

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.

*ON 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 “arrives in the United States”—and so is entitled to apply for asylum and to be inspected by immigration officers, see 8 U.S.C. 1158, 1225—if he is stopped on the Mexican side of the U.S.–Mexico border. That decision conflicts with the statutory text, the presumption against extraterritoriality, and *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993). It also deprives the Executive Branch of an important tool for addressing border surges and preventing overcrowding at ports of entry. This Court should reverse the Ninth Circuit’s judgment.

A. Respondents Cannot Overcome The Statutory Text, The Presumption Against Extraterritoriality, Or *Sale*

Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who “arrives in the United

States” may apply for asylum, see 8 U.S.C. 1158, and must be inspected by immigration officers, see 8 U.S.C. 1225. An alien “arrives in the United States” only when he crosses the border and actually enters the country. See Gov’t Br. 13-16.

Statutory text. Respondents have no good answer to the plain meaning of the words “arrives in the United States.” They contend that Sections 1158 and 1225 cover aliens who are “*attempting* to come into the United States at ports of entry.” Br. 20 (emphasis added). But to “arrive” is to come to the end of a journey, not merely to come near the end. And “in” means “inside,” not “close but still outside.” An alien who is attempting to come into the United States may be attempting to arrive in the country, but that is not the same thing as actual arrival. Cf. *United States v. Taylor*, 596 U.S. 845, 853 (2022) (an attempted robbery is not a robbery); *Brendlin v. California*, 551 U.S. 249, 253 (2007) (an attempted seizure is not a seizure).

When Congress means to refer to aliens who *attempt* to enter the United States, it says so. For example, an alien commits a misdemeanor if he “enters or attempts to enter the United States” at an improper time or place. 8 U.S.C. 1325(a)(1). An alien commits a felony if he “enters, attempts to enter, or is at any time found in” the United States after a previous removal. 8 U.S.C. 1326(a)(2). And immigration officers may arrest aliens who are “entering or attempting to enter the United States” unlawfully. 8 U.S.C. 1357(a)(2). The provisions here, by contrast, say nothing about attempted arrival.

Respondents observe (Br. 21) that Sections 1158 and 1225 use the simple present tense (“arrives”) rather than the past perfect tense (“had arrived”). But that choice of tense reflects the convention that statutes are generally drafted in the present tense. The House of

Representatives drafting manual, for example, states: “STAY IN THE PRESENT.—Whenever possible, use the present tense (rather than the past or the future).” Office of the Legislative Counsel, U.S. House of Representatives, *House Legislative Counsel’s Manual on Drafting Style* § 102(c), at 2 (1995); accord Office of the Legislative Counsel, U.S. Senate, *Legislative Drafting Manual* § 103(a), at 4 (1997); see *United States v. O’Brien*, 560 U.S. 218, 233-234 (2010) (interpreting statutory provision in light of those drafting manuals); *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60-61 (2004) (same). The present tense, in any event, does not change the statutory requirement that the alien’s arrival occur “in the United States.” 8 U.S.C. 1158(a)(1), 1225(a)(1). Regardless of tense, the phrase “arrives in the United States” simply does not describe someone who is stopped in Mexico.

Respondents also emphasize (Br. 21-22) that some of Section 1225’s provisions use the present progressive tense (“is arriving”). See, *e.g.*, 8 U.S.C. 1225(b)(1)(A)(i) and (ii). But the statutory provisions that are directly at issue here, Sections 1158(a)(1) and 1225(a)(1), use the simple present tense (“arrives”). And although the use of the present progressive tense may signal that arrival can be a continuous process, it does not mean that an alien undergoes that process while still outside the country. An alien who is stopped in Mexico is not, in fact, “arriving in the United States.” 8 U.S.C. 1225(b)(1)(A)(i).

Respondents next imply (Br. 22) that “in” is the only “correct preposition” that Congress might have used between “arrives” and “the United States.” But Congress could easily have referred instead to an alien who “arrives *near* the United States.” Or it could have replaced the entire phrase “in the United States” with different language that covers aliens who are not yet in the

United States. For instance, it could have copied a separate provision of the INA that refers to aliens “arriving off the coast of the United States, or near a land border.” 8 U.S.C. 1103(a)(10). That Congress did not adopt those “readily available and apparent alternative[s]” confirms that it did not mean to cover aliens who are outside the country. *Knight v. Commissioner*, 552 U.S. 181, 188 (2008).

Respondents correctly observe (Br. 22) that courts should interpret statutory provisions in context, but the context here confirms that respondents’ reading is wrong. Respondents’ interpretation would collapse the distinction between 8 U.S.C. 1157, which “governs the admission of refugees who seek admission from foreign countries,” and Section 1158, which “sets out the process by which refugees currently in the United States may be granted asylum.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 433 (1987); see Gov’t Br. 16-17. Respondents contend that Section 1158 offers “an additional route to protection” for aliens outside the United States, Br. 42, but that contention contradicts this Court’s recognition that Section 1158 is limited to “refugees currently *in* the United States,” *Cardoza-Fonseca*, 480 U.S. at 433 (emphasis added). Respondents also dismiss, as mere “general background summaries,” this Court’s and other courts’ explanations of the distinction between Sections 1157 and 1158, Br. 42 (citation omitted), but those “background summaries” confirm that Section 1158 has long been understood to reach only aliens who are already in the United States.

Respondents’ position also entails an implausible reading of Section 1225. See Gov’t Br. 17-20. Respondents concede (Br. 43) that the steps that Section 1225 requires immigration officers to take—including inspection, detention, and removal of aliens—can gener-

ally occur only in the United States, and that their interpretation effectively means that any alien who reaches the border must be allowed to proceed into the United States so that immigration officers can take those steps. But it is well established that aliens “have no right to enter the United States unless it has been given to them by the United States.” *United States ex rel. Polymeris v. Trudell*, 284 U.S. 279, 280 (1932). If Congress wanted to depart from that foundational principle and to grant any alien who reaches the Mexican side of the border an automatic right to enter the United States, it would have said so explicitly. It did not.

Respondents principally defend (Br. 23-28) their reading of “arrives in the United States” as necessary to avoid redundancy with the separate statutory references to aliens who are “present in the United States.” 8 U.S.C. 1158(a)(1), 1225(a)(1). But the phrase “arrives in” is not redundant. It clarifies that Sections 1158 and 1225 extend to aliens who arrive in the United States even though, under a longstanding principle of immigration law known as the entry fiction, such an alien is deemed to have entered the United States only when lawfully admitted. See Gov’t Br. 21-22. Respondents contend (Br. 25-26) that the entry fiction does not sensibly apply to the statutory definition of “applicant for admission” or to the phrase “present in the United States,” but that misses the point. When Congress enacted Sections 1158 and 1225, it faced uncertainty about how courts would construe the phrase “present in the United States,” given that this Court had previously applied the entry fiction to hold that arriving aliens are neither “within the United States,” *Leng May Ma v. Barber*, 357 U.S. 185, 186 (1958), nor “found in the United States,” *Kaplan v. Tod*, 267 U.S. 228, 230-231 (1925). “Congressional action in the face of such legal

uncertainty cannot reasonably be characterized as unnecessary surplusage.” *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 649 (2022).

In addition, in both legal usage and ordinary speech, it is common to mention a “general” category alongside a “specific” subcategory, even though the subcategory might “be deemed ‘surplusage.’” *Lorenzo v. SEC*, 587 U.S. 71, 80 (2019) (citation omitted). For instance, the Taxing Clause authorizes Congress to impose “Taxes, Duties, Imposts and Excises,” U.S. Const. Art. I, § 8, Cl. 1, even though duties, impost, and excises are taxes, see 1 Joseph Story, *Commentaries on the Constitution of the United States* § 449, at 435 (1833). The Fourth Amendment protects both “papers” and “effects,” U.S. Const. Amend. IV, even though papers fit within the definition of “effects,” see *Oliver v. United States*, 466 U.S. 170, 177 n.7 (1984). The INA uses the phrase “citizen or national of the United States,” 8 U.S.C. 1101(a)(3), even though every U.S. citizen is a U.S. national, see 8 U.S.C. 1101(a)(22). Many federal statutes refer to “money or property,” see, e.g., 18 U.S.C. 1341, 1343, 1347(a)(2), even though money is a species of property. And an ordinary English speaker might say that a man “lives with his wife and family,” *King v. Smith*, 392 U.S. 309, 315 (1968), even though the man’s wife is part of his family. So too here, it makes sense that Sections 1158 and 1225 would separately mention aliens who arrive in the United States—a distinctive subcategory governed by special legal rules that do not necessarily apply to other applicants for admission. See Gov’t Br. 22-23.

Respondents’ reading, moreover, does not eliminate redundancy. While Section 1225 refers to an “alien present in the United States * * * or who arrives in the United States,” 8 U.S.C. 1225(a)(1), 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) (emphasis added). Respondents interpret (Br. 26) the word “present” in Section 1225 to refer to “[p]hysical presence.” But on that theory, the adverb “physically” in Section 1158 is superfluous. The canon against surplusage carries little force where, as here, “no interpretation” “avoids excess language.” *Microsoft Corp. v. i4i Ltd. Partnership*, 564 U.S. 91, 106 (2011); accord *Bufkin v. Collins*, 604 U.S. 369, 387 (2025); *Rimini Street, Inc. v. Oracle USA, Inc.*, 586 U.S. 334, 346 (2019).

In all events, “[t]he canon against surplusage is not an absolute rule.” *Marx v. General Revenue Corp.*, 568 U.S. 371, 385 (2013). Courts need not “avoid surplusage at all costs” and should “tolerate a degree of surplusage rather than adopt a textually dubious construction.” *United States v. Atlantic Research Corp.*, 551 U.S. 128, 137 (2007); see *USPS v. Konan*, No. 24-351 (Feb. 24, 2026), slip op. 13 (“The canon against surplusage is subordinate to the ‘cardinal canon’ that ‘a legislature says in a statute what it means and means in a statute what it says there.’”) (citation omitted). The preference to avoid surplusage thus cannot justify reading “arrives in the United States” to cover aliens in Mexico.

Finally, respondents repeatedly invoke (Br. 6, 9, 18, 37-38) the pre-1996 version of the asylum statute, which authorized aliens “at a land border” to apply for asylum. 8 U.S.C. 1158(a) (Supp. IV 1980). But that phrase was understood to extend only to “refugees currently in the United States,” *Cardoza-Fonseca*, 480 U.S. at 433—*i.e.*, refugees on the U.S. side rather than the Mexican side of the border. And in 1996, Congress replaced the phrase “at a land border” with the phrase “arrives in the United States”—language that is even more clearly

limited to aliens in the United States. That amendment would have been an odd way for Congress to extend the statute to aliens outside the country.

Presumption against extraterritoriality. Under the presumption against extraterritoriality, a court must presume that a statute applies only in the United States unless the statute clearly and affirmatively indicates that it applies abroad. See *Abitron Austria GmbH v. Hetronic International, Inc.*, 600 U.S. 412, 419 (2023). Because Sections 1158(a) and 1225(a) provide no such clear and affirmative indication, they apply only to aliens in the United States.

Respondents contend (Br. 44-47) that Sections 1158(a) and 1225(a) focus on immigration officers rather than aliens and that, as a result, the application of those statutes to officers on U.S. soil is domestic rather than extraterritorial. But that argument conflicts with the statutes' text. Section 1158(a)(1) provides that an "alien * * * who arrives in the United States * * * may apply for asylum," 8 U.S.C. 1158(a)(1); it neither explicitly nor implicitly refers to immigration officers. Section 1225(a), meanwhile, provides that an "alien * * * who arrives in the United States * * * [is] an applicant for admission," 8 U.S.C. 1225(a)(1), and that "applicants for admission * * * shall be inspected by immigration officers," 8 U.S.C. 1225(a)(3). Section 1225(a)'s use of the passive voice suggests that it focuses on the persons being acted upon (the aliens) rather than the persons performing the action (the immigration officers). See Gov't Br. 30-31. The case that respondents cite (Br. 46), *Dean v. United States*, 556 U.S. 568 (2009), does not suggest otherwise; it confirms that a statute's use of the "passive voice" signals that the statute does *not* focus on the "actor." *Id.* at 572.

Even assuming that Sections 1158(a) and 1225(a) focus on the location of the immigration officers who might conduct inspections rather than the aliens seeking to enter, respondents' theory still gives the provisions an extraterritorial application. Any "cross-border" interaction between an officer who is in the United States and an alien who is in Mexico is properly regarded as extraterritorial, not domestic. Pet. App. 63a (R. Nelson, J., dissenting). Applying a U.S. statute to such a cross-border interaction raises the concerns that underlie the presumption against extraterritoriality, such as risking interference with the political branches' conduct of foreign relations. See *Hernández v. Mesa*, 589 U.S. 93, 104 (2020).

This Court's decision in Sale. Respondents likewise have no adequate answer to *Sale*, where this Court held that the Executive Branch could interdict individuals fleeing from Haiti and prevent them from reaching U.S. soil and seeking protection under U.S. immigration law. See 509 U.S. at 170-177. Respondents do not dispute that the Court interpreted the applicable statute to apply "only within United States territory," *id.* at 173; that Congress was aware of *Sale* when it enacted Sections 1158 and 1225; or that Sections 1158 and 1225 should be read against the backdrop of *Sale*.

Respondents instead try (Br. 47) to distinguish *Sale* on the ground that it involved an "extraterritorial application," while this case involves only a domestic application. That attempted distinction is meritless. In both *Sale* and here, U.S. officials stopped aliens en route to the United States before the aliens reached U.S. soil. If the presumption against extraterritoriality precluded the application of U.S. immigration law to the aliens who were stopped under the interdiction program in *Sale*, see 509 U.S. at 173-174, it likewise precludes the

application of U.S. immigration law to aliens who are stopped under the metering policy at issue here.

Respondents also emphasize (Br. 48) that the aliens here are on the Mexican side the land border while those in *Sale* were “a gulf away.” But the presumption against extraterritoriality is not like a radio signal that gradually grows weaker with distance. It draws a sharp distinction between U.S. and foreign territory. Regardless of whether an alien is a foot, a mile, or a gulf away from the border, he is outside the United States—and outside the scope of Sections 1158(a) and 1225(a).

B. Respondents’ Extratextual Arguments Are Incorrect

Lacking meaningful support for their position in the text that Congress enacted, respondents turn to other sources, such as a treaty, federal regulations, and policy arguments. None of those contentions justifies reading “arrives in the United States” to encompass someone who is outside the United States.

Refugee Convention. Respondents invoke (Br. 34-39) Article 33.1 of the Convention Relating to the Status of Refugees, *done* July 28, 1951, 19 U.S.T. 6259, which provides: “No Contracting State shall expel or return (refouler) 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.” 19 U.S.T. 6276. Though the United States is not a party to the Convention, it has ratified a protocol that obliges it to follow Articles 2 to 34. See *Sale*, 509 U.S. at 169 n.19; Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6224. Respondents contend (Br. 34-39) that the government’s reading of Sections 1158 and 1225 would put the United States in

violation of Article 33.1. That contention is flawed on multiple levels.

First, the United States implements Article 33.1 through the withholding-of-removal statute, 8 U.S.C. 1231(b)(3), not the asylum statute, Section 1158. See *Cardoza-Fonseca*, 480 U.S. at 440-441. Like Article 33.1, the withholding statute generally prohibits the government from removing refugees to countries where their life or freedom would be threatened because of protected traits. See *ibid.* The asylum statute, by contrast, is “a discretionary mechanism” that allows the government to grant refugees a form of “broader relief”—namely, the right to remain in the United States, rather than just protection from being removed to a specific country. *Id.* at 441. Thus, this Court has explained that the asylum statute “does not correspond to Article 33.” *Ibid.*

Second, this Court has already determined in *Sale* that Article 33.1 and the corresponding withholding statute protect only those aliens who are already “present in the host country.” 509 U.S. at 187; see *id.* at 177-187. The Court observed that Article 33.1 makes it unlawful to “expel or return” a refugee. *Id.* at 179 (citation omitted). The Court explained that “expulsion” refers to the removal of a “refugee already admitted into a country,” while “return” refers to the removal of a “refugee already within the territory but not yet resident there.” *Id.* at 182 (citation omitted). The Court also reviewed the Convention’s negotiating history and determined that the drafters understood Article 33.1 “to apply only to aliens physically present in the host country.” *Id.* at 186-187. Further, the Court quoted commentators who recognized that Article 33.1 “concerns refugees who have gained entry into the territory of a Contracting State, legally or illegally, but not to refu-

gees who seek entrance into the territory.” *Id.* at 182 n.40 (brackets and citation omitted).

Since *Sale*, the highest courts of at least two other parties to the Protocol have read Article 33.1 the same way. The House of Lords has held that, though Article 33.1 prohibits the removal of a refugee who has “gained entry into the territory of a Contracting State,” “no Contracting State is prevented from refusing entry in this territory to refugees at the frontier.” *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport*, [2004] UKHL 55, ¶ 17 (opinion of Lord Bingham of Cornhill) (citation omitted).¹ And the High Court of Australia has agreed that Article 33.1 is limited to “refugees who are within Contracting States” and that “none of the provisions [of the Convention] gives to refugees a right to enter the territory of a Contracting State.” *Minister for Immigration & Multicultural Affairs v. Khawar*, [2002] HCA 14, ¶¶ 42, 44 (opinion of McHugh & Gummow, JJ.).² That court elaborated: “States the world over have consistently exhibited great reluctance to give up their sovereign right to determine which persons will, and which will not, be admitted to their territory.” *Id.* ¶ 44 (citation omitted).

Respondents cite (Br. 35) this Court’s statement in *Sale* that Article 33.1 protects aliens who are “on the threshold of initial entry.” *Sale*, 509 U.S. at 180 (citation omitted). This Court’s cases, however, use the phrase “‘on the threshold’” to describe aliens who have “set foot on U.S. soil” but have not “‘effected an entry’” within the meaning of the entry fiction. *DHS v. Thuraissigiam*, 591 U.S. 103, 139-140 (2020) (citations omit-

¹ <http://www.bailii.org/uk/cases/UKHL/2004/55.pdf>

² <https://www.hcourt.gov.au/sites/default/files/eresources/2002/HCA/14.pdf>

ted). Contrary to respondents' contention, *Sale* did not use that phrase to refer to aliens who are physically outside the United States. That reading would conflict with *Sale*'s recognition that "the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory." 509 U.S. at 183.

Respondents also cite (Br. 35) Justice Blackmun's dissent in *Sale*, which asserted that "the majority agrees that the Convention *does* apply to refugees who have reached the border." 509 U.S. at 196. But "[c]omments in the dissenting opinion * * * 'are just that: comments in a dissenting opinion.'" *Castro-Huerta*, 597 U.S. at 656 (citation omitted). The passage from the Court's opinion cited by Justice Blackmun does not support his gloss, as it is followed by a paragraph and a footnote repeatedly making it clear that Article 33.1 refers only to refugees who are "already within the territory" and "does not obligate the Contracting State[s] to admit any person who has not already set foot on their respective territories." *Sale*, 509 U.S. at 182 & n.40 (brackets, citations, and internal quotation marks omitted).

Some amici observe (*e.g.*, Global Strategic Litigation Council Amicus Br. 17-18) that the United Nations High Commissioner for Refugees has opined that Article 33.1 extends to aliens outside a contracting state's territory. Justice Blackmun's dissent in *Sale* also invoked the same view of the then-High Commissioner, to no avail. See 509 U.S. at 198 n.8. Since then, the United States has reiterated "its longstanding interpretation of Article 33" and again "memorialize[d] its fundamental disagreement" with the High Commissioner's theory, which is "at odds with the text and negotiating history of the Convention." U.S. Dep't of State, *Observations of the United States on the Advisory Opinion of the UN High*

Commissioner for Refugees on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol (Dec. 28, 2007).³ In the United States’ view, Article 33.1 “applies only with respect to *non-refoulement* of aliens within the territory of the Contracting State.” *Ibid.*

Regulatory definitions. Respondents also contend (Br. 28-31) that the government’s reading of Sections 1158 and 1225 conflicts with the regulatory definition of “arriving alien.” That is incorrect. Soon after Congress enacted Sections 1158 and 1225, the government defined the term “arriving alien” to include “an alien who seeks admission to * * * the United States, as provided in 8 CFR part 235, at a port-of-entry.” 62 Fed. Reg. 10,312, 10,330 (Mar. 6, 1997). The cross-referenced provisions of 8 C.F.R. part 235 equated “alien[s] seeking admission” with “[a]lien applicants for admission.” *Id.* at 10,354 (emphasis omitted). A year later, the government amended the definition of “[a]rriving 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. 1.2 (emphasis omitted); see 8 C.F.R. 1001.1(q). Both the initial definition and the modified definition of “arriving alien” are thus limited to applicants for admission—and an alien can be an applicant for admission only if he is “present in the United States” or “arrives in the United States.” 8 U.S.C. 1225(a)(1).

Respondents contend (Br. 30) that the government’s argument is “circular” because its interpretation of the regulatory definition of “arriving alien” presupposes its interpretation of the statutory definition of “applicant for admission.” But the same could be said of respond-

³ <https://2001-2009.state.gov/s/l/2007/112631.htm>

ents' logic: *Their* interpretation of the regulatory definition of "arriving alien" presupposes *their* interpretation of the statutory definition of "applicant for admission." Either way, a court can determine what the regulation means only if it first determines what the statute means. Where, as here, a regulation "restate[s] the terms of the statute itself," it provides little insight into the statute's meaning. *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).

Pre-1996 practice. Respondents next assert (Br. 30-31) that, before Congress overhauled Section 1225 in 1996, federal law required immigration officers to inspect aliens who were trying to come into the United States but had not yet done so. But the authorities they cite do not support that claim. In one case, this Court stated in a footnote that, "[i]n this opinion, 'exclusion' means preventing someone from entering the United States who is actually outside of the United States or is treated as being so." *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.4 (1953). In another, a district court stated in a footnote that an alien who has been excluded from the United States may nonetheless file "a new application for admission." *Hernandez v. Casillas*, 520 F. Supp. 389, 394 n.2 (S.D. Tex. 1981). In a third case, the Board of Immigration Appeals recognized that the government could in some circumstances "reopen an exclusion case" after issuing an order of exclusion. *In re Rangel-Cantu*, 12 I. & N. Dec. 73, 74 (1967), overruled in part on other grounds by *In re Ku*, 15 I. & N. Dec. 712 (B.I.A. 1976). None of those statements suggests any obligation to inspect an alien outside the United States.

Respondents in any event overlook material changes to the relevant statutory text. The INA originally required the inspection of "[a]ll aliens arriving at ports of

the United States.” § 235(a), 66 Stat. 198. But in 1996, Congress amended it to require the inspection of an alien who is “present in the United States” or “who arrives in the United States.” 8 U.S.C. 1225(a)(1). Whatever the proper scope of the former reference to “arriving *at* ports,” the phrase “arrives *in* the United States” now plainly excludes aliens who are outside the United States.

Incentives for illegal entry. Respondents contend (Br. 31-32) that the government’s reading creates a perverse incentive for illegal entry: Aliens who unlawfully cross the border may seek asylum, while those who are stopped outside ports of arrival may not do so. But Section 1158 states that an alien may apply for asylum if he “arrives in the United States (whether or not at a designated port of arrival * * *).” 8 U.S.C. 1158(a)(1). That text makes clear that an alien’s ability to apply for asylum depends on whether he “arrives in the United States,” not whether he uses a port of arrival.

The INA, in any event, provides other mechanisms for discouraging unlawful border crossings. For example, the statute makes it a crime, punishable by up to six months of imprisonment, to enter the United States at an improper location. See 8 U.S.C. 1325(a). The statute also makes asylum discretionary, see 8 U.S.C. 1158(b)(1)(A), and the government may consider an alien’s illegal entry when deciding how to exercise that discretion, see *In re A-B-*, 27 I. & N. Dec. 316, 345 & n.12 (A.G. 2018); see also *In re S-S-F-M-*, 29 I. & N. Dec. 207, 208 (A.G. 2025) (reinstating *A-B-* as the best reading of the statutory text). Further, an alien is ineligible for asylum if he unlawfully re-enters the United States after being removed. See 8 U.S.C. 1231(a)(5).

Respondents’ theory would create its own perverse incentives. By giving any alien who reaches the Mexi-

can side of the U.S.–Mexico border a right to proceed into the United States, even if the alien lacks valid travel documents, that theory would encourage aliens to travel to the United States without first obtaining visas. It would also encourage aliens to beset ports of entry even when the ports are overcrowded, leading to the dangerous conditions that led to the adoption of the metering policy in the first place.

Putative circumvention of Sections 1158 and 1225. Respondents further contend (Br. 33) that the government’s interpretation could enable immigration officers to “render [Sections 1158 and 1225] a nullity by simply physically turning back arriving noncitizens before they set foot on U.S. soil.” That is incorrect.

The Constitution and federal statutes empower the Executive Branch to prevent aliens from crossing into the United States. The executive power that Article II vests in the President includes “the power of exclusion of aliens.” *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). Many federal statutes also authorize the Department of Homeland Security (DHS) and U.S. Customs and Border Protection (CBP) to manage the Nation’s borders. See, e.g., 6 U.S.C. 111(b)(1), 202, 211(c) and (g)(3). The Executive Branch therefore possesses broad authority to restrict the movement of individuals “seeking to cross our borders.” *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973). An alien may lawfully be “stopped in crossing an international boundary” and required to “identify himself as entitled to come in.” *Ibid.* (citation omitted). That traditional form of border control is not somehow an improper circumvention of Sections 1158 and 1225.

Sale confirms that respondents’ argument is wrong. There, this Court upheld an interdiction program that “prevented Haitians * * * from reaching our shores

and invoking [the INA’s] protections” for refugees. *Sale*, 509 U.S. at 160. If interdicting aliens at sea was not an improper circumvention of the statute in *Sale*, then physically blocking aliens on land likewise is not an improper circumvention of the statutes here.

In fact, this case is easier than *Sale*. *Sale* concerned withholding of deportation (now known as withholding of removal), which is a mandatory form of protection. See 509 U.S. at 170. This case, by contrast, concerns asylum, a form of discretionary relief that the government is free to deny even when an alien is legally eligible to receive it. See *Cardoza-Fonseca*, 480 U.S. at 441. If the Executive Branch may lawfully use interdiction to prevent an alien from reaching U.S. soil and invoking the mandatory withholding statute, it certainly may use metering to prevent an alien from reaching U.S. soil and invoking the discretionary asylum statute.

Respondents err in claiming (Br. 32) that the government’s theory would enable it “to entirely abandon” the requirements set out in Sections 1158 and 1225. When engaging in metering, officials at the border stop aliens *who lack valid travel documents* from crossing into the United States. See Pet. App. 5a. Accordingly, Sections 1158 and 1225 still do meaningful work with respect to aliens who are not subject to metering—*i.e.*, aliens with valid travel documents, who, after proceeding into the United States, must be inspected and may apply for asylum. Those provisions also do meaningful work as to aliens who *are* subject to metering; if such an alien later returns to the port of entry and crosses the border, he must be inspected and may apply for asylum. Finally, the statutes do meaningful work as to aliens who unlawfully cross into the United States, who likewise must be inspected and may apply for asylum.

C. Respondents' Theory Impairs The Executive Branch's Lawful Authority To Manage The Border

Respondents' interpretation of Sections 1158 and 1225 impairs the Executive Branch's ability to perform "the difficult and important task of policing the border" in accordance with federal law. *Hernández*, 589 U.S. at 105. It prevents CBP from using metering, a tool that Administrations of both political parties have used to address border surges and prevent overcrowding at ports of entry.

Respondents question (Br. 10-12) the necessity of metering, but their arguments lack merit. For instance, respondents observe (Br. 11-12) that DHS's Office of Inspector General issued a report stating that CBP used metering even when ports of entry had space available to hold more aliens. But CBP responded that the report reflected a "misunderstanding" of its operations. J.A. 417. It explained that its capacity to process and hold aliens without valid travel documents depends "not just on the amount of available holding space," but also on other factors, such as the "[v]olume of other travelers seeking entry to the United States," the "[v]olume of trade," and its "[e]ncounters of individuals with terrorist, criminal, or gang ties." J.A. 422-423. CBP also noted that port officials possess broad discretion to "balance" CBP's competing duties "to process lawful trade and travel, to address CBP's counter-narcotics mission, and to process people arriving without documents," and that port officials do not have an obligation to maximize the processing of aliens without valid travel documents at the expense of CBP's other responsibilities. J.A. 423.

Respondents also claim that officials at one port of entry "intentionally removed seats" as part of an effort

to manufacture capacity constraints. Br. 12 (quoting J.A. 176). But the quoted allegation comes from a leading question posed by respondents' counsel during a deposition of a CBP officer, not from the witness's answer. See J.A. 176. Although the witness testified that he had seen some chairs being moved, he did not testify that he personally knew that port leadership moved those chairs for the purpose of diminishing the port's capacity to process asylum seekers. See *ibid.* To the contrary, the witness initially "thought that creating some space there [by moving the chairs] was good for officer safety." J.A. 175. The witness also expressed concerns about his "memory" of the incident. J.A. 176.

Respondents argue (Br. 49-51) that the Executive Branch should manage the border using tools besides metering. But the tools that respondents recommend do not suffice for addressing overcrowding at ports of entry during border surges. Respondents suggest (Br. 49) using "expedited removal," but that procedure simply allows the government to remove certain aliens who are already in the United States; it does not prevent newly arriving aliens from overwhelming a port's capacity to inspect such arriving aliens while fulfilling CBP's other responsibilities. Respondents also suggest "initiating the asylum process" while aliens are still in Mexico, *ibid.* (citation omitted), but they do not explain how officials in the United States could interview or detain aliens in Mexico.

Finally, respondents note (Br. 50) that "courts may only read and interpret existing law," not make policy. Indeed. Existing law provides that an alien becomes entitled to apply for asylum and to be inspected only when he "arrives in the United States." An alien who is still outside the United States has no such entitlement.

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This Court should reverse the judgment of the court
of appeals.

Respectfully submitted.

D. JOHN SAUER
Solicitor General

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