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P R O C E E D I N G S

(11:15 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 25-5, Noem versus Al Otro Lado.

Mr. Suri.

ORAL ARGUMENT OF VIVEK SURI

ON BEHALF OF THE PETITIONERS

MR. SURI: Mr. Chief Justice, and may it please the Court:

Respondents' position is that when Congress said "arrives in the United States," it meant stopped outside the United States. That theory is wrong for the simple reason that it defies the statutory text. You can't arrive in the United States while you're still standing in Mexico. That should be the end of this case.

But even if you see some ambiguity in the text, the Court's decision in Sale should clinch the case for us. In Sale, this Court determined that the protections of the refugee convention and the withholding-of-deportation statute do not extend to aliens outside the United States and, further, that it is entirely

1 lawful for the executive branch to prevent
2 aliens from reaching U.S. soil and claiming
3 those protections.

4 If Congress meant to depart from that
5 territorial approach when it adopted the
6 statute here, just three years after Sale, it
7 would have said so. It didn't.

8 This Court should, therefore, uphold
9 the metering policy and reverse the Ninth
10 Circuit's judgment.

11 JUSTICE THOMAS: Are there treaty
12 obligations that are implicated by either the
13 metering policy or the issues here?

14 MR. SURI: No, there are not, Justice
15 Thomas. Respondents rely primarily here on the
16 refugee convention and the protocol, but there
17 are two reasons for which those don't apply in
18 this case and those aren't violated by
19 metering.

20 The first is, as this Court held in
21 Sale, those provisions simply don't apply
22 extraterritorially. They apply to the return
23 of someone from the United States, not to, in
24 Sale, the return of Haitian refugees who are
25 interdicted in international waters.

1 And, secondly, even where that
2 convention does apply, what it prohibits is
3 returning someone to a foreign country.
4 Metering doesn't return anyone to Haiti or
5 Guatemala or wherever the person might be
6 coming from. It just says you can't set foot
7 in the United States.

8 JUSTICE SOTOMAYOR: I'm not sure that
9 I understand how you can say that we're not
10 violating our treaty obligations with your
11 reading and why Sale -- you think Sale protects
12 you.

13 Sale very clearly says that U.S.
14 asylum and withholding protections apply to
15 those who reside in or have arrived at the
16 border of the United States. It also explained
17 that refoulement means a defensive act of
18 resistance or exclusion at the -- at the
19 border, not merely returning a person to a
20 country.

21 Now the Refugee Act was passed in
22 response to the MS St. Louis situation, which
23 was a ship in 1939 carrying over 900 Jewish
24 refugees that landed in Cuba, the refugees
25 weren't permitted to unload themselves. It

1 then came to the coast of Saint -- of Florida,
2 and the U.S. wouldn't let it dock at all, all
3 right, and turned it back. And it did the same
4 in -- it did the same in Canada. Canada
5 wouldn't let it dock.

6 So the Refugee Act was passed to
7 ensure that people who arrived at a border and
8 knocked on the door -- because that's what
9 you're saying. These are people who come to
10 the line, there's an agent standing at the line
11 that's open to everybody else except refugees,
12 correct? They're letting in workers with
13 permits to come into work, they're letting
14 everybody else in, but they're not permitting
15 the people who come to the line, to the door,
16 and knock on it who want to claim refugee
17 status. You're saying we're not going to
18 inspect you.

19 How does that not violate the Refugee
20 Treaty Act or the spirit of the St. Louis U.N.
21 convention?

22 MR. SURI: To start with the statute,
23 the statute doesn't say "arrive at the door,"
24 "arrive at the border" --

25 JUSTICE SOTOMAYOR: No, but it says

1 "arriving in the U.S." in various provisions.
2 The inspection provision says, "all aliens who
3 are applicants for admission or otherwise
4 seeking admission or readmission or" -- "to or
5 transit through the U.S. shall be inspected by
6 immigration officers."

7 So various provisions of 1125 also
8 speak about aliens arriving. Someone on a
9 plane arriving to land in LaGuardia may not
10 have put their foot on U.S. land, but they've
11 arrived in the United States. They're
12 arriving. They're knocking on the door.

13 MR. SURI: Again, the statute that is
14 specifically at issue here says "arrives in the
15 United States."

16 JUSTICE SOTOMAYOR: So, if I believe
17 that your reading violates the U.N. convention,
18 then what you're telling me is that Congress,
19 when it passed this language in 1996, intended
20 to reject its treaty obligations?

21 MR. SURI: No, I'm telling you --

22 JUSTICE SOTOMAYOR: Without
23 conversation about it and a House report that
24 basically said there is no evidence that
25 Congress -- Congress, in fact, told us it

1 intended to make that provision. The House
2 report stated that the new version of 1158
3 applies "to any" -- "any alien who is
4 physically present in the United States or at
5 the border of the United States."

6 That was the language of the House
7 report.

8 MR. SURI: Not the language of the
9 statute. The statute says "in the United
10 States" and not --

11 JUSTICE SOTOMAYOR: But don't we read
12 statutes in their context?

13 MR. SURI: You read statutes according
14 to their text. And there's no ambiguity --

15 JUSTICE SOTOMAYOR: No.

16 JUSTICE JACKSON: But --

17 JUSTICE SOTOMAYOR: You start with the
18 text and context, correct?

19 JUSTICE JACKSON: -- Mr. -- Mr. Suri,
20 the text has to make sense. And what is a
21 little concerning to me about your reading of
22 the statute is the practical implications
23 insofar as it suggests that a Congress that was
24 authorizing asylum would be requiring people to
25 break the law in order to obtain it.

1 So imagine a polite asylum seeker who
2 wants to do everything by the book, he
3 approaches the border but does not cross
4 precisely because the law says you are not
5 supposed to enter the United States without
6 authority.

7 Why on earth would Congress have
8 intended or meant for his asylum request to be
9 discarded, not taken seriously, not
10 entertained, but someone who manages to enter
11 the United States unlawfully, when the law says
12 you're not supposed to do it, and requests
13 asylum gets their application entertained?

14 That doesn't seem to me to make any
15 sense, that if we're trying to think about what
16 "arriving in" means, surely, Congress was
17 contemplating that a person was -- would be
18 coming to the United States, would be doing so
19 with an intent to comply with the law that says
20 you're not supposed to enter and thereby asking
21 for entry.

22 MR. SURI: There are two reasons for
23 which that makes sense. The first is that we
24 have a separate refugee admission statute,
25 Section 1157, that protects aliens outside the

1 United States.

2 So it makes perfect sense for Congress
3 to say: If you're in the United States, you go
4 to the asylum route, and if you're outside the
5 United States, you go to the refugee route.

6 JUSTICE JACKSON: Yes. But I'm trying
7 to understand your -- the rationality of your
8 interpretation of "arriving in." You're
9 suggesting that "arriving in" means the person
10 who is literally standing on the U.S. side of
11 the border as opposed to the person who
12 approaches the U.S. side of the border.

13 And I don't understand why Congress
14 would make that distinction.

15 MR. SURI: The second reason that
16 Congress would have made that distinction,
17 apart from the fact that the person in Mexico
18 already has this other statute, the refugee
19 statute that he could turn to, is that the
20 problem of the world's refugees is not solely
21 the United States' burden to bear. It's a
22 shared responsibility of nations throughout the
23 world and it makes --

24 JUSTICE JACKSON: No, I understand.
25 But think about the statute at issue. It says

1 "arriving in." It -- it, first of all,
2 distinguishes physically inside, right, and it
3 says "arriving in."

4 And it gives those people the ability
5 to ask for asylum. And the way that your
6 reading plays out, a person who is coming to,
7 arriving in, approaching the United States
8 can't make that ask, but they have to somehow
9 violate the law by entering the United States
10 in order to make that ask.

11 MR. SURI: If I might complete the
12 answer, Congress could reasonably determine
13 that if a refugee is in Mexico, then the
14 Mexican government is primarily responsible for
15 processing his claim.

16 Once the refugee is in the United
17 States, whether legally or illegally, then the
18 United States has greater responsibility toward
19 that person.

20 JUSTICE JACKSON: I guess I don't --

21 CHIEF JUSTICE ROBERTS: Counsel --

22 JUSTICE BARRETT: Mr. Suri --

23 JUSTICE JACKSON: -- understand how
24 that's responsive -- can I just finish?

25 I don't understand how that's

1 responsive to my point, which is the person who
2 is arriving in the United States asking for
3 permission to enter is not necessarily "in
4 Mexico" in a way that implicates all the
5 concerns that you're talking about.

6 Yes, he's physically standing in
7 Mexico, but imagine a person who has a placard
8 on their body as they approach the border that
9 says, you know, I would like entry, I'm being
10 persecuted in Mexico.

11 Your suggestion that the United States
12 would say: Unless you can figure out a way to
13 illegally cross, we're not going to entertain
14 that claim, seems very peculiar.

15 MR. SURI: It seems to me that the
16 premise of the question is that there is
17 something improper about blocking someone from
18 completing the arrival, i.e., into the States.

19 JUSTICE JACKSON: The premise of the
20 question is that "arriving in" has to mean
21 something.

22 MR. SURI: Yes.

23 JUSTICE JACKSON: And to suggest that
24 it means that you have to actually illegally
25 cross doesn't make sense.

1 MR. SURI: There are other penalties
2 that apply to people who illegally cross. It's
3 a crime to illegally cross into the United
4 States. And the fact that someone has
5 illegally crossed into the United States can be
6 taken into account when the person is making
7 the asylum application.

8 JUSTICE JACKSON: Precisely.

9 JUSTICE JACKSON: Mr. Suri, I --

10 CHIEF JUSTICE ROBERTS: Sorry, please.

11 Counsel, the statutory language, is it
12 "arriving in" or is it "arrives in"?

13 MR. SURI: It's "arrives in."

14 CHIEF JUSTICE ROBERTS: Okay. Thank
15 you.

16 JUSTICE KAGAN: Mr. Suri, if --

17 JUSTICE BARRETT: Mr. Suri --

18 CHIEF JUSTICE ROBERTS: Justice Kagan?

19 JUSTICE KAGAN: I don't think you had
20 much of a chance to answer the part of Justice
21 Sotomayor's question, which I am interested in,
22 about the treaty obligations and particularly
23 how the treaty obligations should or should not
24 be interpreted in light of the St. Louis
25 incident that gave rise to the treaty.

1 MR. SURI: The treaty was a compromise
2 between the interest in protecting refugees and
3 the interest in protecting national
4 sovereignty. And the compromise that was
5 reached was we're not going to require nations
6 to admit anyone into the country, but we're
7 going to forbid sending people back to other
8 countries if -- once they have already entered
9 that country.

10 And, here, the treaty doesn't apply
11 for two reasons. One, the individuals at issue
12 haven't entered the United States, and, two,
13 they're not being sent back to any foreign
14 country. They're just being denied admission
15 to the United States.

16 I would also note that even on any
17 interpretation of the statute, the St. Louis
18 situation wouldn't be covered because there's a
19 parenthetical in the statute that talks about
20 people interdicted in United States or
21 international waters, and they're covered by
22 the statute only if they're brought to the
23 United States.

24 So, in the St. Louis example, those
25 individuals were not brought to the United

1 States. Therefore, they'd be outside the scope
2 of the statute, I think, even on Respondents'
3 reading.

4 JUSTICE KAVANAUGH: I think Justice
5 Jackson's question got at the fact that your
6 interpretation privileges someone who illegally
7 enters over someone who legally comes close to
8 the border. And why would Congress privilege
9 someone who illegally enters the United States?

10 Can you answer that directly?

11 MR. SURI: I -- I think it's a bit
12 unfair to say that we're privileging people who
13 illegally enter because people who legally
14 enter are being treated better than people who
15 illegally enter.

16 JUSTICE KAVANAUGH: I got that
17 distinction. The distinction is between the
18 illegal entrant and the person who lawfully
19 gets very close and wants to follow the rules,
20 that person is disadvantaged as compared -- on
21 asylum as compared to the person who illegally
22 enters. And the question as I understood it
23 is, why would Congress do that? So what's the
24 answer?

25 MR. SURI: Two answers to that. The

1 first is we would deny that the person is being
2 privileged because metering is not saying to
3 the person, the polite asylum seeker in Justice
4 Jackson's words, you can never enter the United
5 States and your only option is to enter
6 illegally. It's saying our port is at capacity
7 today, try again some other day, and that time
8 when that person comes in, that person could
9 come in legally.

10 The second answer is that Congress
11 could reasonably determine that the United
12 States has greater responsibilities to aliens
13 in the United States than to aliens in Mexico.
14 That's how sovereignty is divided among nations
15 in the world. And whether you got here
16 illegally or illegally, Congress could say we
17 have greater responsibilities once you're
18 within our borders.

19 JUSTICE KAVANAUGH: More generally or
20 separately, I guess, what is the problem --
21 what was the problem that was trying to be
22 solved here when this policy was put in place?

23 MR. SURI: The policy was put in place
24 in 2016 when ports which might have a capacity
25 of something like 50 or a hundred people, a

1 holding capacity of 50 to a hundred people,
2 were facing lines of aliens far larger than
3 that.

4 And those individuals were demanding
5 entry at that particular time and ports were
6 overwhelmed. Sometimes they didn't have enough
7 food to feed the people arriving at -- in the
8 United States. Sometimes they didn't have beds
9 in which they could sleep. They didn't have
10 places where they could hold them. So it was
11 necessary for the ports to say, sorry, we're at
12 capacity, try again some other time.

13 And I think Respondents' position is
14 that that is categorically illegal in any
15 circumstances because it always violates the
16 asylum statute and the inspection statute to
17 say we're full right now.

18 JUSTICE SOTOMAYOR: That's not quite
19 what they're saying. It's certainly not what
20 the circuit court said.

21 What the circuit court said was we
22 have a law that permits the United States to
23 have people reside in Mexico or stay in Mexico
24 while the application is being considered. So
25 there is already that remedy for the

1 government, correct?

2 MR. SURI: There is a contiguous
3 territory return provision, but --

4 JUSTICE SOTOMAYOR: Exactly. And that
5 only -- and what the circuit said is, it's okay
6 for you to say stay somewhere else while we
7 process this. What you can't do is do what the
8 statute doesn't permit you to do, which is not
9 to inspect me at all.

10 The circuit said you can make a list
11 of people and have a rational basis to tell
12 them to come back in a particular time, but,
13 instead, what you were doing was saying you,
14 alien, we're not going to even consider your
15 application, we're not going to take your
16 number, we're not going to do anything. We're
17 just going to turn you back. We're going to be
18 the ship on the MS Louis and ship you back to
19 be killed wherever you end up. And that's what
20 the statute doesn't permit.

21 Now you mentioned --

22 MR. SURI: Might I answer that?

23 JUSTICE SOTOMAYOR: Yes.

24 MR. SURI: That's an argument that
25 Sale was wrongly decided because that's exactly

1 what the United States was doing in Sale,
2 sipping -- shipping people back to Haiti.

3 JUSTICE SOTOMAYOR: No, because Sale
4 made very clear that the U.N. obligation is, if
5 you're a refugee who's arriving at the port of
6 entry, if you're knocking on the door and I'm
7 staring you in the face, you have an obligation
8 to at least listen to my application.

9 MR. SURI: And the --

10 JUSTICE SOTOMAYOR: And you can tell
11 me to wait, you can put me in a safer place to
12 wait, you can do a bunch of different things.
13 What you can't do is just turn me back from the
14 border.

15 MR. SURI: And the second answer is
16 we're not shipping people back to Haiti or
17 whichever country the person might be coming
18 from.

19 JUSTICE SOTOMAYOR: No. You're just
20 telling them walk back.

21 MR. SURI: No, we're not telling them
22 anything.

23 JUSTICE SOTOMAYOR: So they can
24 just -- the people on the St. Louis could have
25 swam back. They happened to be on a boat. But

1 that's what we did. They were off the coast of
2 Florida and we didn't let them dock. We didn't
3 let them dock and take -- and interview them at
4 all. We didn't consider whether they were
5 being persecuted. And the majority of those
6 people were shipped back or had to go back from
7 where they came and were killed.

8 That's what we're doing here, isn't
9 it?

10 MR. SURI: Like the Court in Sale, I
11 do not deny the moral weight of claims made by
12 refugees. But that is not the question before
13 the Court.

14 The question before the Court --

15 JUSTICE SOTOMAYOR: So tell me why --

16 CHIEF JUSTICE ROBERTS: Could I --
17 would you complete your answer?

18 MR. SURI: The question before the
19 Court is, what obligations did Congress impose
20 in the asylum and inspection statutes? And
21 those refer only to aliens who arrive in the
22 United States.

23 JUSTICE KAGAN: May I ask you a
24 question about the statute and about that
25 answer? You know, I totally get that if you

1 just look at the language "who arrives in the
2 United States," it sort of suggests, well, you
3 have to be in the United States. So totally
4 get that.

5 It does seem to me that this
6 statute -- you don't have to be a superfluity
7 hawk to think that this statute has a massive
8 superfluity argument -- problem, because the
9 way you're understanding that second phrase,
10 the statute ends up saying, essentially, any
11 alien who is in the United States or who is in
12 the United States.

13 So what led to that kind of
14 superfluity in this statute, and how are we to
15 understand it? It really -- if you just sort
16 of -- you -- it can't mean that. So the "in
17 the United States" must mean something else.

18 MR. SURI: I agree that the "arrives"
19 category is a subset of the "present" category,
20 but there are a few different reasons why
21 Congress might have mentioned that subset the
22 same way it mentions subsets in other statutes
23 that refer, for example, to money or property.

24 One reason is that the "arrives"
25 category is subject to special rules that other

1 applicants of -- for admission are not subject
2 to. For example, they're automatically subject
3 to expedited removal if they are inadmissible.

4 So, when the statute, 1225, is talking
5 about the "arrives" category repeatedly in
6 later provisions, it makes sense to mention
7 them separately in the definitional provision.

8 The second reason is that immigration
9 law has historically drawn a distinction
10 between deportation proceedings for people in
11 the interior of the United States and exclusion
12 proceedings for people who have just arrived in
13 the country. This provision -- in this
14 provision, Congress might simply have been
15 trying to make clear that both of those are
16 covered.

17 The third reason is that under the
18 entry fiction, this Court had previously
19 interpreted terms that are close synonyms for
20 "present" in the United States, like "found in"
21 or "within" the United States, to exclude
22 recent arrivals. And Congress might have
23 wanted to make clear that it's covering recent
24 arrivals as well.

25 So, for all those reasons, the

1 "arrives" category serves important clarifying
2 function.

3 JUSTICE KAGAN: You know, it also
4 serves a sort of confusing function. When
5 Congress did this, it must have realized or you
6 would think it would have realized that it was
7 just going to confuse matters to essentially
8 say the same thing twice about an alien who was
9 in the United States.

10 I don't think, on the entry -- what is
11 it called, the entry fiction?

12 MR. SURI: Fiction.

13 JUSTICE KAGAN: I mean, I don't think
14 you would have needed this second provision to
15 do that because you have "physically present."
16 That should have tipped people off that we're
17 not talking about the entry fiction. And we
18 also have the language about "irrespective of
19 the alien's status," which also should have
20 tipped people off that we weren't talking about
21 the entry fiction.

22 So, if -- if -- I took that to be your
23 primary argument in the brief, and I don't
24 think it really sort of does it.

25 MR. SURI: Well, if you're positing

1 that there are already two parts of the asylum
2 statute that are meant to address the entry
3 fiction, then it isn't much of a stretch to say
4 that there's a third piece as well.

5 Secondly, the two pieces you've
6 mentioned are not included in the section
7 called --

8 JUSTICE KAGAN: It's like belts and
9 suspenders and, you know, whatever, a new pair
10 of pants.

11 MR. SURI: And the second point is
12 those two pieces are not in Section 1225.
13 They're only in Section 1158. So, if Congress
14 had included the phrase "arrives" in 1225 but
15 omitted it from 1158, then people might draw a
16 negative inference from the inclusion in one
17 provision and the exclusion in the other.

18 JUSTICE JACKSON: Can I just ask --

19 JUSTICE BARRETT: Mr. Suri, can I ask
20 you, does the administration -- the metering
21 policy has been rescinded. Does the
22 administration intend to reinstate the metering
23 policy if it's successful in this case?

24 MR. SURI: The administration would
25 like to be able to reinstate metering if and

1 when border conditions justify. I cannot
2 predict in advance what border conditions will
3 look like or what specific policy responses the
4 administration would take in response to that.

5 JUSTICE BARRETT: Thank you.

6 JUSTICE JACKSON: So, Mr. Suri,
7 what -- why then aren't we just issuing an
8 advisory opinion in this case? I mean, your
9 back-and-forth with Justice Sotomayor raised
10 another line of questions that I had along the
11 same lines as what Justice Barrett just
12 indicated.

13 At the time in which the district
14 court in this case issued its opinion, the
15 metering policy had been rescinded, and, as
16 you've now represented, the government has no
17 concrete plans to reinstate it.

18 So I don't understand what we are
19 doing other than advising the government in
20 sort of the abstract as to whether or not this
21 kind of thing is lawful. We don't have an
22 actual policy. We don't know who's right as
23 between you and Justice Sotomayor about what
24 metering actually contains because the
25 government doesn't have a policy in effect and

1 hasn't shown us that it wants to have a
2 particular policy. None is on the table.

3 So how do we even have jurisdiction,
4 really, to be addressing this?

5 MR. SURI: The question of mootness
6 turns on whether the Court can grant any
7 effectual relief whatsoever to the prevailing
8 party. You can grant us effectual relief and
9 the case isn't moot because there are three
10 types of prospective orders that the district
11 court issued that are still in place against
12 us, the most important of which is a class-wide
13 declaration saying we can never engage in
14 metering at the southern border.

15 If you agree with us, you would lift
16 that declaration and we'd be able to resume
17 metering. Therefore, the case is not --

18 JUSTICE JACKSON: But you don't -- but
19 you don't have a -- you don't have a plan to
20 resume -- I mean, are you suggesting that --
21 I -- I'm -- I'm a little worried about the
22 judiciability in the following sense: At the
23 time the case was initially brought, there was
24 a policy in place, the government was engaging
25 in metering, and, obviously, we had a live

1 controversy about it.

2 But, before the district court issued
3 its opinion, that policy was rescinded. There
4 was no more metering. And yet, I think, in the
5 record, it demonstrates that the parties just
6 sort of said to the district court: Well, it
7 would be helpful if you would go ahead and
8 enter your ruling.

9 That's ordinarily not the case, that
10 you don't just have the district court opining
11 on policies that are no longer in effect. So I
12 appreciate that the district court did and so
13 you would like to get rid of the order. But
14 why wouldn't the right remedy be to just vacate
15 the order rather than having us speak to the
16 merits of it in this way?

17 MR. SURI: If you'd like to look at
18 the issue through the lens of voluntary
19 cessation, you get to the same result. Yes, we
20 voluntarily ceased metering at one point --

21 JUSTICE JACKSON: There are no
22 findings about voluntary -- the district court
23 did not make findings about voluntary
24 cessation, so I don't know how we could get --
25 go there.

1 MR. SURI: But the test under
2 voluntary cessation is, is it absolutely clear
3 that the conduct can't reasonably be expected
4 to recur? And that can't possibly be satisfied
5 here because we're telling you we want to do
6 this policy again if border conditions justify
7 it.

8 JUSTICE SOTOMAYOR: The --

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas?

12 Justice Alito?

13 JUSTICE ALITO: During the period when
14 metering was suspended, what would happen in
15 the hypothetical situation or not so
16 hypothetical situation you were talking about
17 where a port was capable of handling, let's
18 say, 50 aliens and, instead, 300 wanted to --
19 wanted to enter? What was done?

20 MR. SURI: What was done during the
21 previous administration differed from what was
22 done during the Obama administration. During
23 the previous administration, the aliens were
24 generally paroled into the United States.

25 And the current administration has

1 serious concerns about that approach as a
2 policy matter because that means that
3 individuals who may not necessarily be entitled
4 to asylum are allowed to enter the United
5 States without showing that they have a valid
6 claim, and it may be years before the person
7 can be found and deported if that is
8 appropriate.

9 JUSTICE ALITO: Do you happen to know
10 how many people were paroled?

11 MR. SURI: I don't have an exact
12 number on that, but it would not surprise me if
13 it was in the millions.

14 JUSTICE ALITO: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor?

17 JUSTICE SOTOMAYOR: Counsel, the
18 Office of the Inspector General issued a report
19 that said that some of the metering that was
20 done was not done because of lack of space. It
21 reported on the fact that there were empty beds
22 in at least two ports, okay?

23 So Justice Alito assumes the moment in
24 which there were not enough space, but there is
25 a claim that at least one president was using

1 this as a subterfuge for ignoring any
2 inspection whatsoever.

3 Do you have a response to that?

4 MR. SURI: Yes, I have two. The first
5 is that we dispute those facts, and this is at
6 the summary judgment stage, so you can't
7 resolve those disputes in Respondents' favor.

8 JUSTICE SOTOMAYOR: But we do have an
9 Office of the Inspector General report that
10 says that, correct?

11 MR. SURI: True. The second answer is
12 that Respondents brought two different types of
13 challenges to metering in the lower courts.
14 First, a facial challenge saying metering is
15 never okay, even if done for legitimate reason.
16 That's the only reason before you today.

17 And they also brought an arbitrary and
18 capricious challenge saying even if metering is
19 acceptable when the port is actually
20 overcrowded you can't use it as a subterfuge.
21 That's not before you today.

22 JUSTICE SOTOMAYOR: All right. The
23 language at issue here was passed in 1996. In
24 1998, the government modified its regulations
25 to define an "arriving alien" as an applicant

1 for admission coming or attempting to come into
2 the United States at a port of entry, which is
3 consistent with the policy that had been
4 followed since 1980, I think it is, when the
5 Refugee Act was passed, correct?

6 MR. SURI: Not correct. The Court
7 said in Cardoza-Fonseca when it was talking
8 about the 1908 Refugee Act that the asylum
9 statute applies only to aliens in the United
10 States.

11 JUSTICE SOTOMAYOR: But the port, the
12 regulations have always been treating aliens
13 who knock on the door at the port -- a
14 legitimate port of entry, have up until the
15 metering policy, were at least letting --
16 giving them the opportunity to claim asylum,
17 correct?

18 MR. SURI: I'm sorry, that's not
19 correct either. The regulation refers to an
20 applicant for admission. And an applicant for
21 admission is --

22 JUSTICE SOTOMAYOR: All right. We're
23 back in the same circle.

24 MR. SURI: Yes.

25 JUSTICE SOTOMAYOR: All right.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 JUSTICE KAGAN: I'm going to take you
3 back to the statute, Mr. Suri, and this super
4 fluidity problem. You said to me the second
5 phrase should be viewed as a subset of the
6 first. And I want to understand what you mean
7 by that.

8 What does the first include that the
9 second does not?

10 MR. SURI: It includes individuals who
11 may have arrived in the United States a long
12 time ago, but the process of arrival has been
13 completed. The person would be present in the
14 United States but the person doesn't arrive in
15 the United States.

16 JUSTICE KAGAN: Is that really what
17 you're saying? Is that your best -- because it
18 strikes me that that's actually a better
19 argument than the ones you've given so far,
20 that the first phrase is people who have been
21 here for some time and that the second phrase
22 is meant to refer to people who sort of may
23 arrive right now after this statute has gone
24 into effect?

25 MR. SURI: If you're intent on giving

1 these provisions non-superfluous meanings, then
2 we think that's the --

3 JUSTICE KAGAN: Well, that's --

4 MR. SURI: -- right way to go.

5 JUSTICE KAGAN: -- a good thing to be
6 intent on, I mean, because this is really not,
7 like, a kind of, oh, like Congress didn't see
8 that it was doing the same thing in two
9 different parts of the statute.

10 I mean, these phrases are like right
11 next to each other. And they must have meant,
12 you know, if you're right about what "arrives
13 in" means, I'm looking for a theory as to how
14 that just doesn't repeat what the first phrase
15 does.

16 MR. SURI: It -- it's a subset but
17 that's different from saying that it has a
18 completely different meaning and --

19 JUSTICE KAGAN: Okay.

20 MR. SURI: -- includes people who --

21 JUSTICE KAGAN: You know, what --

22 MR. SURI: -- don't fit in the first
23 category.

24 JUSTICE KAGAN: -- I -- I got that.
25 But you're -- you're essentially saying that

1 the second phrase is a subset that's meant to
2 respond to the fact that they've just put in a
3 provision for expedited removal, which focuses
4 on the same group of -- the same group of
5 arriving people --

6 MR. SURI: Correct.

7 JUSTICE KAGAN: -- right? And that --
8 and that the first provision does not really
9 focus on this expedited removal group of
10 arriving people, but instead applies as well,
11 although it also applies to them, and,
12 honestly, Congress didn't really need it, but
13 applies as well to people who have been, you
14 know, sitting in Kansas for the last five
15 years.

16 MR. SURI: It could refer, for
17 example, to someone who comes here on a visa,
18 the visa expires, but conditions in his home
19 country have changed while he's been in the
20 United States and so now he wants to apply for
21 asylum.

22 He isn't in the arrives category but
23 he is in the present category.

24 JUSTICE KAGAN: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 Justice Kavanaugh?

3 JUSTICE KAVANAUGH: Is it lawful to
4 impose the metering policy for the government
5 to do that, even if a port is not overwhelmed?

6 MR. SURI: We believe that it is
7 lawful, but we're not asking the Court to go
8 that far today. The only issue before the
9 Court today is this facial challenge to
10 metering that it always violates the inspection
11 and asylum statutes. There are separate claims
12 that it would be arbitrary and capricious to
13 engage in metering as a subterfuge but that's
14 not the issue.

15 JUSTICE KAVANAUGH: Okay. It wouldn't
16 be a statutory issue, it would be an arbitrary
17 and capricious issue then?

18 MR. SURI: That's the claim that's
19 been raised by the other side.

20 JUSTICE KAVANAUGH: Okay. And you
21 make an argument, this is a relatively minor
22 point but it's in your brief, and I didn't
23 agree with it so I'm going to bring it up,
24 which is page 25, you say that because it's in
25 a parenthetical, it's different than if it had

1 been separated by commas or dashes.

2 Do you really mean that?

3 MR. SURI: Yes, I -- I recognize --

4 JUSTICE KAVANAUGH: I know we have a
5 case in a particular case that once said that,
6 but I don't know that that's a general rule
7 that parenthesis are different than dashes in
8 interpreting statutes.

9 MR. SURI: I -- I recognize that --

10 JUSTICE KAVANAUGH: Or a comma.

11 MR. SURI: -- you dissented in the
12 case we're relying on.

13 JUSTICE KAVANAUGH: I -- yes. But do
14 you think that's a general proposition that
15 parenthesis are different than dashes or commas
16 in interpreting statutes?

17 MR. SURI: Not that they're different
18 in that sense but that they convey an aside and
19 that material in parenthesis or for that matter
20 even in dashes don't override unambiguous
21 language outside the parenthesis or dashes.

22 JUSTICE KAVANAUGH: Or commas?

23 MR. SURI: I -- I think commas
24 grammatically alter --

25 JUSTICE KAVANAUGH: I mean, I was

1 surprised to see this. And, you know, the
2 Constitution has things in parenthesis. And
3 I'm just trying to make sure that this doesn't
4 expand.

5 MR. SURI: The Court does not need to
6 rely on that argument to vote for us.

7 JUSTICE KAVANAUGH: Thank you.

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?

11 JUSTICE BARRETT: Mr. Suri, when I
12 asked if the administration intended to
13 reinstate the metering policy, I didn't intend
14 to suggest that it was formally moot. And it
15 was my understanding, I just wanted to clarify
16 it, that the injunction in this case still has
17 continuing effect on members of the class
18 because it still matters.

19 MR. SURI: That's right. There's a
20 declaration that has continuing effect as to
21 the whole class. There's also an individual
22 injunction that has continuing effect as to one
23 particular plaintiff, Beatrice Doe, whom the
24 district court ordered us to allow into the
25 United States. And that's an additional basis

1 for avoiding any mootness concerns.

2 JUSTICE BARRETT: And that's why the
3 Ninth Circuit said it wasn't moot?

4 MR. SURI: That's right. And that's
5 presumably why the other side hasn't raised a
6 mootness argument, and why, even though we
7 discussed mootness in our cert stage papers the
8 Court still granted review.

9 JUSTICE BARRETT: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Jackson?

12 JUSTICE JACKSON: So under Acheson
13 Hotels, why wouldn't we still not reach at
14 least the injunction because Ms. Doe apparently
15 has represented that she does not intend to
16 return to the United States, and the injunction
17 is specifically requiring the United States to
18 facilitate her entry.

19 MR. SURI: In the Acheson case, the
20 plaintiff dismissed the -- that plaintiff's
21 claim and told the court that the plaintiff was
22 abandoning her claim entirely and acquiesced in
23 vacatur. There's nothing like --

24 JUSTICE JACKSON: So she would have to
25 -- she would have to do more, you're saying,

1 than say I'm not coming back to the United
2 States?

3 MR. SURI: I think it's far too late
4 to do any of that now because we also have the
5 class-wide declaration that independently keeps
6 this case live.

7 JUSTICE JACKSON: Right. Let me talk
8 about the class-wide declaration. You're --
9 you're asking us to reach the merits of whether
10 or not metering is lawful and reverse the
11 district court's judgment on that basis.

12 Why isn't vacatur a permissible remedy
13 here? I mean, I understand you -- you'd like
14 us to say today metering can be done, give you
15 the okay to do it, but another way to address
16 this, I would think, given that the district
17 court declared a policy unlawful, even though
18 the policy was no longer in place, and the
19 government today is saying it has no concrete
20 plans to reinstate it, and the district court
21 issued this order without making any findings
22 about whether or not a live case or controversy
23 existed, I think one could argue that the
24 district court at least abused it's discretion
25 by nevertheless entering this broad

1 declaration, so it would solve your problem, I
2 think, if the Court on those grounds just
3 vacated it.

4 MR. SURI: No, Your --

5 JUSTICE JACKSON: Why -- why -- why
6 need we get into giving you an answer on the
7 merits of the question of whether or not
8 metering is lawful?

9 MR. SURI: The Ninth Circuit reached
10 the issue of mootness and issued a ruling on
11 that issue. I think it's the first footnote in
12 its opinion. So unless you determine that that
13 mootness holding was wrong, there's no basis
14 for disturbing the Ninth Circuit's decision.

15 And on mootness, we think the Ninth
16 Circuit got it right. This case isn't moot
17 because we'd like to reinstate metering and
18 we're being prevented from doing so.

19 JUSTICE JACKSON: But you don't have a
20 concrete plan, I just want to make clear?

21 MR. SURI: Concrete plans are
22 necessary for standing, not for mootness.

23 JUSTICE JACKSON: All right. Let me
24 just ask you one question about your response
25 to Justice Kagan. You were talking about the

1 various reasons why Congress had "arriving in"
2 in this statute and that one of them, you said,
3 was the fact that there was previously a
4 distinction between deportation and exclusion
5 and that Congress was trying to ensure that
6 that was also covered or that the principles
7 related to deportation and exclusion were
8 covered by this new regime.

9 My understanding is that exclusion
10 applied to people who were "at alien border,"
11 at a port, but your reconceptualization of what
12 "arriving in" is doing does not allow for at a
13 land border or at a port. And so can you help
14 me to understand how Congress could both be
15 attempting to ensure that those principles were
16 included but we still agree with your reading
17 of the statute?

18 MR. SURI: The phrase "at a land
19 border" in this context refers to people on the
20 U.S. side of the border, rather than the
21 Mexican side of the border. And we know that
22 in two ways.

23 The first is the Court's entry fiction
24 cases like Kaplan against Tod and Leng May Ma
25 repeatedly refer to aliens on the U.S. side of

1 the border who have just arrived as the --

2 JUSTICE JACKSON: In the entry fiction
3 context, but we don't have a case or a scenario
4 in which Congress makes clear that it's
5 responding to the entry fiction when it uses
6 the words "arriving at," right?

7 MR. SURI: And the second answer is
8 that in Cardoza-Fonseca, when the statute said
9 at a land border, the Court interpreted --
10 understood that to refer to aliens in the
11 United States.

12 JUSTICE JACKSON: Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Ms. Corkran.

16 ORAL ARGUMENT OF KELSI B. CORKRAN

17 ON BEHALF OF THE RESPONDENTS

18 MS. CORKRAN: Mr. Chief Justice, and
19 may it please the Court:

20 In the 1980 Refugee Act, Congress
21 established a statutory process for
22 non-citizens fleeing persecution to seek
23 protection in the United States. Congress
24 designed the scheme to track the United States'
25 treaty obligation not to refoule refugees to

1 territories where their life or freedom would
2 be threatened. Because refoulement includes,
3 to quote Sale, "defensive acts of resistance or
4 exclusion at the border," the Act requires
5 immigration officers to process claims not only
6 for non-citizens already present in the country
7 but also for those arriving at ports and
8 elsewhere along the border.

9 For decades, port officers followed
10 the statutory procedures designated by Congress
11 for inspecting and processing arriving asylum
12 seekers. It was not until 2016 that the
13 government asserted for the first time that it
14 can wholly avoid these mandatory duties simply
15 by blocking asylum seekers just as they are
16 about to step over the port threshold.

17 Petitioners' theory of the statutory
18 text isolates the word "in" at the expense of
19 making the rest of the statute nonsensical. By
20 Petitioners' account, the phrase "arrives in
21 the United States" has no meaning not already
22 covered by "present in the United States,"
23 "arrives" means "already arrived," and
24 amendments that Congress intended to encourage
25 non-citizens to lawfully seek admission, in

1 fact, did the opposite, permitting border
2 officers to effectively eliminate access to
3 asylum at ports.

4 Petitioners' position is also at odds
5 with the original public meaning of the
6 provisions reflected in the government's
7 long-standing inspection practices -- practices
8 at the time of IIRIRA's enactment and in the
9 government's own regulations, which have
10 recognized for nearly 30 years that the Act's
11 inspection and processing duties apply to
12 non-citizens, "coming or attempting to come"
13 into the United States at a port of entry.

14 As this Court observed in
15 *Thuraissigiam*, Congress carefully crafted our
16 asylum system to ensure that the United States
17 lives up to its ideals and its treaty
18 obligations towards non-citizens fleeing
19 persecution. The term "bad policy" flouted
20 both. And the Ninth Circuit was correct to
21 deem it a withholding of the government's
22 statutory mandates.

23 I welcome the Court's questions.

24 JUSTICE THOMAS: How would you
25 distinguish this case from *Sale*?

1 MS. CORKRAN: Yeah. This case is
2 distinguishable from Sale in a number of ways.
3 One, Sale involved the withholding provision
4 alone. It didn't involve the statutory
5 mandates that are at issue here in 1225, the
6 inspection and processing mandates. So here we
7 have a 706(1) claim about whether the
8 government has withheld compliance with those
9 mandates.

10 Sale is also different from an
11 extraterritoriality and a treaty perspective
12 because it involved interdiction on the high
13 seas, which, as Sale explained, is outside the
14 jurisdiction of the United States. So it
15 raises a host of questions that aren't raised
16 here.

17 I'd be happy to address some of the
18 points my friend made.

19 JUSTICE SOTOMAYOR: Could you address
20 1157?

21 MS. CORKRAN: Yes. So 1157 is the
22 refugee program. My friend takes the position
23 that our -- that we have collapsed the
24 distinction between the two.

25 Our position reflects the way that

1 1157 and 1158 operated from 1980 to 2016. So
2 for 36 years, no one was concerned about the
3 distinction being collapsed. And that's
4 because they served two entirely different
5 functions. Section 1157's refugee program is
6 entirely elective. The President chooses
7 whether to admit refugees. It's not something
8 that refugees in other countries can apply for.
9 It's decided between the countries. There are
10 a host of benefits you get if you were admitted
11 through that program.

12 But 1157 is not the provision that
13 implements the Article 33 obligations. That
14 happens through the asylum processing that's
15 under 1225 and 1158. And that asylum
16 processing is also how you determine whether
17 someone is entitled to withholding.

18 JUSTICE SOTOMAYOR: Mr. Suri gave some
19 responses to Justice Kagan in saying that
20 there's a subset of people who are arriving in
21 the U.S. who are -- as opposed to long-standing
22 people. The problem with that is those people
23 who are arriving, he says, are present in the
24 U.S. So I'm not sure how his answer gets you
25 around --

1 MS. CORKRAN: Yes.

2 JUSTICE SOTOMAYOR: -- the surplusage
3 problem.

4 MS. CORKRAN: Yes, I agree. My friend
5 made a -- a number of new arguments about
6 surplusage that weren't in the briefing, and I
7 think that is one of them. But I would note
8 exactly what you said, making it a subsection
9 doesn't mean that it's not redundant. It's
10 still entirely redundant --

11 JUSTICE KAGAN: But that's true,
12 Ms. Corkran, that it's a subset and so there's
13 still redundancy, but I suppose if Congress in
14 IIRIRA had just created this big deal about
15 expedited removal and said that expedited
16 removal was what arriving people got, you know,
17 it -- it might be that they just wanted to
18 emphasize that just because you were in the --
19 that you were subject to the expedited removal
20 procedures did not mean that you still couldn't
21 apply for asylum.

22 So that the -- the -- the -- the fear,
23 if you might say, is that if they just had that
24 one "physically present" provision and struck
25 out what had previously been in the statute,

1 the "arrive at the port" provision, somebody
2 might have thought, like, all these people that
3 are now being subject to expedited removal do
4 not have the right to apply for asylum. And
5 this provision is supposed to make clear that
6 they do.

7 MS. CORKRAN: There is no reason for
8 the inspection mandate to need to make that
9 clear because 1225(b), the asylum processing
10 section -- it's in (b)(1) to (A) -- has a whole
11 process in place for how you assess asylum
12 claims by arriving aliens.

13 So that credible fear interview
14 provision says if an immigration officer
15 determines that an alien who is arriving in the
16 United States has expressed a fear of future
17 persecution, then the immigration officer shall
18 refer them for a credible fear interview. And
19 then there are a host of provisions that
20 explain how that credible fear assessment plays
21 into expedited removal.

22 So there would be no way that someone
23 could read the entirety of 1225 and be
24 concerned about how it applied to arriving
25 asylum seekers.

1 JUSTICE BARRETT: Can I ask you a
2 question? I feel like there is some slippage
3 between "arriving" and "arrives." And as the
4 Chief Justice pointed out, the language is
5 "arrives in." I mean, "arriving" sounds more
6 "in the process of." "Arrives in" sounds more
7 like you've reached your destination.

8 How do you know under your theory when
9 the person is close enough that we could say
10 they've -- they have "arrives in" or "arrived"
11 in the destination? I mean, what if there's a
12 queue and they're far back, or what if they
13 arrive not at a port of entry? How close do
14 you have to be to the border? Could you say
15 that someone arrives in the United States if
16 they're at a portion of the border that does
17 not have a port of entry? Like, what is it --
18 if it's not crossing the physical border, what
19 is the magic thing or the dispositive thing
20 that we're looking for where we say, ah, now
21 that person we can say arrives in the United
22 States?

23 MS. CORKRAN: So I'm going to try and
24 keep that in order in my head, and I'm going to
25 --

1 JUSTICE BARRETT: Okay.

2 MS. CORKRAN: -- start with the first
3 point, which is actually it's the -- "arrives
4 in" is the tense that triggers the inspection
5 under 1225(8), but "is arriving in" is the
6 language that triggers their credible fear
7 interview. So that's the provision under
8 1225(b) that mandates asylum processing within
9 the context of expedited -- expedited removal.

10 And as the government acknowledges and
11 I think Your Honor just said, "is arriving in"
12 does suggest a process. And, In fact, that's
13 exactly -- that determination is what's
14 happening under the turn-back practices. So
15 they have immigration officers standing at the
16 border asking arriving non-citizens what's the
17 basis for your admission? They get right up to
18 the borderline. And if they say I'm here
19 seeking asylum, then the border officer turns
20 them away, when, in fact, 1225(b) says that if
21 the immigration officer determines that the
22 person is seeking asylum, he shall refer that
23 person to a credible fear interview.

24 So that argument stands separate from
25 the inspection mandate. And what used to

1 happen is that you have inspection and that's
2 how you'd find out someone had a fear, and then
3 that would trigger the credible fear interview.
4 But both of those provisions are at play here.

5 JUSTICE BARRETT: And can you answer
6 the question about what is the dispositive
7 thing that has to happen to say that someone
8 arrives in?

9 MS. CORKRAN: Yes. So a person
10 arrives in the United States at a port of entry
11 when they are at the threshold of the port's
12 entrance about to step over. So they are
13 arriving there. I think that's consistent with
14 ordinary meaning. "I arrive at my house" or "I
15 arrive in my yard" when I'm going through the
16 gate.

17 Now that process of arriving is
18 interrupted by the border officer physically
19 blocking them from completing the arrival such
20 that the person never arrived, but the process
21 of arriving is beginning at that moment.

22 JUSTICE BARRETT: And is that just for
23 the person? I mean, if there's a -- if there's
24 a line, you know, and you're far back and you
25 hear, oh, no, no, no, we can't cross the border

1 today, have they arrived in and been turned
2 away, or is it only the person initially told,
3 and how could it be something different if you
4 arrive at a port of entry versus if you cross
5 the border or you arrive on the other side of
6 the border, the Mexican side of the border,
7 but, say, cross into Texas or try to cross into
8 Texas, where there's not a port of entry?

9 MS. CORKRAN: Yeah. So, to start with
10 the hypothetical where you have a line --

11 JUSTICE BARRETT: Mm-hmm.

12 MS. CORKRAN: -- I'm going -- I think
13 that the -- I mean, our position is not that
14 "arrives in the United States" is doing no work
15 at all. The question is what "arrives in the
16 United States at a port of entry" means. And I
17 think that means you have to be at the
18 threshold.

19 If I'm in a line waiting to get into
20 my house for some reason into my yard and I'm
21 half a block back, I haven't actually started
22 the process of arriving in because I'm in a
23 line waiting to get there.

24 So I think, you know, if -- if the
25 word was being passed down a line that's going

1 over the bridge and people are turning away
2 without actually getting to the threshold, they
3 wouldn't fall under the -- under the statutory
4 inspection mandate or processing mandate.

5 The second question I think has to do
6 with how arrival looks between ports. As a
7 practical matter, the borderline isn't
8 generally delineated in a way between ports
9 that would allow for this kind of discernment
10 about have you reached the threshold of the
11 port.

12 JUSTICE BARRETT: But doesn't the
13 statute say whether or not at a port of entry?

14 MS. CORKRAN: Yes, yes. So I was
15 going to get to that part next. So we -- we
16 take out "at the port of entry" when we're
17 talking between ports and the question is, what
18 does it mean to arrive in the United States?

19 I think you would have to be at a
20 place where you could, in fact, cross. So, if
21 you got up to, let's -- let's assume it's a
22 place on the border where there is an actual
23 line, identifiable line. I would say the same
24 analysis applies, right? Have you made it to
25 the threshold and you're about to step over?

1 JUSTICE GORSUCH: So anybody at the
2 otters' edge of the Rio Grande on the Mexican
3 side has arrived in?

4 MS. CORKRAN: No, the border is
5 halfway through the water.

6 JUSTICE GORSUCH: Okay. All right.
7 So half -- they've got -- they've got one step
8 short of halfway through. They've -- they've
9 arrived, but somebody who's on the water's edge
10 has not arrived?

11 MS. CORKRAN: I think that's right.
12 So you're looking at being at the threshold of
13 when you're going to cross the border.

14 JUSTICE GORSUCH: And so somebody
15 who's at the fence has arrived in, but somebody
16 a step away from the fence has not arrived in?

17 MS. CORKRAN: Well, so the fence, if
18 we're talking about the border wall --

19 JUSTICE GORSUCH: Yeah.

20 MS. CORKRAN: -- that is -- the border
21 wall is entirely on the interior, so, in fact,
22 anyone who gets to the border wall --

23 JUSTICE GORSUCH: They're already in?

24 MS. CORKRAN: -- is also physically
25 present in the United States.

1 JUSTICE GORSUCH: So -- so anybody
2 who's arrived at the fence is in?

3 MS. CORKRAN: They're -- yes. But
4 that's just a matter of geography that
5 they're -- they're already present.

6 JUSTICE GORSUCH: Okay.

7 MS. CORKRAN: To take the
8 hypothetical, though, what if there was a
9 border wall --

10 JUSTICE GORSUCH: Fence along the
11 line, yeah.

12 MS. CORKRAN: Exactly, on the -- on
13 the borderline.

14 JUSTICE GORSUCH: Yeah.

15 MS. CORKRAN: There, the analogy that
16 I think of is a stadium. So I'm arriving at a
17 stadium when I'm at the entrance going through
18 the turnstile. I probably wouldn't describe
19 myself as arriving in the stadium if I'm still
20 in the perimeter making my way to a place where
21 I can enter. So I don't think someone who's at
22 a --

23 JUSTICE GORSUCH: So, at the top --
24 top of the wall, they're in, but if they're at
25 the bottom of the wall, they're -- they're out?

1 MS. CORKRAN: Oh, so now they're --
2 they've climbed?

3 JUSTICE GORSUCH: Yeah. No, I'm just
4 trying to understand what it means.

5 MS. CORKRAN: Yeah. So I suppose --

6 JUSTICE GORSUCH: We're going to get
7 these case -- you know --

8 MS. CORKRAN: Yeah.

9 JUSTICE GORSUCH: We're going to
10 get case -- as soon as we decide what it means,
11 we're going to get cases.

12 MS. CORKRAN: Well, so, as a practical
13 matter, that's not going to be a concern
14 because the wall is, in fact, within the
15 perimeter.

16 JUSTICE GORSUCH: I -- I understand.
17 Okay.

18 MS. CORKRAN: A hypothetical wall that
19 was on the line and a person had kind of gotten
20 to the top and was --

21 JUSTICE GORSUCH: Yeah.

22 MS. CORKRAN: -- about to fall over, I
23 guess, would potentially be arriving. It would
24 depend on the situation.

25 JUSTICE GORSUCH: Yeah, be in. How

1 come somebody who's in the line isn't in? I
2 mean, if the whole point is to make sure that
3 people who are attempting to get into the
4 country have -- have the opportunity to file
5 asylum claims and they've made it all the way,
6 why -- why does it matter who's second in line?

7 MS. CORKRAN: I think that's just a
8 function of arriving in or is arriving.

9 JUSTICE GORSUCH: So the whole debate
10 boils down to the one person who's at the port,
11 the one person who's at the front of the line?

12 MS. CORKRAN: Yeah, and I think that's
13 because I think it's important to remember --

14 JUSTICE GORSUCH: So the rest of the
15 case you agree with the government on?

16 MS. CORKRAN: No.

17 JUSTICE GORSUCH: And everybody else
18 in the line -- everybody else who's being
19 metered doesn't have an asylum claim, just the
20 person who's --

21 MS. CORKRAN: They have an asylum
22 claim. They have to get up to the border to
23 present it. Now I think maybe the question is
24 if the government was stopping people from
25 getting physically to the line because, if

1 you're waiting in line and you just decide to
2 abandon waiting and you don't actually make it
3 to the threshold --

4 JUSTICE GORSUCH: No, no, no, no.
5 These -- these people want to make these
6 claims. They're there.

7 MS. CORKRAN: Yeah. Right. So, if
8 they --

9 JUSTICE GORSUCH: And they're being
10 metered and they're told no, not today. And
11 you're saying the person who's made it up to
12 the -- to the inspection officer gets to make
13 that claim and everybody else who's been
14 waiting there maybe for hours or days doesn't.

15 MS. CORKRAN: Well, they just then,
16 once they get up there, can -- can make the
17 claim. That's when they tell --

18 JUSTICE GORSUCH: But they have to get
19 up there, yeah. Okay.

20 MS. CORKRAN: Yeah, but I -- there's
21 no reason to think they wouldn't be able to do
22 that. And I think it's important to remember
23 that from 1917 to 2016, 99 years, there
24 weren't -- there was not a single example of a
25 turn-back.

1 So what was happening is people would
2 come through the port. At that point when they
3 were in the port, they would be inspected and
4 processing would happen. So it's an unusual
5 scenario we have here where we have the officer
6 standing there and turning people back.

7 CHIEF JUSTICE ROBERTS: Well, I --

8 JUSTICE SOTOMAYOR: And now we have
9 these expedited removal processes at the
10 border.

11 MS. CORKRAN: Yes.

12 JUSTICE SOTOMAYOR: So many of them
13 are not getting in at all. But they're coming
14 to the line and they're at least being
15 questioned and permitted to make the claim?

16 MS. CORKRAN: Under the expedited --
17 if they -- if they were being applied the way
18 that they're supposed --

19 JUSTICE SOTOMAYOR: I think your point
20 that you're making is the statute is very clear
21 that anyone in the U.S., now the other side
22 says a foot. I don't know why the foot is
23 magical. I could put my hand through or my
24 nose through. I don't know. Why does a foot
25 count as opposed to a piece of your body count?

1 So, if you're up on the top of this wall,
2 that's not on the U.S. side?

3 But my point is, in asking or
4 clarifying this question, is "arriving at the
5 border" means you're knocking on the door,
6 correct?

7 MS. CORKRAN: Yes. That is what it
8 has meant for -- for 99 years before this --

9 JUSTICE SOTOMAYOR: Mr. Suri suggested
10 that's not what it meant, that that's not what
11 the federal regulation said, that that's not
12 what practice was. Was he simply wrong about
13 that? I --

14 MS. CORKRAN: Yes.

15 JUSTICE SOTOMAYOR: -- in reading the
16 papers, I understood that up until 2016, anyone
17 who knocked on the door had the opportunity to
18 make the claim and they weren't guaranteed
19 success, but they could make the claim.

20 MS. CORKRAN: That's right. So the
21 government purports to cite a few earlier cases
22 which it says support its position. That's
23 Leng May Ma, Kwong Hai Chew, Mezei, the Ellis
24 island case. All of the cases that the
25 government is citing it cites are playing fast

1 and loose with entry. So each one of those
2 noncitizens was present in the United States,
3 arrives in the United States, at which point
4 they were subject to exclusion proceedings.

5 That's the statutory process that you
6 got if you arrived and then you weren't
7 actually admitted or physically present in the
8 country. That is all that -- we're just
9 looking for the statutory process to be applied
10 to our class members or we were when this
11 policy was in effect.

12 JUSTICE KAGAN: Ms. Corkran --

13 CHIEF JUSTICE ROBERTS: I just want to
14 make sure I understand exactly. There's a line
15 of 50 people trying to get in. The first one
16 knocks on the door, so maybe he or she is
17 processed. I don't know how many people are
18 there processing. But, if there's one person
19 there, maybe Person 3 to 50, they don't have a
20 claim, right?

21 MS. CORKRAN: Yes. So -- so --

22 CHIEF JUSTICE ROBERTS: No, no, wait.
23 Yes or no? They -- do they have a claim or
24 not?

25 MS. CORKRAN: They are going to have

1 a -- it's -- it's going to depend on whether
2 it's a reasonable delay.

3 CHIEF JUSTICE ROBERTS: Well, what do
4 you think a reasonable delay is?

5 MS. CORKRAN: Well, so that's under
6 706(1). I think Justice Sotomayor made the
7 point earlier that the Ninth Circuit made a
8 determination that this was complete
9 withholding because there was no ability to
10 wait. There is no ability to put your name on
11 any sort of meaningful list that would ensure
12 that you were going to --

13 CHIEF JUSTICE ROBERTS: So, if you --
14 so it's not knocking on the door. It's getting
15 your name on a list?

16 MS. CORKRAN: Yeah. So it's a --
17 yeah, it's a turnstile if you're at a land port
18 and it's a -- there's a plaque halfway across
19 the bridge, so not a physical door, but yes.
20 So, when you go through the line, if it's
21 working the way it should, you should make your
22 way up to the borderline, at which point you
23 come across and you're processed.

24 CHIEF JUSTICE ROBERTS: Well, but --
25 but -- maybe I just don't understand it. I

1 mean, it depends kind of on how long the line
2 is, right?

3 MS. CORKRAN: Yes. There were no --
4 there were non-examples prior to the turn-back
5 policy and even during the turn-back policy of
6 there being kind of lines of people waiting to
7 be processed who were outside of the United
8 States because, under the prior practice, you
9 came through the turnstile and then you were
10 inspected and processed. Now there could have
11 been long waits within the port. That
12 certainly happened. And that would have been
13 subject to kind of a reasonable delay analysis.

14 But this idea of kind of lines and
15 people piling up on the Mexican side of the
16 border didn't happen until the turn-back policy
17 was put in place and you've got this bottleneck
18 of people waiting on that side.

19 JUSTICE GORSUCH: Well, I -- I
20 understand that, but I -- I'm still struggling
21 with the Chief's question. And we do have
22 situations where there are lines. And I had
23 thought you had said to me and -- and Justice
24 Sotomayor and others that the first person at
25 the turnstile with -- with the inspection

1 officer has arrived, but people further back in
2 the line haven't.

3 And now I -- I -- I thought I heard a
4 different answer to the Chief Justice, and I'm
5 just wondering, I really do -- whatever you
6 think it is, I want to know what it is.

7 MS. CORKRAN: I think I was skipping
8 ahead when I answered the Chief's question to
9 kind of the nature of the 706(1) claim and the
10 difference between withholding --

11 JUSTICE GORSUCH: I'm just curious --

12 MS. CORKRAN: Yes.

13 JUSTICE GORSUCH: -- what "arrives in"
14 means.

15 MS. CORKRAN: "Arrives in" means they
16 reached their threshold. I didn't mean to
17 create confusion about that when I was
18 answering the --

19 JUSTICE GORSUCH: Okay. So it's the
20 person at --

21 MS. CORKRAN: Yes.

22 JUSTICE GORSUCH: -- the turnstile,
23 it's the person halfway through the Rio Grande,
24 not somebody two people back, not one person
25 back, not one person who can't reach across the

1 halfway point of the Rio Grande? None of them?

2 MS. CORKRAN: You have to reach the
3 threshold in order to be subject to the 1225
4 mandates --

5 JUSTICE GORSUCH: Okay.

6 MS. CORKRAN: -- for inspection
7 purposes.

8 JUSTICE KAGAN: So how does that fit,
9 Ms. Corkran, with 1225(b)(1)(A)(i), which says,
10 if an immigration officer determines that an
11 alien who's arriving in the United States is
12 inadmissible, the officer shall order the alien
13 removed from the United States?

14 Now, to me, that suggests not -- you
15 remove somebody from the United States when
16 they are -- when they already have crossed the
17 threshold.

18 MS. CORKRAN: Yes. That --

19 JUSTICE KAGAN: Not when they are
20 knocking at the door. So that suggests to me
21 that "arriving in" suggests that they've
22 already crossed.

23 MS. CORKRAN: So it's a process of
24 arrival. So the person is arriving in when
25 they are about to step over the threshold.

1 And, again, I may go to the plain meaning, and
2 I think about kind of being in a house or a
3 yard. If my husband called and said, are you
4 arriving at the house as I'm walking through
5 the door and I said no, that would be a strange
6 answer to give him. The ordinary meaning is,
7 yes, I am crossing through --

8 JUSTICE KAGAN: Well, but if you're --
9 it's arriving in, the officer shall order the
10 alien removed from the United States, that
11 seems to suggest that your view of plain
12 meaning, whether it is plain or not, is not the
13 statutory meaning because, if you're removing
14 somebody from the United States, that person
15 has clearly made it over to the United States.
16 You don't remove somebody from the United
17 States when they're just knocking at the door.

18 MS. CORKRAN: Well, so I think that
19 provision makes sense if you remember that
20 removal is a legal term. It refers to removal
21 proceedings. So what that provision is
22 assuming is the completion of arriving because,
23 in 1996, when Congress was drafting the
24 language, it had no reason to think that 20
25 years later, the government was going to change

1 its position and start blocking people while
2 they were in the process of arrival.

3 So you see in the regulations and I
4 think also in Sale kind of the understanding
5 that the process of arrival starts when the
6 person is at the threshold and it continues as
7 they step over the -- the threshold and are
8 being inspected.

9 JUSTICE JACKSON: And --

10 MS. CORKRAN: So I don't think there's
11 an inconsistency there.

12 JUSTICE JACKSON: -- so, to -- so, to
13 clarify, when the person is arriving at the
14 threshold, the process of inspection, you say,
15 kicks in based on their arrival, and that
16 process could take place on U.S. soil,
17 presumably without metering. The inspectors
18 are on the U.S. side, and so they're asking and
19 they're investigating, and the person is in the
20 U.S. at that point.

21 But the obligation to do that kind of
22 inspection, I think you're saying, kicks in
23 based on the person's arrival.

24 MS. CORKRAN: Yes, that's exactly
25 right, and it makes sense when you remember

1 that that is how it had worked from 1917 to
2 1996, when Congress was -- was amending the
3 provisions in IIRIRA.

4 JUSTICE JACKSON: Can you speak of --

5 JUSTICE ALITO: It will be
6 interesting -- it'll be interesting to read the
7 actual transcript of the oral argument because
8 I -- I believe that both you and Justice
9 Sotomayor and Justice Jackson on several
10 occasions have used the phrase "arriving at."
11 I think you said you arrived at your house.
12 But that's not the term that is in the statute.

13 Do you think there is no difference
14 between arriving at a location and arriving in
15 the location?

16 MS. CORKRAN: Yes. Thank you for the
17 opportunity to clarify.

18 So we have "in the United States" "at
19 a port of entry." I can explain the amendment
20 history on how we ended up with the
21 prepositional phrases in that order, but I
22 think my first-order answer is "in" is just how
23 you describe being in a region. You wouldn't
24 say "at the United States." You would say "in
25 the United States." I'm arriving in Baltimore

1 when I'm on the train as it's coming in. I am
2 at Penn Station when I'm in New York.

3 So that's the difference -- difference
4 in prepositional phrases, which even if it
5 doesn't completely answer the question, does
6 give you some pause to say, well, maybe "in"
7 isn't doing the work that the government is
8 suggesting here because it has to do with kind
9 of the natural way that we talk.

10 But the way we ended up with that
11 order of the prepositional phrases is that the
12 pre- --

13 JUSTICE ALITO: Well, I'm not quite
14 sure I understand that. So there's been talk
15 about knocking at the door. Do you think
16 someone who comes to the front door of a house
17 and knocks at the door has arrived "in" the
18 house? The person may have arrived "at" the
19 house.

20 MS. CORKRAN: No, but that's past
21 tense. Are they arriving in the house?

22 JUSTICE ALITO: Has -- does a person
23 arrive in the house when the person is not in
24 the house and is knocking at the door asking to
25 be admitted to the house?

1 MS. CORKRAN: Yes, I think, here, the
2 door is open. The officer is standing on the
3 other side of the threshold. The person gets
4 there and is ready to -- to take the step over,
5 right? The officers and the asylum seekers
6 here were toe to toe. This was happening right
7 at the line, and they're about to step over.

8 They are arriving, present tense.
9 Once they're inside, they've arrived, past
10 tense, but we know that Congress used the
11 present tense here.

12 CHIEF JUSTICE ROBERTS: Well, it does
13 make -- I gather you think it makes a
14 difference whether there -- there's a door or a
15 turnstile, you have to be there. If you're at
16 the end of a long line, you're not there. You
17 haven't arrived at the turnstile.

18 MS. CORKRAN: Yes.

19 CHIEF JUSTICE ROBERTS: Okay. So then
20 does it matter how many people are processing
21 the arrivals? I mean, how quickly the line's
22 going to move? I mean, it strikes me as a very
23 significant factual question. In other words,
24 it's not -- if you're at the end of the line,
25 you're -- you're not covered by the requirement

1 to process, is that right?

2 MS. CORKRAN: Yes. So, once you get
3 to the -- you have to arrive, and that's just
4 the nature of the -- the language that Congress
5 used. However, if -- if the government was
6 complying with the inspection and processing
7 mandate, people would be going right through
8 the turnstile. There is no stopping or
9 processing that happens at the turnstile under
10 the prior practice. A person goes through, and
11 at that point, they are --

12 CHIEF JUSTICE ROBERTS: So you don't
13 even have to knock?

14 MS. CORKRAN: No, there was no
15 knocking. You went through. There was no
16 immigration officer who was stopping you.
17 You're going straight through the open door.
18 You are now in the inspection area. You're in
19 the port. And at that point, there would be
20 perhaps a delay of processing for the reason
21 you say. That delay would be subject to
22 706(1), unreasonable delay. Here, we had a
23 complete withholding.

24 But I think -- I think maybe where
25 we're getting stuck is kind of the idea that

1 processing is happening at the border. That
2 only happens under the turn-back policy.
3 That's the only situation in which you're going
4 to have immigration officers interacting with
5 asylum seekers on the other side of the border.

6 JUSTICE KAVANAUGH: So, historically,
7 if you were at the end of the line, you still
8 went through?

9 MS. CORKRAN: There -- there was no
10 line. People just -- it was a constant --

11 JUSTICE KAVANAUGH: Right, there was
12 no line.

13 MS. CORKRAN: Yes. That --

14 JUSTICE KAVANAUGH: This only became
15 an issue, is what you're saying, and so the
16 "arrives in" wouldn't have had the significance
17 in 1996, is what -- based on the historical
18 practice. And now we're trying to figure out
19 what it means when there's a new practice not
20 envisioned by Congress?

21 MS. CORKRAN: Yes, that's right. And
22 if I could go back to something you said
23 earlier, which is the logic or the logical
24 problem the government has with treating
25 this -- kind of the change in language as if it

1 suddenly substantially narrowed access to
2 asylum at the ports.

3 Not only is that illogical, but it
4 defies the express purpose that the text was
5 seeking to achieve, to quote Justice Scalia.
6 We know that the reason that Congress amended
7 1225(a)(1) was to expand the category of
8 applicants to include people who were already
9 present in the United States and people who --
10 who entered between ports because it needed to
11 put them on equal footing. So to read that
12 language as then re-disadvantaging people who
13 attempt to enter lawfully makes no sense at
14 all.

15 JUSTICE JACKSON: Can I ask you,
16 this -- this is a new practice. Justice
17 Kavanaugh just said a new practice not
18 envisioned by Congress. The Chief Justice says
19 we have a significant factual question here
20 about how this actually works.

21 Why wouldn't we wait until we had an
22 actual policy with real facts in the record
23 regarding what's going on? I mean, even if
24 this is not technically non-justiciable, even
25 if there is jurisdiction in the literal sense,

1 we do have some control over whether or not we
2 reach and discuss issues.

3 And it just seems to me that we have a
4 lot of hypotheticals regarding how this policy
5 may have worked in the past, how it's possibly
6 going to work in the future, but we don't have
7 a policy in effect right now --

8 MS. CORKRAN: Yeah.

9 JUSTICE JACKSON: -- that we can
10 actually rule upon. So how should we take that
11 into account as we think about this?

12 MS. CORKRAN: Yes. Thank you, Your
13 Honor. So, as we explained in pages 15, I
14 think, to 21 of our brief in opposition, this
15 case has no virtually ongoing significance,
16 certainly not for the plaintiffs. Now the
17 government has sought this Court's review
18 because it wants to preserve its degrees of
19 freedom in the future.

20 Right now, the border is closed under
21 other authorities, but maybe that's not true in
22 the future and conditions change. That is not
23 a reason for this Court to -- to grant plenary
24 review, and the government suggests that --

25 JUSTICE JACKSON: I mean, if the

1 government were to just bring its own action, I
2 think Mr. Suri has conceded that they wouldn't
3 have standing because they don't have an actual
4 plan in place that they're trying to implement.

5 MS. CORKRAN: Yeah.

6 JUSTICE JACKSON: What they're doing
7 is saying: We have this, you know, essentially
8 extant district court order out there, and at
9 some point in the future, we might want to have
10 a policy like this, so, Supreme Court, tell us
11 now whether or not that's going to be unlawful.

12 MS. CORKRAN: Yes. That's -- that's
13 what they're seeking. That doesn't -- you
14 know, in order -- as the Court said in *Camreta*
15 *v. Greene*, both parties have to have a live
16 interest in the case in order for the court to
17 proceed.

18 And that explanation doesn't go to how
19 plaintiffs continue to have an interest in the
20 declaratory judgment against a policy that was
21 rescinded five years ago. And so I -- I think
22 it's odd to raise the voluntary sensation --
23 cessation exception here, where it's the
24 defendants who want to continue --

25 JUSTICE JACKSON: Absolutely. Usually

1 voluntary cessation is the defendant --

2 MS. CORKRAN: Right.

3 JUSTICE JACKSON: -- wanting to avoid

4 --

5 MS. CORKRAN: Right.

6 JUSTICE JACKSON: -- the court's

7 orders.

8 MS. CORKRAN: And the --

9 JUSTICE JACKSON: -- they -- they
10 remove the policy so that the court doesn't
11 order.

12 MS. CORKRAN: Right.

13 JUSTICE JACKSON: Here we have them
14 pointing to the voluntary cessation as a reason
15 for the Court to weigh in on this policy.

16 MS. CORKRAN: Right. And it's the
17 government that's saying -- you know -- you
18 know, the government has control over the
19 extent to which most likely --

20 JUSTICE JACKSON: Correct.

21 JUSTICE BARRETT: Counsel, do you
22 think Ninth Circuit was wrong to say that it
23 was not moot, then? You didn't challenge that
24 in your brief.

25 MS. CORKRAN: No. So what the -- the

1 Ninth Circuit said the declaratory judgment was
2 moot and the dissenting judge agreed. The
3 reason that the Ninth Circuit reached its
4 holding was because of the transit rule
5 injunction, that smaller class, which at that
6 point that injunction was still in place and
7 posed a number of obligations on other parties.

8 JUSTICE BARRETT: Right.

9 MS. CORKRAN: So the -- the Ninth
10 Circuit was not wrong about that. But on
11 remand, the parties agreed to essentially
12 dissolve the injunction because the burdens
13 that it was placing on the parties no longer
14 had any benefit to the class members. The
15 class members had been identified.

16 JUSTICE BARRETT: So you're taking the
17 position it's formally moot?

18 MS. CORKRAN: I do think it's moot for
19 the reasons --

20 JUSTICE BARRETT: Why didn't you make
21 that point in your brief?

22 MS. CORKRAN: We -- we wrote six pages
23 of all the reasons we thought --

24 JUSTICE BARRETT: In the BIO?

25 MS. CORKRAN: Yes, in the brief in

1 opposition. It wasn't until the reply in
2 support of cert that the government suggested
3 Munsingwear vacatur. We don't object to that.
4 We didn't address it in our brief in opposition
5 because that would be an odd thing for a
6 Respondent to suggest.

7 And once the Court granted review, we
8 focused on the merits. But to Justice
9 Jackson's point about Munsingwear vacatur, we
10 don't have an objection and I think that
11 resolves all of the government's concerns in
12 this case.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas?

16 Justice Alito?

17 Anything further?

18 JUSTICE SOTOMAYOR: On that last
19 point, the Court said to declaratory judgment,
20 it was vacating that. And it's also vacated
21 the preliminary injunction?

22 MS. CORKRAN: No. So the declaratory
23 judgment was -- is still in place. But I think
24 is moot for the reasons that the -- that the
25 Ninth Circuit said. But the Ninth Circuit went

1 on to reach kind of the -- the statutory
2 interpretation question, not with respect to
3 the declaratory judgment, but with respect to
4 the transit rule injunction which would only be
5 in place if the, you know, underlying statutory
6 question was resolved in the plaintiff's favor.

7 But then that injunction was
8 dissolved. So we really have nothing that's
9 before the Court at this point.

10 JUSTICE SOTOMAYOR: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

12 JUSTICE KAGAN: Is your position that
13 when a person gets to the border, she has a
14 right to apply for asylum only or that she also
15 has a right to enter?

16 MS. CORKRAN: So enter in the -- so
17 right to cross, I'll say cross the --

18 JUSTICE KAGAN: A right to cross.

19 MS. CORKRAN: -- the entry. So I
20 think the right to cross is -- is tied up in
21 the inspection and processing mandates that are
22 on the government. So we have a 706(1) claim
23 here. It's based on ministerial duties that
24 attach to the government under these
25 circumstances.

1 JUSTICE KAGAN: And if the United
2 States figured out a way to do its various
3 things that it has to do without having the
4 person cross, would that be sufficient? You
5 know, like you could have a Zoom interview or
6 something like that.

7 MS. CORKRAN: Yeah, I suppose that
8 1225 assumes that all this is happening on U.S.
9 soil and I think for good reason, because
10 that's how it already worked.

11 The government's extraterritorial
12 concerns might weigh against doing some sort of
13 process but I don't know that I have a stake in
14 -- in pushing back on that way of -- of
15 approaching things.

16 JUSTICE KAGAN: Okay.

17 CHIEF JUSTICE ROBERTS: Justice
18 Gorsuch, anything further?

19 JUSTICE GORSUCH: Just briefly.

20 You mentioned the -- the court of
21 appeals revised opinion. It said it didn't
22 think the case was moot because of the
23 equitable relief still present, which I -- I --
24 I took to mean both the declaratory judgment
25 and -- and the injunction. Am I mistaken?

1 MS. CORKRAN: So, yes. They were both
2 left in place. The reason that the Ninth
3 Circuit reached the underlying statutory
4 interpretation question was --

5 JUSTICE GORSUCH: Because they were
6 both in place. Yeah.

7 MS. CORKRAN: Yes.

8 JUSTICE GORSUCH: Okay. Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh?

11 JUSTICE KAVANAUGH: On that question
12 that you made a point on about why Congress
13 would give better treatment to those unlawfully
14 in the country, I guess one response to that, I
15 want to get your reaction, would be we should
16 just interpret the rule in front of us or
17 statute in front of us by its terms and not
18 trying try to figure out all the things that
19 might be going on with people unlawfully in the
20 country to try to make it all fit in some
21 perfect world.

22 Rather we should -- you know, there
23 are lots of issues where people are unlawfully
24 in the country that -- but the only issue
25 before us is trying to figure out what arrives

1 in means and not worry about that. Just want
2 to get your reaction to that.

3 MS. CORKRAN: Sorry. I -- I'm not
4 sure I followed the question.

5 JUSTICE KAVANAUGH: You were saying
6 that if we interpreted it the government's
7 way --

8 MS. CORKRAN: Yes.

9 JUSTICE KAVANAUGH: -- that Congress
10 would have been privileging people unlawfully
11 in the country. And my response or my question
12 to you is, well, I don't -- whatever is going
13 on with people unlawfully in the country, the
14 sole issue before us is trying to figure out
15 what "arrives in" means when you're at the
16 border and whatever the effects of that are in
17 terms of creating -- creating disparities, we
18 can't sort all that out here. All we have to
19 do is focus on the issue before us.

20 So what's your reaction to that?

21 MS. CORKRAN: Yes, thank you. Sorry
22 it took me a little bit to get there.

23 So I think it's less about advantaging
24 people who are already in than it is about
25 addressing the disparity incentives that

1 Congress was trying to resolve in 1225. So
2 under the government's framework, if you are
3 an asylum seeker coming to the United States,
4 you should not go to a port because you will be
5 turned away. You need to cross the Rio Grande
6 -- Grande, you need to come in between ports.

7 That is the exact opposite of what
8 Congress was trying to accomplish there. And I
9 know also --

10 JUSTICE KAVANAUGH: But the answer to
11 that could be better enforcement of people
12 coming in unlawfully. And Congress might have
13 assumed, particularly in 1996, when there was
14 an increased effort to prevent illegal
15 immigration, that, you know, people wouldn't go
16 flooding in unlawfully. That turned out not to
17 be accurate but that might have been the
18 expectation in 1996. So --

19 MS. CORKRAN: But I don't -- I don't
20 think that then explains what Congress was
21 doing in 1225. It creates this applicant for
22 admission category in order to unify the
23 proceedings, the deportation and exclusion
24 proceedings. What the government is suggesting
25 just makes all of that somewhat nonsensical.

1 JUSTICE KAVANAUGH: Okay. Completely
2 different question. Last one.

3 This seems very artificial trying to
4 figure out at the threshold on the line, in the
5 middle of the river, because wherever the line
6 is, the government's presumably going to stop
7 you on the other side of that line and prevent
8 you from getting to wherever the line is.
9 Right?

10 MS. CORKRAN: So that you're getting a
11 cross the line?

12 JUSTICE KAVANAUGH: Yeah. So if we
13 define it as the threshold, the government is
14 going to stop you short of the threshold or try
15 to.

16 MS. CORKRAN: Oh, I understand.

17 JUSTICE KAVANAUGH: And if we say 100
18 yards from the threshold, they're going to stop
19 you 125 yards from the threshold.

20 MS. CORKRAN: Oh, I understand. So --

21 JUSTICE KAVANAUGH: In other words,
22 the point I guess the "arrives in" thing seems
23 kind of artificial.

24 The whole question, the bigger
25 question, it seems to me, is can the government

1 physically stop people before they get to
2 whatever that line is no matter how we define
3 it. And that seems like not a statutory
4 question, more of an arbitrary and capricious
5 question. But maybe I'm wrong. I just want to
6 get your reactions to that.

7 This whole idea if you're second in
8 line, or third -- the government, wherever we
9 define it, is going to stop you when they want
10 to implement this policy on the other side of
11 that line.

12 Do you follow that?

13 MS. CORKRAN: I do. And so I think
14 that -- that -- that maybe the factual premise
15 that's inaccurate there, the port goes right to
16 the borderline. So the government understands
17 ports as being kind of that geographic space.
18 So the threshold at the port is the borderline.

19 So you can't really, if you move to
20 the threshold further in, then you have people
21 who are present in the United States, if you
22 move the threshold further out, well now we're
23 in Mexican territory and the government doesn't
24 have authority to act there.

25 JUSTICE KAVANAUGH: Well that's --

1 okay. So that's a good answer. Does the
2 government -- how far into Mexico, maybe the
3 SG, will the government go -- maybe they don't
4 want to answer that.

5 (Laughter.)

6 JUSTICE KAVANAUGH: -- to stop people?

7 MS. CORKRAN: Yes. Yeah, I think if
8 the government starts going well into Mexico --
9 sorry --

10 JUSTICE KAVANAUGH: Well the well --
11 well into, is that 100 yards? I mean, 150
12 yards? That's not the threshold anymore. And
13 will they go -- and I mean, again, you might
14 not have the answer to this question but
15 this -- the whole thing seems kind of
16 artificial to me because the government is
17 going -- if they want to do this policy,
18 they're going to stop you on the other side of
19 the line.

20 MS. CORKRAN: Yes. And I would say
21 there that -- so if we start to have the
22 government kind of circumventing further into
23 Mexico, whether it's ten feet or 100 feet. We
24 certainly -- we move out of the inspection
25 and -- and asylum processing mandates in 1225

1 and now I think it's a question of just kind of
2 ultraverus acting without authority in another
3 country.

4 JUSTICE KAVANAUGH: Okay. All right.
5 Thank you for your help.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

8 Justice Jackson?

9 JUSTICE JACKSON: We don't have the
10 answers to Justice Kavanaugh's good questions
11 because there is no policy in effect, right?
12 We don't know --

13 MS. CORKRAN: That is right.

14 JUSTICE JACKSON: -- what the
15 government's doing.

16 MS. CORKRAN: I was going to make that
17 point as well. Right -- right now we have a
18 legal question that's unanchored from any
19 actual practice before the court.

20 JUSTICE JACKSON: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Rebuttal, Mr. Suri?

24

25

1 REBUTTAL ARGUMENT OF VIVEK SURI
2 ON BEHALF OF THE PETITIONERS

3 MR. SURI: Just a few quick points,
4 Mr. Chief Justice.

5 First, this Court should decide this
6 case. The case is not moot because there is
7 still effectual relief the Court could award,
8 namely, lifting the class-wide declaration and
9 the individual injunction to which the
10 government is still subject.

11 There's also a strong practical reason
12 for the Court to decide this case.

13 Administrations of both parties since 2016 have
14 consistently said that this is an important
15 tool in the government's toolbox for dealing
16 with border surges when they occur. I can't
17 predict when the next border surge occurs, but
18 I can say that when it does occur, this is a
19 tool that DHS would want in its toolbox. It's
20 not something the Court should leave to future
21 uncertainty.

22 We've been faulted here for not having
23 a specific policy in place, but that's not
24 really fair to us. There's a class-wide
25 declaratory judgment saying that this practice

1 is unlawful. And I think the government should
2 not be faulted for conforming its current
3 conduct to what a court has declared to be the
4 law. Once that declaratory judgment is lifted,
5 we'll take appropriate steps at that time.

6 Second, the text of the statute should
7 control the Court's decision. And that text is
8 "arrives in the United States." We've heard
9 attempts to substitute other language that
10 might be more ambiguous or more susceptible to
11 Respondents' interpretation than the language
12 Congress actually used. For example, we've
13 heard many references to "arriving in the
14 United States." But the specific language at
15 issue here is "arrives," not "arriving."

16 Further, as Justice Kagan correctly
17 pointed out, there's a separate provision of
18 Section 1225 that says that "arriving" aliens
19 can be removed from the United States in
20 certain circumstances. And that suggests that
21 even the "arriving" category is limited to
22 aliens who've already crossed the border.

23 Even if you think that there is some
24 ambiguity in the term "arriving," though, the
25 correct approach is to use the clarity of

1 "arrives" to resolve the ambiguity in
2 "arriving." You shouldn't use the ambiguity,
3 potentially, in "arriving" as an excuse to
4 ignore the clear word "arrives."

5 Similarly, we've heard attempts to
6 replace "arrives in the United States" with
7 "arrives at a land border" or "arrives at the
8 threshold" or "knocks on the door." None of
9 those terms are the terms Congress actually
10 used in the statute. Moreover, even when a
11 previous version of the statute said "arrives
12 at a land border," this Court still interpreted
13 that to refer to aliens in the United States.

14 We've relatedly heard a suggestion
15 that the alien arrives "at" the port of entry
16 because the port goes right up to the border.
17 We don't think that's accurate. The entrance
18 to the port might be something like a quarter
19 mile from the border. So even if you think the
20 question is whether the person arrives "at" the
21 port, the person hasn't arrived at the port.
22 More importantly, the real question is whether
23 the person arrives in the United States.

24 Finally, Respondents' position raises
25 serious line-drawing problems. It's not clear

1 from their position whether you have to be at
2 the front of the line, the back of the line, or
3 the middle of the line. It's not clear whether
4 they're distinguishing between someone who is
5 stopped by a border officer versus someone who
6 is stopped by the Rio Grande versus someone who
7 is stopped by the border wall versus someone
8 who's stopped by Mexican authorities working in
9 concert with the United States, which is
10 something that could happen, in response to
11 Justice Kavanaugh's question. I don't think we
12 ourselves go into Mexico, but we could
13 cooperate with the Mexican authorities to stop
14 people from reaching the border of the United
15 States.

16 Our position avoids all of those
17 line-drawing problems, because Congress drew a
18 clear line here. It said that if you're
19 outside the United States, you -- you can apply
20 for refugee admission under Section 1157. If
21 you're in the United States, whether you've
22 been here for a long time or you've just
23 arrived, you can apply for asylum.

24 The Court should respect the line that
25 Congress drew.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 The case is submitted.

4 (Whereupon, at 12:37 p.m., the case
5 was submitted.)

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