No. 25-5

IN THE

Supreme Court of the United States

KRISTI NOEM, SECRETARY OF HOMELAND SECURITY, *et al.*,

Petitioners,

v.

AL OTRO LADO, A CALIFORNIA CORPORATION, *et al.*,

Respondents.

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

BRIEF OF FEDERATION FOR AMERICAN IMMIGRATION REFORM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Federation for American Immigration Reform ("FAIR") is a non-profit 501(c)(3) public interest organization dedicated to informing the public about the effects of both unlawful and lawful immigration, and to defending in court the interests of Americans in limiting overall immigration, enhancing border security, and ending illegal immigration.

FAIR has been involved in more than 100 legal cases since 1980, either as a party or as *amicus curiae*. FAIR has direct and vital interests in the outcome of this case because this Court's decision will directly impact the federal government's ability to achieve operational control of the border, a goal that FAIR strongly supports and that Congress has identified as a compelling government interest.

SUMMARY OF ARGUMENT

Although Congress distinguishes between aliens seeking protection from abroad and those applying from within the United States, the Ninth Circuit interpreted the inspection and asylum statutes to extend asylum protection to aliens near, but not in, the United States. The circuit court's reading of the statutes introduces a conflict with, or partial repeal of, a statute recognizing the

1. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus*, its members, or its counsel—contributed monetarily to its preparation or submission.

President's broad power to suspend the entry of aliens. In order to avoid this conflict or repeal by implication, this Court should reject the Ninth Circuit's interpretation of the inspection and asylum statutes.

After extending protection to refugees on foreign soil through the refugee admissions process, Congress enacted the asylum statute in order to extend protection to aliens already inside the United States who meet the definition of refugee. The Ninth Circuit's interpretation of the asylum statute to extend to aliens near, but not inside, the United States unnecessarily blurs the distinction made by Congress. In order to show the proper respect to the political branches' judgment about the proper procedures, respectively, for protecting aliens inside and outside of the country this Court should reject the Ninth Circuit's interpretation.

Because the Ninth Circuit's reading of the inspection and asylum statutes introduces conflict with another provision of the Immigration and Nationality Act (INA), and because it also improperly interferes with the way Congress has chosen to distinguish between refugees and asylees, this Court should reverse the judgment below.

ARGUMENT

I. The Ninth Circuit's reading of the asylum and inspection statutes creates conflicts with another provision of the INA.

In the inspection statute, Congress provides that an alien "present in the United States who has not been admitted" or "who arrives in the United States" "shall

be deemed for purposes of this chapter an applicant for admission," 8 U.S.C. § 1225(a)(1), and that each applicant for admission must be inspected by immigration officers, 8 U.S.C. § 1225(a)(3). In the asylum statute, Congress further provides that an alien "who is present in the United States" or "who arrives in the United States" may apply for asylum. 8 U.S.C. § 1158(a)(1).

Below, the Ninth Circuit held that the Department of Homeland Security's metering process, which, in order to preserve agency resources during border surges and to prevent overcrowding, temporarily prevented aliens without valid travel documents from crossing into the United States, violates the inspection and asylum statutes. The Ninth Circuit based this holding on the premise that "the phrase 'arrives in the United States' encompasses those who encounter officials at the border, whichever side of the border they are standing on." *Al Otro Lado v. Exec. Office for Immigr. Review*, Nos. 22-55988, 22-56036, 2025 U.S. App. LEXIS 11683, at *22 (9th Cir. May 14, 2025) (citation omitted).

The government demonstrates that the Ninth Circuit's reading is inconsistent with both the straightforward text of the statutes and the presumption against extraterritoriality. In addition to those infirmities, the Ninth Circuit's reading of the inspection and asylum statues also introduces conflict with 8 U.S.C. § 1182(f), which provides in relevant part:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by

> proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

If the Ninth Circuit's reading of the first two above-mentioned statutes is upheld, the President would be unable to do what he is clearly able to do under the third: suspend the entry of asylum-seekers into the country. Asylum-seekers who encountered border officials at or near the border but outside of the United States would have to be inspected—presumably in the United States, not in the territory of a foreign country—and meeting that statutory requirement would involve their physical entry into the United States. Even if the President could order that the asylum-seekers be prevented from applying for asylum, on the theory that such an order would amount to a blanket denial of asylum that is within the executive's discretion, *see Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 730-31 (D.C. Cir. 2022), they would still have entered the country, in contravention of his proclamation suspending their entry.

The same goes for any other class of aliens whose entry the President might deem it in the national interest to suspend. He might, for example, enact something similar to the metering process by a proclamation suspending the entry of all aliens who seek entry through ports of entry but lack valid travel documents, citing evidence that some of these aliens are likely to be suicide bombers. The Ninth Circuit's reading of "arrives in" would require the inspection of these aliens, and thus their physical entry into the United States.

The President clearly has the power to suspend the entry of the above classes of aliens under § 1182(f). The only prerequisite for suspending the entry of all or any class of aliens or imposing any restriction upon their entry the President deems appropriate is his determination that their entry would be detrimental to the interests of the United States. This Court has described § 1182(f) as "exud[ing] deference to the President in every clause." *Trump v. Hawaii*, 585 U.S. 667, 684 (2018). Yet the Ninth Circuit's reading of "arrives in" would restrict that power in many situations, thus introducing a conflict with, and making other statutes work a partial repeal of, § 1182(f).

"It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored." *United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 168 (1976). There are only two situations where courts find repeals by implication:

> (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest.

Kremer v. Chem. Constr. Corp., 456 U.S. 461, 468 (1982) (quotation omitted). Such a finding is rare. *See Branch v. Smith*, 538 U.S. 254, 293 (2003) (O'Connor, J., concurring in part and dissenting in part) (observing the Court had not found an implied repeal outside the antitrust context since 1917, or any implied repeal since 1975).

More generally,

> [t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible."

Morton v. Mancari, 417 U.S. 535, 551 (1974) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)).

Sections 1225 and 1158 are neither substitutes for, nor in irreconcilable conflict with, § 1182(f). Indeed, there is no conflict so long as §§ 1225 and 1158 are read only to apply to aliens within the territorial boundaries of the United States, as the government persuasively urges. It is only under the Ninth Circuit's reading that the conflict arises.

In order to avoid this conflict or repeal by implication, this Court should reject the Ninth Circuit's interpretation of the inspection and asylum statutes in favor of the government's more-than-permissible interpretation. Section 1182(f) and the inspection and asylum statutes can all be given effect, but only by rejecting the Ninth Circuit's interpretation and reversing its judgment.

II. The Ninth Circuit's interpretation improperly interferes with the judgment of the political branches.

Under the Constitution, the political branches of government, not courts, are entitled to set immigration policies. As this Court has long recognized,

> [t]he power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.

Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893). *See also Mathews v. Diaz*, 426 U.S. 67, 81 (1976) ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government"); *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("that the formulation of [immigration] policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government").

Congress decided to extend refugee protection to aliens outside of the United States through the refugee admissions process. *See generally* 8 U.S.C. § 1157. Subsequently, Congress extended asylum protections to aliens inside the United States. 8 U.S.C. § 1158; *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 433 (1987) (observing that prior to the enactment of § 1158, the INA addressed only refugees seeking "admission from foreign countries," and left "no statutory basis for granting asylum to aliens who applied from within the United States"). So Congress has established two distinct forms of protection:

refugee admissions for aliens outside of the United States and asylum protection for aliens inside the United States.

Yet, as the government points out, the Ninth Circuit's interpretation conflates asylum eligibility with refugee admissions and inappropriately interferes with Congress's judgment that only aliens inside the United States may apply for asylum, whereas those outside of the United States may seek admission as refugees. Pet. Br. at 16-17 (distinguishing refugee admissions from asylum).

The Ninth Circuit's interpretation of §§ 1225 and 1158 extends asylum to aliens near, but outside of, the United States, and thus blurs the line drawn by Congress, even though nothing in the Constitution or any statute invites or compels the Ninth Circuit's intervention in Congress's geographically-based distinction between refugee admissions and asylum. This Court should reject the Ninth Circuit's interpretation because it redraws the lines established by Congress, in so doing overruling its policy judgment about the respective procedures to be followed for protecting aliens in the United States and aliens abroad.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

Respectfully submitted,

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