). But the prospect that other courts could still consider those distinct issues hardly justifies leaving in place the Ninth Circuit’s erroneous resolution of the question presented here. If anything, the prospect that the Ninth Circuit’s logic could extend to other classes of aliens confirms that the decision warrants this Court’s review. See Pet. App. 121a (Bress, J., dissenting) (noting a “core ambiguity about how far into Mexico the [Ninth Circuit’s] decision reaches”).

Second, respondents argue (Br. in Opp. 16) that this Court should deny review because DHS has rescinded the metering policy addressed by the district court. That, too, is wrong. In the Obama Administration and first Trump Administration, DHS relied on metering to address the severe overcrowding at ports of entry caused by border surges. See Pet. 23-24. While the Biden Administration rescinded DHS’s metering guidance in 2021, this Administration and future Administrations should retain the option of reviving that practice when border conditions justify doing so. “It should come as no surprise that some Administrations may be more laissez-faire in enforcing immigration law, and other Administrations more strict.” *Noem v. Vasquez Perdomo*, No. 25A169 (Sept. 8, 2025), slip op. 9 (Kavanaugh, J., concurring). But the government is conforming its conduct to the existing declaratory judgment.

Respondents speculate (Br. in Opp. 1-2) that DHS will not need to rely on metering again, but “levels of migration ebb[] and flow[],” often in unpredictable ways. Pet. App. 367a. For example, the district court stated that migration levels “‘surge[d]’” in 2016, that the surge “‘unexpectedly ended’” in early 2017, and that “migration numbers again began to increase” before “peak[ing]” in spring 2018. *Ibid.* (citation omitted). Metering is an essential tool in DHS’s toolbox for addressing border surges when they occur. See Pet. 23. That is why Administrations of both parties “have strenuously opposed the panel’s result and reasoning.” Pet. App. 114a (Bress, J., dissenting).

In addition, the decision below threatens more than just metering practices. For instance, respondents note (Br. in Opp. 20) that, during the Biden Administration, U.S. Customs and Border Protection developed a mobile application, the “CBP One” app, through which aliens could set up appointments at points of entry. While respondents argue (*ibid.*) otherwise, the court of appeals’ decision threatens DHS’s ability to prevent the entry of an alien who comes to the border without making such an appointment. Such an alien could claim that he has arrived “in the United States” and that the government therefore has a legal duty to inspect him and process his asylum application. See, *e.g.*, *Al Otro Lado, Inc. v. Mayorkas*, No. 23-cv-1367, 2024 WL 4370577, at *6-*7 (S.D. Cal. Sept. 30, 2024) (relying on the decisions in this case to hold that aliens still in Mexico without CBP One appointments had asylum rights).

Third, respondents argue that the court of appeals’ decision “provides the government with plenty of flexibility” because the court supposedly suggested that DHS could comply with the decision simply by taking “‘minimal steps’” to enable aliens in Mexico “‘to open

asylum applications.’” Br. in Opp. 18-19 (quoting Pet. App. 31a-32a). That is incorrect. The INA provides that an alien who arrives in the United States “may apply for asylum,” 8 U.S.C. 1158(a)(1), and that such an alien “shall be inspected by immigration officers,” 8 U.S.C. 1225(a)(3). To comply with those provisions, the government must actually inspect the alien and process his asylum application, not just take “minimal steps.”

The court of appeals’ reference to “minimal steps,” Pet. App. 32a, concerns not the INA but the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* The APA authorizes a reviewing court to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. 706(1). The Ninth Circuit analyzed this as an unlawful-withholding case but stated that “minimal steps by the Government, such as implementing and following a waitlist system or initiating the asylum process, would shift the [APA] analysis of any challenge from the withholding category into the delay category.” Pet. App. 32a. But regardless of the appropriate framework for reviewing an APA claim, DHS will remain subject to an obligation, under the court’s erroneous reading of the INA, to inspect, and to process asylum applications from, aliens stopped in Mexico. The imposition of such “court-created obligations” with respect to aliens who “are not even in the United States” manifestly warrants this Court’s review. *Id.* at 131a (Bress, J., dissenting).

Finally, though respondents do not explicitly argue that this case is moot, they state (Br. in Opp. 33) that the Court’s opinion would be “advisory” because DHS has rescinded the metering policy. As the government has explained (Pet. 25-26), that argument is wrong. The district court’s judgment affects more than just meter-

ing; even as to metering, the judgment subjects DHS to ongoing obligations; and, in all events, DHS’s voluntary cessation of metering practices cannot moot this case when DHS has explained that it would likely resume the use of metering as soon as changed border conditions warrant that step. See *ibid.*

Respondents do not address those points. At most, they contend (Br. in Opp. 17) that the district court’s judgment now has “little” ongoing significance. For the reasons discussed above, that is incorrect; among other things, the judgment deprives DHS of an important tool for managing border surges when they occur. Regardless, a case remains live if, as here, “the parties have a concrete interest, however small, in the outcome of the litigation.” *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (citation omitted). And even if the case were moot, the appropriate course would be to vacate the court of appeals’ judgment under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)—not, as respondents suggest, to deny certiorari.

Since the outset of this suit in 2017, respondents have “fought vigorously” for the district court’s judgment. Pet. App. 132a (Bress, J., dissenting). It is difficult to understand their insistence that the decision has “little ongoing legal or practical significance,” Br. in Opp. 17, “as anything other than an attempt to forestall further review” of the court of appeals’ “radical” and “manifestly incorrect” decision, Pet. App. 116a, 121a, 132a (Bress, J., dissenting).

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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