SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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KRISTI NOEM, SECRETARY OF	)
HOMELAND SECURITY, ET AL.,	)
Petitioners,	)
v.	) No. 25-5
AL OTRO LADO, A CALIFORNIA	)
CORPORATION, ET AL.,	)
Respondents.	)

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Pages: 1 through 92

Place: Washington, D.C.

Date: March 24, 2026

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11

12   Washington, D.C.

13   Tuesday, March 24, 2026

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15   The above-entitled matter came on for

16   oral argument before the Supreme Court of the

17   United States at 11:15 a.m.

18

19

20   APPEARANCES:

21   VIVEK SURI, Assistant to the Solicitor General,

22   Department of Justice, Washington, D.C.; on behalf

23   of the Petitioners.

24   KELSI B. CORKRAN, ESQUIRE, Washington, D.C.; on behalf

25   of the Respondents.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (11:15 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument next in Case 25-5, Noem versus Al Otro

5   Lado.

6   Mr. Suri.

7   ORAL ARGUMENT OF VIVEK SURI

8   ON BEHALF OF THE PETITIONERS

9   MR. SURI: Mr. Chief Justice, and may

10   it please the Court:

11   Respondents' position is that when

12   Congress said "arrives in the United States,"

13   it meant stopped outside the United States.

14   That theory is wrong for the simple reason that

15   it defies the statutory text. You can't arrive

16   in the United States while you're still

17   standing in Mexico. That should be the end of

18   this case.

19   But, even if you see some ambiguity in

20   the text, the Court's decision in Sale should

21   clinch the case for us. In Sale, this Court

22   determined that the protections of the refugee

23   convention and the withholding-of-deportation

24   statute do not extend to aliens outside the

25   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." That was the

6   language of the House report.

7   MR. SURI: Not the language of the

8   statute. The statute says "in the United

9   States" and not --

10   JUSTICE SOTOMAYOR: But don't we read

11   statutes in their context?

12   MR. SURI: You read statutes according

13   to their text. And there's no ambiguity --

14   JUSTICE SOTOMAYOR: No.

15   JUSTICE JACKSON: But --

16   JUSTICE SOTOMAYOR: You start with the

17   text and context, correct?

18   JUSTICE JACKSON: -- Mr. -- Mr. Suri,

19   the text has to make sense. And what is a

20   little concerning to me about your reading of

21   the statute is the practical implications

22   insofar as it suggests that a Congress that was

23   authorizing asylum would be requiring people to

24   break the law in order to obtain it.

25   So imagine a polite asylum seeker who

1   wants to do everything by the book, he

2   approaches the border but does not cross

3   precisely because the law says you are not

4   supposed to enter the United States without

5   authority.

6   Why on earth would Congress have

7   intended or meant for his asylum request to be

8   discarded, not taken seriously, not

9   entertained, but someone who manages to enter

10   the United States unlawfully, when the law says

11   you're not supposed to do it, and requests

12   asylum gets their application entertained?

13   That doesn't seem to me to make any

14   sense, that if we're trying to think about what

15   "arriving in" means, surely, Congress was

16   contemplating that a person was -- would be

17   coming to the United States, would be doing so

18   with an intent to comply with the law that says

19   you're not supposed to enter and thereby asking

20   for entry.

21   MR. SURI: There are two reasons for

22   which that makes sense. The first is that we

23   have a separate refugee admission statute,

24   Section 1157, that protects aliens outside the

25   United States.

1   So it makes perfect sense for Congress

2   to say: If you're in the United States, you go

3   to the asylum route, and if you're outside the

4   United States, you go to the refugee route.

5   JUSTICE JACKSON: Yes. But I'm trying

6   to understand your -- the rationality of your

7   interpretation of "arriving in." You're

8   suggesting that "arriving in" means the person

9   who is literally standing on the U.S. side of

10   the border as opposed to the person who

11   approaches the U.S. side of the border.

12   And I don't understand why Congress

13   would make that distinction.

14   MR. SURI: The second reason that

15   Congress would have made that distinction,

16   apart from the fact that the person in Mexico

17   already has this other statute, the refugee

18   statute that he could turn to, is that the

19   problem of the world's refugees is not solely

20   the United States' burden to bear. It's a

21   shared responsibility of nations throughout the

22   world and it makes --

23   JUSTICE JACKSON: No, I understand.

24   But think about the statute at issue. It says

25   "arriving in." It -- it, first of all,

1   distinguishes physically inside, right, and it

2   says "arriving in." And it gives those people

3   the ability to ask for asylum.

4   And the way that your reading plays

5   out, a person who is coming to, arriving in,

6   approaching the United States, can't make that

7   ask, but they have to somehow violate the law

8   by entering the United States in order to make

9   that ask.

10   MR. SURI: If I might complete the

11   answer, Congress could reasonably determine

12   that if a refugee is in Mexico, then the

13   Mexican government is primarily responsible for

14   processing his claim.

15   Once the refugee is in the United

16   States, whether legally or illegally, then the

17   United States has greater responsibility toward

18   that person.

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

20   CHIEF JUSTICE ROBERTS: Counsel --

21   JUSTICE BARRETT: Mr. Suri --

22   JUSTICE JACKSON: -- understand how

23   that's responsive -- can I just finish?

24   I don't understand how that's

25   responsive to my point, which is the person who

1   is arriving in the United States asking for

2   permission to enter is not necessarily "in

3   Mexico" in a way that implicates all the

4   concerns that you're talking about.

5   Yes, he's physically standing in

6   Mexico. But imagine a person who has a placard

7   on their body as they approach the border that

8   says, you know, I would like entry, I'm being

9   persecuted in Mexico.

10   Your suggestion that the United States

11   would say: Unless you can figure out a way to

12   illegally cross, we're not going to entertain

13   that claim, seems very peculiar.

14   MR. SURI: It seems to me that the

15   premise of the question is that there is

16   something improper about blocking someone from

17   completing the arrival, arriving into the

18   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.

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 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 BARRETT:  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.
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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 is

23   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

3   didn't let them dock and take -- and interview

4   them at all. We didn't consider whether they

5   were being persecuted. And the majority of

6   those people were shipped back or had to go

7   back from 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.

18   And we also have the language about

19   "irrespective of the alien's status," which

20   also should have tipped people off that we

21   weren't talking about 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 Section 12 --

 7   JUSTICE KAGAN: It's like belt and

 8   suspenders and, you know, whatever, a new pair

 9   of pants.

10   MR. SURI: And the second point is

11   those two pieces are not in Section 1225.

12   They're only in Section 1158. So, if Congress

13   had included the phrase "arrives" in 1225 but

14   omitted it from 1158, then people might draw a

15   negative inference from the inclusion in one

16   provision and the exclusion in the other.

17   JUSTICE JACKSON: Can I just ask --

18   JUSTICE BARRETT: Mr. Suri, can I ask

19   you, does the administration -- the metering

20   policy has been rescinded. Does the

21   administration intend to reinstate the metering

22   policy if it's successful in this case?

23   MR. SURI: The administration would

24   like to be able to reinstate metering if and

25   when border conditions justify. I cannot

1   predict in advance what border conditions will

2   look like or what specific policy responses the

3   administration would take in response to that.

4   JUSTICE BARRETT: Thank you.

5   JUSTICE JACKSON: So, Mr. Suri, why --

6   why then aren't we just issuing an advisory

7   opinion in this case?

8   I mean, your back-and-forth with

9   Justice Sotomayor raised another line of

10   questions that I had along the same lines as

11   what Justice Barrett just indicated.

12   At the time in which the district

13   court in this case issued its opinion, the

14   metering policy had been rescinded, and, as

15   you've now represented, the government has no

16   concrete plans to reinstate it.

17   So I don't understand what we are

18   doing other than advising the government in

19   sort of the abstract as to whether or not this

20   kind of thing is lawful. We don't have an

21   actual policy. We don't know who's right as

22   between you and Justice Sotomayor about what

23   metering actually contains because the

24   government doesn't have a policy in effect and

25   hasn't shown us that it wants to have a

1   particular policy. None is on the table.

2   So how do we even have jurisdiction,

3   really, to be addressing this?

4   MR. SURI: The question of mootness

5   turns on whether the Court can grant any

6   effectual relief whatsoever to the prevailing

7   party. You can grant us effectual relief and

8   the case isn't moot because there are three

9   types of prospective orders that the district

10   court issued that are still in place against

11   us, the most important of which is a class-wide

12   declaration saying we can never engage in

13   metering at the southern border.

14   If you agree with us, you would lift

15   that declaration and we'd be able to resume

16   metering. Therefore, the case is not --

17   JUSTICE JACKSON: But you don't -- but

18   you don't have a -- you don't have a plan to

19   resume -- I mean, are you suggesting that --

20   I -- I'm -- I'm a little worried about the

21   judiciability in the following sense. At the

22   time the case was initially brought, there was

23   a policy in place, the government was engaging

24   in metering, and, obviously, we had a live

25   controversy about it.

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1              But, before the district court issued

2      its opinion, that policy was rescinded.  There

3      was no more metering.  And yet, I think, in the

4      record, it demonstrates that the parties just

5      sort of said to the district court:  Well, it

6      would be helpful if you would go ahead and

7      enter your ruling.

8              That's ordinarily not the case, that

9      you don't just have the district court opining

10     on policies that are no longer in effect.  So I

11     appreciate that the district court did and so

12     you would like to get rid of the order.  But

13     why wouldn't the right remedy be to just vacate

14     the order rather than having us speak to the

15     merits of it in this way?

16             MR. SURI:  If you'd like to look at

17     the issue through the lens of voluntary

18     cessation, you get to the same result.  Yes, we

19     voluntarily ceased metering at one point --

20             JUSTICE JACKSON:  There are no

21     findings about voluntary -- the district court

22     did not make findings about voluntary

23     cessation, so I don't know how we could get --

24     go there.

25             MR. SURI:  But the test under
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1   voluntary cessation is, is it absolutely clear

2   that the conduct can't reasonably be expected

3   to recur? And that can't possibly be satisfied

4   here because we're telling you we want to do

5   this policy again if border conditions justify

6   it.

7   JUSTICE SOTOMAYOR: The --

8   CHIEF JUSTICE ROBERTS: Thank you,

9   counsel.

10   Justice Thomas?

11   Justice Alito?

12   JUSTICE ALITO: During the period when

13   metering was suspended, what would happen in

14   the hypothetical situation or not so

15   hypothetical situation you were talking about

16   where a port was capable of handling, let's

17   say, 50 aliens and, instead, 300 wanted to --

18   wanted to enter? What was done?

19   MR. SURI: What was done during the

20   previous administration differed from what was

21   done during the Obama administration. During

22   the previous administration, the aliens were

23   generally paroled into the United States.

24   And the current administration has

25   serious concerns about that approach as a

1   policy matter because that means that

2   individuals who may not necessarily be entitled

3   to asylum are allowed to enter the United

4   States without showing that they have a valid

5   claim, and it may be years before the person

6   can be found and deported if that is

7   appropriate.

8   JUSTICE ALITO: Do you happen to know

9   how many people were paroled?

10   MR. SURI: I don't have an exact

11   number on that, but it would not surprise me if

12   it was in the millions.

13   JUSTICE ALITO: Thank you.

14   CHIEF JUSTICE ROBERTS: Justice

15   Sotomayor?

16   JUSTICE SOTOMAYOR: Counsel, the

17   Office of the Inspector General issued a report

18   that said that some of the metering that was

19   done was not done because of lack of space. It

20   reported on the fact that there were empty beds

21   in at least two ports, okay?

22   So Justice Alito assumes the moment in

23   which there were not enough space, but there is

24   a claim that at least one president was using

25   this as a subterfuge for ignoring any

1   inspection whatsoever.

2   Do you have a response to that?

3   MR. SURI: Yes, I have two. The first

4   is that we dispute those facts, and this is at

5   the summary judgment stage, so you can't

6   resolve those disputes in Respondents' favor.

7   JUSTICE SOTOMAYOR: But we do have an

8   Office of the Inspector General report that

9   says that, correct?

10   MR. SURI: True. The second answer is

11   that Respondents brought two different types of

12   challenges to metering in the lower courts,

13   first, a facial challenge saying metering is

14   never okay, even if done for a legitimate

15   reason. That's the only one before you today.

16   And they also brought an arbitrary and

17   capricious challenge saying, even if metering

18   is acceptable when the port is actually

19   overcrowded, you can't use it as a subterfuge.

20   That's not before you today.

21   JUSTICE SOTOMAYOR: All right. The

22   language at issue here was passed in 1996. In

23   1998, the government modified its regulations

24   to define an "arriving alien" as an applicant

25   for admission coming or attempting to come into

1   the United States at a port of entry, which is

2   consistent with the policy that had been

3   followed since 1980 -- '80 I think it is, when

4   the Refugee Act was passed, correct?

5   MR. SURI: Not correct. The Court

6   said in Cardoza-Fonseca when it was talking

7   about the 1980 Refugee Act that the asylum

8   statute applies only to aliens in the United

9   States.

10   JUSTICE SOTOMAYOR: But the port --

11   the regulations have always been treating

12   aliens who knock on the door at the port of --

13   a legitimate port of entry, have up until the

14   metering policy, were at least letting --

15   giving them the opportunity to claim asylum,

16   correct?

17   MR. SURI: I'm sorry, that's not

18   correct either. The regulation refers to an

19   applicant for admission, and an applicant for

20   admission is --

21   JUSTICE SOTOMAYOR: All right. We're

22   back in the same circle.

23   MR. SURI: Yes.

24   JUSTICE SOTOMAYOR: All right.

25   CHIEF JUSTICE ROBERTS: Justice Kagan?

1   JUSTICE KAGAN: I'm going to take you

2   back to the statute, Mr. Suri, and the

3   superfluity problem. You said to me the second

4   phrase should be viewed as a subset of the

5   first, and I want to understand what you mean

6   by that. What does the first include that the

7   second does not?

8   MR. SURI: It includes individuals who

9   may have arrived in the United States a long

10   time ago, but the process of arrival has been

11   completed. The person would be present in the

12   United States, but the person doesn't arrive in

13   the United States.

14   JUSTICE KAGAN: Is that really what

15   you're saying? Is that your best -- because it

16   strikes me that that's actually a better

17   argument than the ones you've given so far,

18   that the first phrase is people who have been

19   here for some time and the second phrase is

20   meant to refer to people who sort of may arrive

21   right now after this statute has gone into

22   effect?

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

24   these provisions non-superfluous meanings, then

25   we think that's the --

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 1                JUSTICE KAGAN:  Well, that's --

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

 3                JUSTICE KAGAN:  -- a good thing to be

 4     intent on, I mean, because this is really not,

 5     like, a kind of, oh, like, Congress didn't see

 6     that it was doing the same thing in two

 7     different parts of the statute.

 8                I mean, these phrases are, like, right

 9     next to each other, and they must have meant --

10     you know, if you're right about what "arrives

11     in" mean, I'm -- I'm looking for a theory as to

12     how that just doesn't repeat what the first

13     phrase does.

14                MR. SURI:  It -- it's a subset, but

15     that's different from saying that it has a

16     completely different meaning and --

17                JUSTICE KAGAN:  Okay.

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

19                JUSTICE KAGAN:  You know what --

20                MR. SURI:  -- don't fit in the first

21     category.

22                JUSTICE KAGAN:  -- I -- I got that.

23     But you're -- you're essentially saying that

24     the second phrase is a subset that's meant to

25     respond to the fact that they've just put in a
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1   provision for expedited removal which focuses

2   on the same group of -- the same group of

3   arriving people --

4   MR. SURI: Correct.

5   JUSTICE KAGAN: -- right? And that --

6   and that the first provision does not really

7   focus on this expedited removal group of

8   arriving people but instead applies as well,

9   although it also applies to them, and,

10   honestly, Congress didn't really need it, but

11   applies as well to people who have been, you

12   know, sitting in Kansas for the last five

13   years.

14   MR. SURI: It could refer, for

15   example, to someone who comes here on a visa,

16   the visa expires, but conditions in his home

17   country have changed while he's been in the

18   United States and so now he wants to apply for

19   asylum. He isn't in the "arrives" category,

20   but he is in the "present" category.

21   JUSTICE KAGAN: Thank you.

22   CHIEF JUSTICE ROBERTS: Justice

23   Gorsuch?

24   Justice Kavanaugh?

25   JUSTICE KAVANAUGH: Is it lawful to

1   impose the metering policy, for the government

2   to do that, even if a port is not overwhelmed?

3   MR. SURI: We believe that it is

4   lawful, but we're not asking the Court to go

5   that far today. The only issue before the

6   Court today is this facial challenge to

7   metering that it always violates the inspection

8   and asylum statutes. There are separate claims

9   that it would be arbitrary and capricious to

10   engage in metering as a subterfuge, but that's

11   not the issue here.

12   JUSTICE KAVANAUGH: Okay. It wouldn't

13   be a statutory issue, it would be an arbitrary

14   and capricious issue then?

15   MR. SURI: That's the claim that's

16   been raised by the other side.

17   JUSTICE KAVANAUGH: Okay. And you

18   make an argument, this is a relatively minor

19   point, but it's in your brief, and I didn't

20   agree with it, so I'm going to bring it up,

21   which is page 25, you say that because it's in

22   a parenthetical, it's different than if it had

23   been separated by commas or dashes.

24   Do you really mean that?

25   MR. SURI: Yes, I -- I do recognize --

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1            JUSTICE KAVANAUGH:  I mean, I know we
2    have a case in a particular context that once
3    said that, but I don't know that that's a
4    general rule that parentheses are different
5    than dashes in interpreting statutes.
6            MR. SURI:  I -- I recognize that --
7            JUSTICE KAVANAUGH:  Or a comma.
8            MR. SURI:  -- you dissented in the
9    case we're relying on.
10           JUSTICE KAVANAUGH:  I -- yes.
11           MR. SURI:  But --
12           JUSTICE KAVANAUGH:  But do you think
13   that's a general proposition that parentheses
14   are different than dashes or commas in
15   interpreting statutes?
16           MR. SURI:  Not that they're different
17   in that sense but that they convey an aside and
18   that material in parentheses or, for that
19   matter, even in dashes don't override
20   unambiguous language outside the parentheses or
21   dashes.
22           JUSTICE KAVANAUGH:  Or commas?
23           MR. SURI:  I -- I think commas
24   grammatically are a little --
25           JUSTICE KAVANAUGH:  I just don't want
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1   this -- I mean, I was surprised to see this.

2   And, you know, the Constitution has things in

3   parentheses, and I'm just trying to make sure

4   that this doesn't 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,

8   the 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 Mrs. Doe

15   apparently has represented that she does not

16   intend to return to the United States, and the

17   injunction is specifically requiring the United

18   States to 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 that --

24   JUSTICE JACKSON: So she would have

25   to -- 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 its 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, no.

5   JUSTICE JACKSON: Why need we get into

6   giving you an answer on the merits of the

7   question of whether or not metering is lawful?

8   MR. SURI: The Ninth Circuit reached

9   the issue of mootness and issued a ruling on

10   that issue. I think it's the first footnote in

11   its opinion. So, unless you determine that

12   that mootness holding was wrong, there's no

13   basis for disturbing the Ninth Circuit's

14   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 --

23   JUSTICE JACKSON: For standing and not

24   for mootness?

25   MR. SURI: -- not for mootness.

1   JUSTICE JACKSON: All right. Let me

2   just ask you one question about your response

3   to Justice Kagan. You were talking about the

4   various reasons why Congress had "arriving in"

5   in this statute and that one of them, you said,

6   was the fact that there was previously a

7   distinction between deportation and exclusion

8   and that Congress was trying to ensure that

9   that was also covered or that the principles

10   related to deportation and exclusion were

11   covered by this new regime.

12   My understanding is that exclusion

13   applied to people who were "at alien border,"

14   at a port, but your reconceptualization of what

15   "arriving in" is doing does not allow for at a

16   land border or at a port. And so can you help

17   me to understand how Congress could both be

18   attempting to ensure that those principles were

19   included, but we still agree with your reading

20   of the statute?

21   MR. SURI: The phrase "at a land

22   border" in this context refers to people on the

23   U.S. side of the border rather than the Mexican

24   side of the border, and we know that in two

25   ways.

1   The first is the Court's entry fiction

2   cases like Kaplan against Tod and Leng May Ma

3   repeatedly refer to aliens on the U.S. side of

4   the border who have just arrived as the --

5   JUSTICE JACKSON: In the entry fiction

6   context, but we don't have a case or a scenario

7   in which Congress makes clear that it's

8   responding to the entry fiction when it uses

9   the words "arriving at," right?

10   MR. SURI: And the second answer is

11   that in Cardoza-Fonseca, when the statute said

12   "at a land border," the Court interpreted --

13   understood that to refer to aliens in the

14   United States.

15   JUSTICE JACKSON: Thank you.

16   CHIEF JUSTICE ROBERTS: Thank you,

17   counsel.

18   Ms. Corkran.

19   ORAL ARGUMENT OF KELSI B. CORKRAN

20   ON BEHALF OF THE RESPONDENTS

21   MS. CORKRAN: Mr. Chief Justice, and

22   may it please the Court:

23   In the 1980 Refugee Act, Congress

24   established a statutory process for noncitizens

25   fleeing persecution to seek protection in the

1   United States. Congress designed the scheme to

2   track the United States' treaty obligation not

3   to refoule refugees to territories where their

4   life or freedom would be threatened. Because

5   refoulement includes, to quote Sale, "defensive

6   acts of resistance or exclusion at the border,"

7   the Act requires immigration officers to

8   process claims not only for noncitizens already

9   present in the country but also for those

10   arriving at ports and elsewhere along the

11   border.

12   For decades, port officers followed

13   the statutory procedures designated by Congress

14   for inspecting and processing arriving asylum

15   seekers. It was not until 2016 that the

16   government asserted for the first time that it

17   can wholly avoid these mandatory duties simply

18   by blocking asylum seekers just as they are

19   about to step over the port threshold.

20   Petitioners' theory of the statutory

21   text isolates the word "in" at the expense of

22   making the rest of the statute nonsensical. By

23   Petitioners' account, the phrase "arrives in

24   the United States" has no meaning not already

25   covered by "present in the United States,"

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 1    "arrives" means "already arrived," and

 2    amendments that Congress intended to encourage

 3    noncitizens to lawfully seek admission, in

 4    fact, did the opposite, permitting border

 5    officers to effectively eliminate access to

 6    asylum at ports.

 7              Petitioners' position is also at odds

 8    with the original public meaning of the

 9    provisions reflected in the government's

10    longstanding inspection practices -- practices

11    at the time of IIRIRA's enactment and in the

12    government's own regulations, which have

13    recognized for nearly 30 years that the Act's

14    inspection and processing duties apply to

15    noncitizens "coming or attempting to come" into

16    the United States at a port of entry.

17              As this Court observed in

18    Thuraissigiam, Congress carefully crafted our

19    asylum system to ensure that the United States

20    lives up to its ideals and its treaty

21    obligations towards noncitizens fleeing

22    persecution.  The turn-back policy flouted

23    both.  And the nine -- Ninth Circuit was

24    correct to deem it a withholding of the

25    government's statutory mandates.
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1   I welcome the Court's questions.

2   JUSTICE THOMAS: How would you

3   distinguish this case from Sale?

4   MS. CORKRAN: Yeah. This case is

5   distinguishable from Sale in a number of ways.

6   One, Sale involved the withholding provision

7   alone. It didn't involve the statutory

8   mandates that are at issue here in 1225, the

9   inspection and processing mandates. So, here,

10 we have a 706(1) claim about whether the

11 government has withheld compliance with those

12 mandates.

13   Sale is also different from an

14 extraterritoriality and a treaty perspective

15 because it involved interdiction on the high

16 seas, which, as Sale explained, is outside of

17 the jurisdiction of the United States. So it

18 raises a host of questions that aren't raised

19 here.

20   I'd be happy to address some of the

21 points my friend made. I'll --

22   JUSTICE SOTOMAYOR: Could you address

23 1157?

24   MS. CORKRAN: Yes. So 1157 is the

25 refugee program. My friend takes the position

1   that our -- that we have collapsed the

2   distinction between the two.

3   Our position reflects the way that

4   1157 and 1158 operated from 1980 to 2016. So,

5   for 36 years, no one was concerned about the

6   distinction being collapsed, and that's because

7   they served two entirely different functions.

8   Section 1157's refugee program is entirely

9   elective. The president chooses whether to

10   admit refugees. It's not something that

11   refugees in other countries can apply for.

12   It's decided between the countries. There are

13   a host of benefits you get if you were admitted

14   through that program.

15   But 1157 is not the provision that

16   implements the Article 33 obligations. That

17   happens through the asylum processing that's

18   under 1225 and 1158. And that asylum

19   processing is also how you determine whether

20   someone is entitled to withholding.

21   JUSTICE SOTOMAYOR: Mr. Suri gave some

22   responses to Justice Kagan in saying that

23   there's a subset of people who are arriving in

24   the U.S. who are -- as opposed to longstanding

25   people. The problem with that is those people

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 1    who are arriving, he says, are present in the

 2    U.S.  So I'm not sure how his answer gets you

 3    around --

 4              MS. CORKRAN:  Yes.

 5              JUSTICE SOTOMAYOR:  -- the surplus

 6    problem.

 7              MS. CORKRAN:  Yes, I agree.  My friend

 8    made a -- a number of new arguments about

 9    surplusage that weren't in the briefing, and I

10    think that is one of them.  But I would note

11    exactly what you said.  Making it a subsection

12    doesn't mean that it's not redundant.  It's

13    still entirely redundant --

14              JUSTICE KAGAN:  Well, that's true,

15    Ms. Corkran, that it's a subset and so there's

16    still redundancy, but I suppose, if Congress in

17    IIRIRA had just created this big deal about

18    expedited removal and said that expedited

19    removal was what arriving people got, you know,

20    it -- it might be that they just wanted to

21    emphasize that just because you were in the --

22    that you were subject to the expedited removal

23    procedures did not mean that you still couldn't

24    apply for asylum.

25              So the -- the -- the -- the -- the --
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1   the fear, if you might say, is that if they

2   just had that one "physically present"

3   provision and struck out what had previously

4   been in the statute, the "arrive at the port"

5   provision, somebody might have thought, like,

6   all these people that are now being subject to

7   expedited removal do not have the right to

8   apply for asylum, and this provision is

9   supposed to make clear that they do.

10   MS. CORKRAN: There is no reason for

11   the inspection mandate to need to make that

12   clear because 1225(b), the asylum processing

13   section -- it's in (b)(1) to (A) -- has a whole

14   process in place for how you assess asylum

15   claims by arriving aliens.

16   So that credible fear interview

17   provision says, if an immigration officer

18   determines that an alien who is arriving in the

19   United States has expressed a fear of future

20   persecution, then the immigration officer shall

21   refer them for a credible fear interview. And

22   then there are a host of provisions that

23   explain how that credible fear assessment plays

24   into expedited removal.

25   So there would be no way that someone

 1   could read the entirety of 1225 and be

 2   concerned about how it applied to arriving

 3   asylum seekers.

 4   JUSTICE BARRETT: Can I ask you a

 5   question? I feel like there's some slippage

 6   between "arriving" and "arrives." And as the

 7   Chief Justice pointed out, the language is

 8   "arrives in." I mean, "arriving" sounds more

 9   in the process of. "Arrives in" sounds more

10   like you've reached your destination.

11   How do you know under your theory when

12   the person is close enough that we could say

13   they've -- they have "arrives in" or "arrived"

14   in the destination? I mean, what if there's a

15   queue and they're far back, or what if they

16   arrive not at a port of entry? How close do

17   you have to be to the border? Could you say

18   that someone arrives in the United States if

19   they're at a portion of the border that does

20   not have a port of entry?

21   Like, what is it -- if it's not

22   crossing the physical border, what is the magic

23   thing or the dispositive thing that we're

24   looking for where we say, ah, now that person

25   we can say arrives in the United States?

1   MS. CORKRAN: So I'm going to try and

2   keep that in order in my head, and I'm going to

3   start with --

4   JUSTICE BARRETT: Okay.

5   MS. CORKRAN: -- the first point,

6   which is, actually, it's the -- "arrives in" is

7   the tense that triggers the inspection under

8   1225(8), but "is arriving in" is the language

9   that triggers the credible fear interview. So

10   that's the provision under 1225(b) that

11   mandates asylum processing within the context

12   of expedited -- expedited removal.

13   And as the government acknowledges and

14   I think Your Honor just said, "is arriving in"

15   does suggest a process. And, in fact, that's

16   exactly -- that determination is what's

17   happening under the turn-back practices. So

18   they have immigration officers standing at the

19   border asking arriving noncitizens, what's the

20   basis for your admission? They get right up to

21   the borderline. And if they say, I'm here

22   seeking asylum, then the border officer turns

23   them away, when, in fact, 1225(b) says that if

24   the immigration officer determines that the

25   person is seeking asylum, he shall refer that

1   person to a credible fear interview.

2   So that argument stands separate from

3   the inspection mandate. And what used to

4   happen is that you have inspection and that's

5   how you'd find out someone had a fear, and then

6   that would trigger the credible fear interview.

7   But both of those provisions are at play here.

8   I'm sorry.

9   JUSTICE BARRETT: And can you answer

10   the question about what is the dispositive

11   thing that has to happen to say that someone

12   arrives in?

13   MS. CORKRAN: Yes. So a person

14   arrives in the United States at a port of entry

15   when they are at the threshold of the port's

16   entrance about to step over. So they are

17   arriving there. I think that's consistent with

18   ordinary meaning. "I arrive at my house" or "I

19   arrive in my yard" when I'm going through the

20   gate.

21   Now that process of arriving is

22   interrupted by the border officer physically

23   blocking them from completing the arrival such

24   that the person never arrived, but the process

25   of arriving is beginning at that moment.

1   JUSTICE BARRETT: And is that just for

2   the person? I mean, if there's a -- if there's

3   a line, you know, and you're far back and you

4   hear, oh, no, no, no, we can't cross the border

5   today, have they arrived in and been turned

6   away, or is it only the person initially told,

7   and how could it be something different if you

8   arrive at a port of entry versus if you cross

9   the border or you arrive on the other side of

10   the border, the Mexican side of the border,

11   but, say, cross into Texas or try to cross into

12   Texas, where there's not a port of entry?

13   MS. CORKRAN: Yeah. So, to start with

14   the hypothetical where you have a line --

15   JUSTICE BARRETT: Mm-hmm.

16   MS. CORKRAN: -- I'm going -- I think

17   that the -- I mean, our position is not that

18   "arrives in the United States" is doing no work

19   at all. The question is what "arrives in the

20   United States at a port of entry" means. And I

21   think that means you have to be at the

22   threshold.

23   If I'm in a line waiting to get into

24   my house for some reason into my yard and I'm

25   half a block back, I haven't actually started

1   the process of arriving in because I'm in a

2   line waiting to get there.

3   So I think, you know, if -- if the

4   word was being passed down a line that's going

5   over the bridge and people are turning away

6   without actually getting to the threshold, they

7   wouldn't fall under the -- under the statutory

8   inspection mandate or processing mandate.

9   The second question I think has to do

10   with how arrival looks between ports. As a

11   practical matter, the borderline isn't

12   generally delineated in a way between ports

13   that would allow for this kind of discernment

14   about have you reached the threshold of the

15   port.

16   JUSTICE BARRETT: But doesn't the

17   statute say whether or not at a port of entry?

18   MS. CORKRAN: Yes, yes. So I was

19   going to get to that part next. So we -- we

20   take out "at the port of entry" when we're

21   talking between ports and the question is, what

22   does it mean to arrive in the United States?

23   I think you would have to be at a

24   place where you could, in fact, cross. So, if

25   you got up to, let's -- let's assume it's a

1   place on the border where there is an actual

2   line, identifiable line. I would say the same

3   analysis applies, right? Have you made it to

4   the threshold and you're about to step over?

5   JUSTICE GORSUCH: So anybody at the

6   water's edge of the Rio Grande on the Mexican

7   side has arrived in?

8   MS. CORKRAN: No, the border is

9   halfway through the water.

10   JUSTICE GORSUCH: Okay. All right.

11   So half -- they've got -- they've got one step

12   short of halfway through. They've -- they've

13   arrived, but somebody who's on the water's edge

14   has not arrived?

15   MS. CORKRAN: I think that's right.

16   So you're looking at being at the threshold of

17   when you're going to cross the border.

18   JUSTICE GORSUCH: And so somebody

19   who's at the fence has arrived in, but somebody

20   a step away from the fence has not arrived in?

21   MS. CORKRAN: Well, so the fence, if

22   we're talking about the border wall --

23   JUSTICE GORSUCH: Yeah.

24   MS. CORKRAN: -- that is -- the border

25   wall is entirely on the interior, so, in fact,

 1   anyone who gets to the border wall --

 2   JUSTICE GORSUCH: They're already in?

 3   MS. CORKRAN: -- is also physically

 4   present in the United States.

 5   JUSTICE GORSUCH: So -- so anybody

 6   who's arrived at the fence is in?

 7   MS. CORKRAN: They're -- yes. But

 8   that's just a matter of geography that

 9   they're -- they're already present.

10   JUSTICE GORSUCH: Okay.

11   MS. CORKRAN: To take the

12   hypothetical, though, what if there was a

13   border wall --

14   JUSTICE GORSUCH: Fence along the

15   line, yeah.

16   MS. CORKRAN: Exactly, on the -- on

17   the borderline.

18   JUSTICE GORSUCH: Yeah.

19   MS. CORKRAN: There, the analogy that

20   I think of is a stadium. So I'm arriving at a

21   stadium when I'm at the entrance going through

22   the turnstile. I probably wouldn't describe

23   myself as arriving in the stadium if I'm still

24   in the perimeter making my way to a place where

25   I can enter. So I don't think someone who's at

1   a --

2   JUSTICE GORSUCH: So, at the top --

3   top of the wall, they're in, but if they're at

4   the bottom of the wall, they're -- they're out?

5   MS. CORKRAN: Oh, so now they're --

6   they've climbed?

7   JUSTICE GORSUCH: Yeah. No, I'm just

8   trying to understand what it means.

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

10   JUSTICE GORSUCH: We're going to get

11   these case -- you know --

12   MS. CORKRAN: Yeah.

13   JUSTICE GORSUCH: -- we're going to

14   get case -- as soon as we decide what it means,

15   we're going to get cases.

16   MS. CORKRAN: Well, so, as a practical

17   matter, that's not going to be a concern

18   because the wall is, in fact, within the

19   perimeter.

20   JUSTICE GORSUCH: I -- I understand.

21   Okay.

22   MS. CORKRAN: A hypothetical wall that

23   was on the line and a person had kind of gotten

24   to the top and was --

25   JUSTICE GORSUCH: Yeah.

1   MS. CORKRAN: -- about to fall over, I

2   guess, would potentially be arriving. It would

3   depend on the situation.

4   JUSTICE GORSUCH: Yeah, be in. How

5   come somebody who's in the line isn't in? I

6   mean, if the whole point is to make sure that

7   people who are attempting to get into the

8   country have -- have the opportunity to file

9   asylum claims and they've made it all the way,

10   why -- why does it matter he's second in line?

11   MS. CORKRAN: I think that's just a

12   function of arriving in or is arriving.

13   JUSTICE GORSUCH: So the whole debate

14   boils down to the one person who's at the port,

15   the one person who's at the front of the line?

16   MS. CORKRAN: Yeah, and I think that's

17   because I think it's important to remember --

18   JUSTICE GORSUCH: So the rest of the

19   case you agree with the government on?

20   MS. CORKRAN: No.

21   JUSTICE GORSUCH: And everybody else

22   in the line -- everybody else who's being

23   metered doesn't have an asylum claim, just the

24   person who's --

25   MS. CORKRAN: They have an asylum

1   claim. They have to get up to the border to

2   present it. Now I think maybe the question is

3   if the government was stopping people from

4   getting physically to the line because, if

5   you're waiting in line and you just decide to

6   abandon waiting and you don't actually make it

7   to the threshold --

8   JUSTICE GORSUCH: No, no, no, no.

9   These -- these people want to make these

10   claims. They're there.

11   MS. CORKRAN: Yeah. Right. So, if

12   they --

13   JUSTICE GORSUCH: And they're being

14   metered and they're told no, not today. And

15   you're saying the person who's made it up to

16   the -- to the inspection officer gets to make

17   that claim and everybody else who's been

18   waiting there maybe for hours or days doesn't.

19   MS. CORKRAN: Well, they just then,

20   once they get up there, can -- can make the

21   claim. That's when they tell --

22   JUSTICE GORSUCH: But they have to get

23   up there, yeah. Okay.

24   MS. CORKRAN: Yeah, but I -- there's

25   no reason to think they wouldn't be able to do

1   that. And I think it's important to remember

2   that from 1917 to 2016, 99 years, there

3   weren't -- there was not a single example of a

4   turn-back.

5   So what was happening is people would

6   come through the port. At that point when they

7   were in the port, they would be inspected and

8   processing would happen. So it's an unusual

9   scenario we have here where we have the officer

10   standing there and turning people back.

11   CHIEF JUSTICE ROBERTS: Well, I --

12   JUSTICE SOTOMAYOR: And now we have

13   these expedited removal processes at the

14   border.

15   MS. CORKRAN: Yes.

16   JUSTICE SOTOMAYOR: So many of them

17   are not getting in at all. But they're coming

18   to the line and they're at least being

19   questioned and permitted to make the claim?

20   MS. CORKRAN: Under the expedited --

21   if they -- if they were being applied the way

22   that they're supposed --

23   JUSTICE SOTOMAYOR: I think your point

24   that you're making is the statute is very clear

25   that anyone in the U.S., now the other side

    1   says a foot. I don't know why the foot is

    2   magical. I could put my hand through or my

    3   nose through. I don't know. Why does a foot

    4   count as opposed to a piece of your body count?

    5   So, if you're up on the top of this wall,

    6   that's not on the U.S. side?

    7   But my point is, in asking or

    8   clarifying this question, is "arriving at the

    9   border" means you're knocking on the door,

   10   correct?

   11   MS. CORKRAN: Yes. That is what it

   12   has meant for -- for 99 years before this --

   13   JUSTICE SOTOMAYOR: Mr. Suri suggested

   14   that's not what it meant, that that's not what

   15   the federal regulation said, that that's not

   16   what practice was. Was he simply wrong about

   17   that? I --

   18   MS. CORKRAN: Yes.

   19   JUSTICE SOTOMAYOR: -- in reading the

   20   papers, I understood that up until 2016, anyone

   21   who knocked on the door had the opportunity to

   22   make the claim, and they weren't guaranteed

   23   success, but they could make the claim.

   24   MS. CORKRAN: That's right. So the

   25   government purports to cite a few earlier cases

1   which it says support its position. That's

2   Leng May Ma, Kwong Hai Chew, Mezei, the Ellis

3   island case. All of the cases that the

4   government is citing it cites are playing fast

5   and loose with entry. So each one of those

6   noncitizens was present in the United States,

7   arrives in the United States, at which point

8   they were subject to exclusion proceedings.

9   That's the statutory process that you

10   got if you arrived and then you weren't

11   actually admitted or physically present in the

12   country. That is all that -- we're just

13   looking for the statutory process to be applied

14   to our class members or we were when this

15   policy was in effect.

16   JUSTICE KAGAN: Ms. Corkran --

17   CHIEF JUSTICE ROBERTS: I just want to

18   make sure I understand exactly. There's a line

19   of 50 people trying to get in. The first one

20   knocks on the door, so maybe he or she is

21   processed. I don't know how many people are

22   there processing. But, if there's one person

23   there, maybe Person 3 to 50, they don't have a

24   claim, right?

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

1   CHIEF JUSTICE ROBERTS: No, no, wait.

2   Yes or no? They -- do they have a claim or

3   not?

4   MS. CORKRAN: They are going to have

5   a -- it's -- it's going to depend on whether

6   it's a reasonable delay.

7   CHIEF JUSTICE ROBERTS: Well, what do

8   you think a reasonable delay is?

9   MS. CORKRAN: Well, so that's under

10   706(1). I think Justice Sotomayor made the

11   point earlier that the Ninth Circuit made a

12   determination that this was complete

13   withholding because there was no ability to

14   wait. There is no ability to put your name on

15   any sort of meaningful list that would ensure

16   that you were going to --

17   CHIEF JUSTICE ROBERTS: So, if you --

18   so it's not knocking on the door. It's getting

19   your name on a list?

20   MS. CORKRAN: Yeah. So it's a --

21   yeah, it's a turnstile if you're at a land port

22   and it's a -- there's a plaque halfway across

23   the bridge, so not a physical door, but yes.

24   So, when you go through the line, if it's

25   working the way it should, you should make your

1   way up to the borderline, at which point you

2   come across and you're processed.

3   CHIEF JUSTICE ROBERTS: Well, but --

4   but -- maybe I just don't understand it. I

5   mean, it depends kind of on how long the line

6   is, right?

7   MS. CORKRAN: Yes. There were no --

8   there were non-examples prior to the turn-back

9   policy and even during the turn-back policy of

10   there being kind of lines of people waiting to

11   be processed who were outside of the United

12   States because, under the prior practice, you

13   came through the turnstile and then you were

14   inspected and processed. Now there could have

15   been long waits within the port. That

16   certainly happened. And that would have been

17   subject to kind of a reasonable delay analysis.

18   But this idea of kind of lines and

19   people piling up on the Mexican side of the

20   border didn't happen until the turn-back policy

21   was put in place and you've got this bottleneck

22   of people waiting on that side.

23   JUSTICE GORSUCH: Well, I -- I

24   understand that, but I -- I'm still struggling

25   with the Chief's question. And we do have

1   situations where there are lines. And I had

2   thought you had said to me and -- and Justice

3   Sotomayor and others that the first person at

4   the turnstile with -- with the inspection

5   officer has arrived, but people further back in

6   the line haven't.

7   And now I -- I -- I thought I heard a

8   different answer to the Chief Justice, and I'm

9   just wondering, I really do -- whatever you

10   think it is, I want to know what it is.

11   MS. CORKRAN: I think I was skipping

12   ahead when I answered the Chief's question to

13   kind of the nature of the 706(1) claim and the

14   difference between withholding --

15   JUSTICE GORSUCH: I'm just curious --

16   MS. CORKRAN: Yes.

17   JUSTICE GORSUCH: -- what "arrives in"

18   means.

19   MS. CORKRAN: "Arrives in" means they

20   reached their threshold. I didn't mean to

21   create confusion about that when I was

22   answering the --

23   JUSTICE GORSUCH: Okay. So it's the

24   person at --

25   MS. CORKRAN: Yes.

 1   JUSTICE GORSUCH: -- the turnstile,

 2   it's the person halfway through the Rio Grande,

 3   not somebody two people back, not one person

 4   back, not one person who can't reach across the

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

 6   MS. CORKRAN: You have to reach the

 7   threshold in order to be subject to the 1225

 8   mandates --

 9   JUSTICE GORSUCH: Okay.

10   MS. CORKRAN: -- for inspection

11   purposes.

12   JUSTICE KAGAN: So how does that fit,

13   Ms. Corkran, with 1225(b)(1)(A)(i), which says,

14   if an immigration officer determines that an

15   alien who's arriving in the United States is

16   inadmissible, the officer shall order the alien

17   removed from the United States?

18   Now, to me, that suggests not -- you

19   remove somebody from the United States when

20   they are all -- when they already have crossed

21   the threshold.

22   MS. CORKRAN: Yes. That --

23   JUSTICE KAGAN: Not when they are

24   knocking at the door. So that suggests to me

25   that "arriving in" suggests that they've

1   already crossed.

2   MS. CORKRAN: So it's a process of

3   arrival. So the person is arriving in when

4   they are about to step over the threshold.

5   And, again, I may go to the plain meaning, and

6   I think about kind of being in a house or a

7   yard. If my husband called and said, are you

8   arriving at the house as I'm walking through

9   the door and I said no, that would be a strange

10   answer to give him. The ordinary meaning is,

11   yes, I am crossing through --

12   JUSTICE KAGAN: Well, but if you're --

13   it's arriving in, the officer shall order the

14   alien removed from the United States, that

15   seems to suggest that your view of plain

16   meaning, whether it is plain or not, is not the

17   statutory meaning because, if you're removing

18   somebody from the United States, that person

19   has clearly made it over to the United States.

20   You don't remove somebody from the United

21   States when they're just knocking at the door.

22   MS. CORKRAN: Well, so I think that

23   provision makes sense if you remember that

24   removal is a legal term. It refers to removal

25   proceedings. So what that provision is

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1   assuming is the completion of arriving because,

2   in 1996, when Congress was drafting the

3   language, it had no reason to think that 20

4   years later, the government was going to change

5   its position and start blocking people while

6   they were in the process of arrival.

7   So you see in the regulations and I

8   think also in Sale kind of the understanding

9   that the process of arrival starts when the

10   person is at the threshold and it continues as

11   they step over the -- the threshold and are

12   being inspected.

13   JUSTICE JACKSON: And --

14   MS. CORKRAN: So I don't think there's

15   an inconsistency there.

16   JUSTICE JACKSON: -- so, to -- so, to

17   clarify, when the person is arriving at the

18   threshold, the process of inspection, you say,

19   kicks in based on their arrival, and that

20   process could take place on U.S. soil,

21   presumably without metering. The inspectors

22   are on the U.S. side, and so they're asking and

23   they're investigating, and the person is in the

24   U.S. at that point.

25   But the obligation to do that kind of

1   inspection, I think you're saying, kicks in

2   based on the person's arrival.

3   MS. CORKRAN: Yes, that's exactly

4   right, and it makes sense when you remember

5   that that is how it had worked from 1917 to

6   1996, when Congress was -- was amending the

7   provisions in IIRIRA.

8   JUSTICE JACKSON: Can you speak of --

9   JUSTICE ALITO: It will be

10   interesting -- it'll be interesting to read the

11   actual transcript of the oral argument because

12   I -- I believe that both you and Justice

13   Sotomayor and Justice Jackson on several

14   occasions have used the phrase "arriving at."

15   I think you said you arrived at your house.

16   But that's not the term that is in the statute.

17   Do you think there is no difference

18   between arriving at a location and arriving in

19   the location?

20   MS. CORKRAN: Yes. Thank you for the

21   opportunity to clarify.

22   So we have "in the United States" "at

23   a port of entry." I can explain the amendment

24   history on how we ended up with the

25   prepositional phrases in that order, but I

 1   think my first-order answer is "in" is just how

 2   you describe being in a region. You wouldn't

 3   say "at the United States." You would say "in

 4   the United States." I'm arriving in Baltimore

 5   when I'm on the train as it's coming in. I am

 6   at Penn Station when I'm in New York.

 7   So that's the deference -- difference

 8   in prepositional phrases, which, even if it

 9   doesn't completely answer the question, does

10   give you some pause to say, well, maybe "in"

11   isn't doing the work that the government is

12   suggesting here because it has to do with kind

13   of the natural way that we talk.

14   But the way we ended up with that

15   order of the prepositional phrases is that the

16   pre- --

17   JUSTICE ALITO: Well, I'm not quite

18   sure I understand that. So there's been talk

19   about knocking at the door. Do you think

20   someone who comes to the front door of a house

21   and knocks at the door has arrived "in" the

22   house? The person may have arrived "at" the

23   house.

24   MS. CORKRAN: No, but that's past

25   tense. Are they arriving in the house?

1   JUSTICE ALITO: Has -- does a person

2   arrive in the house when the person is not in

3   the house and is knocking at the door asking to

4   be admitted to the house?

5   MS. CORKRAN: Yes, I think, here, the

6   door is open. The officer is standing on the

7   other side of the threshold. The person gets

8   there and is ready to -- to take the step over,

9   right? The officers and the asylum seekers

10   here were toe to toe. This was happening right

11   at the line, and they're about to step over.

12   They are arriving, present tense.

13   Once they're inside, they've arrived, past

14   tense, but we know that Congress used the

15   present tense here.

16   CHIEF JUSTICE ROBERTS: Well, it does

17   make -- I gather you think it makes a

18   difference whether there -- there's a door or a

19   turnstile, you have to be there. If you're at

20   the end of a long line, you're not there. You

21   haven't arrived at the turnstile.

22   MS. CORKRAN: Yes.

23   CHIEF JUSTICE ROBERTS: Okay. So then

24   does it matter how many people are processing

25   the arrivals? I mean, how quickly the line's

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 1      going to move?  I mean, it strikes me as a very

 2      significant factual question.  In other words,

 3      it's not -- if you're at the end of the line,

 4      you're -- you're not covered by the requirement

 5      to process, is that right?

 6              MS. CORKRAN:  Yes.  So, once you get

 7      to the -- you have to arrive, and that's just

 8      the nature of the -- the language that Congress

 9      used.  However, if -- if the government was

10      complying with the inspection and processing

11      mandate, people would be going right through

12      the turnstile.  There is no stopping or

13      processing that happens at the turnstile under

14      the prior practice.  A person goes through, and

15      at that point, they are in --

16              CHIEF JUSTICE ROBERTS:  So you don't

17      even have to knock?

18              MS. CORKRAN:  No, there was no

19      knocking.  You went through.  There was no

20      immigration officer who was stopping you.

21      You're going straight through the open door.

22      You are now in the inspection area.  You're in

23      the port.  And at that point, there would be

24      perhaps a delay of processing for the reason

25      you say.  That delay would be subject to
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 1   706(1), unreasonable delay. Here, we had a

 2   complete withholding.

 3   But I think -- I think maybe where

 4   we're getting stuck is kind of the idea that

 5   processing is happening at the border. That

 6   only happens under the turn-back policy.

 7   That's the only situation in which you're going

 8   to have immigration officers interacting with

 9   asylum seekers on the other side of the border.

10   JUSTICE KAVANAUGH: So, historically,

11   if you were at the end of the line, you still

12   went through?

13   MS. CORKRAN: There -- there was no

14   line. People just -- it was a constant --

15   JUSTICE KAVANAUGH: Right, there was

16   no line.

17   MS. CORKRAN: Yes. That --

18   JUSTICE KAVANAUGH: This only became

19   an issue, is what you're saying, and so the

20   "arrives in" wouldn't have had the significance

21   in 1996, is what -- based on the historical

22   practice. And now we're trying to figure out

23   what it means when there's a new practice not

24   envisioned by Congress?

25   MS. CORKRAN: Yes, that's right. And

1   if I could go back to something you said

2   earlier, which is the logic or the logical

3   problem the government has with treating

4   this -- kind of the change in language as if it

5   suddenly substantially narrowed access to

6   asylum at the ports.

7   Not only is that illogical, but it

8   defies the express purpose that the text was

9   seeking to achieve, to quote Justice Scalia.

10   We know that the reason that Congress amended

11   1225(a)(1) was to expand the category of

12   applicants to include people who were already

13   present in the United States and people who --

14   who entered between ports because it needed to

15   put them on equal footing.

16   So to read that language as then

17   re-disadvantaging people who attempt to enter

18   lawfully makes no sense at all.

19   JUSTICE JACKSON: Can I ask you,

20   this -- this is a new practice. Justice

21   Kavanaugh just said a new practice not

22   envisioned by Congress. The Chief Justice says

23   we have a significant factual question here

24   about how this actually works.

25   Why wouldn't we wait until we had an

           1   actual policy with real facts in the record

           2   regarding what's going on? I mean, even if

           3   this is not technically non-justiciable, even

           4   if there is jurisdiction in the literal sense,

           5   we do have some control over whether or not we

           6   reach and discuss issues.

           7   And it just seems to me that we have a

           8   lot of hypotheticals regarding how this policy

           9   may have worked in the past, how it's possibly

          10   going to work in the future, but we don't have

          11   a policy in effect right now --

          12   MS. CORKRAN: Yeah.

          13   JUSTICE JACKSON: -- that we can

          14   actually rule upon. So how should we take that

          15   into account as we think about this?

          16   MS. CORKRAN: Yes. Thank you, Your

          17   Honor. So, as we explained in pages 15, I

          18   think, to 21 of our brief in opposition, this

          19   case has no virtually ongoing significance,

          20   certainly not for the plaintiffs. Now the

          21   government has sought this Court's review

          22   because it wants to preserve its degrees of

          23   freedom in the future.

          24   Right now, the border is closed under

          25   other authorities, but maybe that's not true in

1   the future and conditions change. That is not

2   a reason for this Court to -- to grant plenary

3   review, and the government suggests that --

4   JUSTICE JACKSON: I mean, if the

5   government were to just bring its own action, I

6   think Mr. Suri has conceded that they wouldn't

7   have standing because they don't have an actual

8   plan in place that they're trying to implement.

9   MS. CORKRAN: Yeah.

10   JUSTICE JACKSON: What they're doing

11   is saying: We have this, you know, essentially

12   extant district court order out there, and at

13   some point in the future, we might want to have

14   a policy like this, so, Supreme Court, tell us

15   now whether or not that's going to be unlawful.

16   MS. CORKRAN: Yes. That's -- that's

17   what they're seeking. That doesn't -- you

18   know, in order -- as the Court said in Camreta

19   v. Greene, both parties have to have a live

20   interest in the case in order for the court to

21   proceed.

22   And that explanation doesn't go to how

23   plaintiffs continue to have an interest in the

24   declaratory judgment against a policy that was

25   rescinded five years ago. And so I think it's

1   odd to -- to raise the voluntary sensation --

2   cessation exception here, where it's the

3   defendants who want to continue to do the

4   policy.

5   JUSTICE JACKSON: Absolutely.

6   Usually, voluntary cessation is the

7   defendant --

8   MS. CORKRAN: Right.

9   JUSTICE JACKSON: -- wanting to

10   avoid --

11   MS. CORKRAN: Right.

12   JUSTICE JACKSON: -- the court's

13   orders.

14   MS. CORKRAN: And the --

15   JUSTICE JACKSON: They -- they -- they

16   remove the policy so that the court doesn't

17   order.

18   MS. CORKRAN: Right.

19   JUSTICE JACKSON: Here, we have them

20   pointing to the voluntary cessation as a reason

21   for the Court to weigh in on this policy.

22   MS. CORKRAN: Right. And it's the

23   government that's saying, you know -- you know,

24   the government has control over the extent to

25   which it's most likely --

1   JUSTICE JACKSON: Correct.

2   JUSTICE BARRETT: Counsel, do you

3   think the Ninth Circuit was wrong to say that

4   it was not moot then?

5   MS. CORKRAN: So the --

6   JUSTICE BARRETT: You didn't challenge

7   that in your brief.

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

9   Ninth Circuit said that the declaratory

10   judgment was moot, and the dissenting judge

11   agreed. The reason that the Ninth Circuit

12   reached its holding was because of the transit

13   rule injunction, that smaller class, which, at

14   that point, that injunction was still in place

15   and it imposed a number of obligations on --

16   JUSTICE BARRETT: Right.

17   MS. CORKRAN: -- other parties. So

18   the -- the Ninth Circuit was not wrong about

19   that. But, on remand, the parties agreed to

20   essentially dissolve the injunction because the

21   burdens that it was placing on the parties no

22   longer had any benefit to the class members.

23   The class members had been identified.

24   JUSTICE BARRETT: So you're taking the

25   position it's formally moot?

1   MS. CORKRAN: I do think it's moot for

2   the reasons that --

3   JUSTICE BARRETT: Why didn't you make

4   that point in your brief?

5   MS. CORKRAN: We -- we wrote six pages

6   of all the reasons that we thought --

7   JUSTICE BARRETT: In the BIO?

8   MS. CORKRAN: Yes, in the Brief In

9   Opposition. It wasn't until the reply in

10   support of cert that the government suggested

11   Munsingwear vacatur. I'll say we don't object

12   to that. We didn't address it in our Brief In

13   Opposition because that would be an odd thing

14   for a respondent to suggest. And once the

15   Court granted review, we focused on the merits.

16   But, to Justice Jackson's point about

17   Munsingwear vacatur, we don't have an

18   objection, and I think that resolves all of the

19   government's concerns in this case.

20   CHIEF JUSTICE ROBERTS: Thank you,

21   counsel.

22   Justice Thomas?

23   Justice Alito, anything further?

24   JUSTICE SOTOMAYOR: On that last

25   point, the Court said declaratory judgment, it

1   was vacating that. And then, when -- and it's

2   also vacated the preliminary injunction?

3   MS. CORKRAN: No. So the declaratory

4   judgment was -- is still in place but I think

5   is moot for the reasons that the -- that the

6   Ninth Circuit said. The Ninth Circuit went on

7   to reach kind of the -- the statutory

8   interpretation question, not with respect to

9   the declaratory judgment but with respect to

10   the transit rule injunction, which would only

11   be in place if the, you know, underlying

12   statutory question was resolved in the

13   plaintiffs' favor.

14   But then that injunction was

15   dissolved, so we really have nothing that's

16   before the Court at this point.

17   JUSTICE SOTOMAYOR: Thank you.

18   CHIEF JUSTICE ROBERTS: Justice Kagan?

19   JUSTICE KAGAN: Is your position that

20   when a person gets to the border, she has a

21   right to apply for asylum only or that she also

22   has a right to enter?

23   MS. CORKRAN: So enter in the -- so

24   right to cross, I'll say cross to avoid --

25   JUSTICE KAGAN: A right to cross.

1   MS. CORKRAN: -- the entry. So I

2   think the right to cross is -- is tied up in

3   the inspection and processing mandates that are

4   on the government. So we have a 706(1) claim

5   here. It's based on ministerial duties that

6   attach to the government under these

7   circumstances.

8   JUSTICE KAGAN: And if the United

9   States figured out a way to do its various

10   things that it has to do without having the

11   person cross, would that be sufficient? You

12   know, like, you could have a Zoom interview or

13   something like that.

14   MS. CORKRAN: Yeah, I suppose that

15   1225 assumes that all this is happening on U.S.

16   soil and I think for good reason because that's

17   how it already worked.

18   The government's extraterritoriality

19   concerns might weigh against doing some sort of

20   process, but I don't know that I have a stake

21   in -- in pushing back on that way of -- of

22   approaching things.

23   JUSTICE KAGAN: Okay.

24   CHIEF JUSTICE ROBERTS: Justice

25   Gorsuch, anything further?

1   JUSTICE GORSUCH: Just briefly.

2   You mentioned the -- the court of

3   appeals revised opinion. It said it didn't

4   think the case was moot because of the

5   equitable relief still present, which I -- I --

6   I took to mean both the declaratory judgment

7   and -- and the injunction. Am I mistaken?

8   MS. CORKRAN: So, yes, they were both

9   left in place. The reason that the Ninth

10 Circuit reached the underlying statutory

11 interpretation question was because --

12   JUSTICE GORSUCH: Is because they were

13 both in place?

14   MS. CORKRAN: Yes.

15   JUSTICE GORSUCH: Yeah. Okay. Thank

16 you.

17   MS. CORKRAN: Yes.

18   CHIEF JUSTICE ROBERTS: Justice

19 Kavanaugh?

20   JUSTICE KAVANAUGH: On that question

21 that you made a point on about why Congress

22 would give better treatment to those unlawfully

23 in the country, I guess one response to that, I

24 just want to get your reaction, would be we

25 should just interpret the rule in front of us

1   or the statute in front of us by its terms and

2   not try to figure out all the things that might

3   be going on with people unlawfully in the

4   country to try to make it all fit in some

5   perfect world.

6   Rather, we should -- you know, there

7   are lots of issues where people are unlawfully

8   in the country that -- but the only issue

9   before us is trying to figure out what "arrives

10   in" means and not worry about that. Just want

11   to get your reaction to that.

12   MS. CORKRAN: Sorry, I -- I'm not sure

13   I followed the question.

14   JUSTICE KAVANAUGH: You were saying

15   that if we interpreted it the government's

16   way --

17   MS. CORKRAN: Yes.

18   JUSTICE KAVANAUGH: -- that Congress

19   would have been privileging people unlawfully

20   in the country. And my response or my question

21   to you is, well, I don't -- whatever's going on

22   with people unlawfully in the country, the sole

23   issue before us is trying to figure out what

24   "arrives in" means when you're at the border,

25   and whatever the effects of that are in terms

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1    of creating -- creating disparities, we can't
2    sort all that out here.  All we have to do is
3    focus on the issue before us.
4              So what's your reaction to that?
5              MS. CORKRAN:  Yes, thank you.  Sorry
6    it took me a little bit to get there.
7              So I think it's less about advantaging
8    people who are already in than it is about
9    addressing the disparity incentives that
10   Congress was trying to resolve in 1225.  So,
11   under the government's framework, if you are an
12   asylum seeker coming to the United States, you
13   should not go to a port because you will be
14   turned away.  You need to cross the Rio
15   Grand -- Grande, you need to come in between
16   ports.
17             That is the exact opposite of what
18   Congress was trying to accomplish there.  And I
19   know also --
20             JUSTICE KAVANAUGH:  But the answer to
21   that could be better enforcement of people
22   coming in unlawfully.  And Congress might have
23   assumed, particularly in 1996, when there was
24   an increased effort to prevent illegal
25   immigration, that, you know, people wouldn't be
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1   flooding in unlawfully. That turned out not to

2   be accurate, but that might have been the

3   expectation in 1996. So --

4   MS. CORKRAN: But I don't -- I don't

5   think that then explains what Congress was

6   doing in 1225. It creates this applicant-for-

7   admission category in order to unify the

8   proceedings, the deportation and exclusion

9   proceedings. What the government is suggesting

10   just makes all of that somewhat nonsensical.

11   JUSTICE KAVANAUGH: Okay. Completely

12   different question. Last one.

13   This seems very artificial, trying to

14   figure out at the threshold, on the line, in

15   the middle of the river, because wherever the

16   line is, the government's presumably going to

17   stop you on the other side of that line and

18   prevent you from getting to wherever the line

19   is, right?

20   MS. CORKRAN: So that you're getting

21   across the line?

22   JUSTICE KAVANAUGH: Yeah. So, if we

23   define it as the threshold, the government's

24   going to start -- stop you short of the

25   threshold or try to.

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

2   JUSTICE KAVANAUGH: And if we say a

3   hundred yards from the threshold, they're going

4   to stop you 125 yards from the threshold.

5   MS. CORKRAN: Oh. So the --

6   JUSTICE KAVANAUGH: In other words,

7   the point -- I guess the "arrives in" thing

8   seems kind of artificial.

9   The whole question -- the bigger

10   question, it seems to me, is can the government

11   physically stop people before they get to

12   whatever that line is no matter how we define

13   it, and that seems like not a statutory

14   question, more of an arbitrary and capricious

15   question. But maybe I'm wrong. Just want to

16   get your reactions to that.

17   This whole idea, if you're second in

18   line or third -- the government, wherever we

19   define it, is going to stop you when they want

20   to implement this policy on the other side of

21   that line. Do you follow that?

22   MS. CORKRAN: I do. And so I think

23   that the -- that maybe the factual premise

24   that's inaccurate there, the port goes right to

25   the borderline. So the government understands

1   ports as being kind of that geographic space.

2   So the threshold of the port is the borderline.

3   So you can't really, if you moved the

4   threshold further in, then you have people who

5   are present in the United States; if you move

6   the threshold further out, well, now we're in

7   Mexican territory, and the government doesn't

8   have authority to act there. So we're always

9   going to be --

10   JUSTICE KAVANAUGH: Well, that --

11   okay. So that's a good answer. Does the

12   government -- how far into Mexico -- maybe the

13   SG -- will the government go -- maybe they

14   don't want to answer that --

15   (Laughter.)

16   JUSTICE KAVANAUGH: -- to stop people?

17   MS. CORKRAN: Yes. Yeah, I think, if

18   the government starts going well into Mexico

19   and started --

20   JUSTICE KAVANAUGH: Well, the well --

21   well into, is that a hundred yards? I mean,

22   150 yards? That's not the threshold anymore.

23   And will they go into -- I mean, again, you

24   might not have the answer to this question, but

25   this -- the whole thing seems kind of

1   artificial to me because the government is

2   going -- if they want to do this policy,

3   they're going to stop you on the other side of

4   the line.

5   MS. CORKRAN: Yes. And I would say

6   there that -- so, if we start to have the

7   government kind of circumventing further into

8   Mexico, whether it's 10 feet or a hundred feet,

9   we start -- we move out of the inspection

10   and -- and asylum processing mandates in 1225

11   and now I think it's a question of just kind of

12   ultra vires acting without authority in another

13   country.

14   JUSTICE KAVANAUGH: Okay. All right.

15   Thank you for your help.

16   CHIEF JUSTICE ROBERTS: Justice

17   Barrett?

18   Justice Jackson?

19   JUSTICE JACKSON: We don't have the

20   answers to Justice Kavanaugh's good questions

21   because there is no policy in effect, right?

22   We don't know --

23   MS. CORKRAN: That is right.

24   JUSTICE JACKSON: -- what the

25   government is doing.

1   MS. CORKRAN: I was going to make that

2   point as well. Right -- right now, we have a

3   legal question that's unanchored from any

4   actual practice before the Court.

5   JUSTICE JACKSON: Thank you.

6   MS. CORKRAN: Yeah.

7   CHIEF JUSTICE ROBERTS: Thank you,

8   counsel.

9   Rebuttal, Mr. Suri?

10   REBUTTAL ARGUMENT OF VIVEK SURI

11   ON BEHALF OF THE PETITIONERS

12   MR. SURI: Just a few quick points,

13   Mr. Chief Justice.

14   First, this Court should decide this

15   case. The case is not moot because there is

16   still effectual relief that the Court could

17   award, namely, lifting the class-wide

18   declaration and the individual injunction to

19   which the government is still subject.

20   There's also a strong practical reason

21   for the Court to decide this case.

22   Administrations of both parties since 2016 have

23   consistently said that this is an important

24   tool in the government's toolbox for dealing

25   with border surges when they occur. I can't

1   predict when the next border surge occurs, but

2   I can say that when it does occur, this is a

3   tool that DHS would want in its toolbox. It's

4   not something the Court should leave to future

5   uncertainty.

6   We've been faulted here for not having

7   a specific policy in place, but that's not

8   really fair to us. There's a class-wide

9   declaratory judgment saying that this practice

10   is unlawful. And I think the government should

11   not be faulted for conforming its current

12   conduct to what a court has declared to be the

13   law. Once that declaratory judgment is lifted,

14   we'll take appropriate steps at that time.

15   Second, the text of the statute should

16   control the Court's decision, and that text is

17   "arrives in the United States." We've heard

18   attempts to substitute other language that

19   might be more ambiguous or more susceptible to

20   Respondents' interpretation than the language

21   Congress actually used. For example, we heard

22   many references to "arriving in the United

23   States." But the specific language at issue

24   here is "arrives," not "arriving."

25   Further, as Justice Kagan correctly

 1   pointed out, there's a separate provision of

 2   Section 1225 that says that "arriving" aliens

 3   can be removed from the United States in

 4   certain circumstances, and that suggests that

 5   even the "arriving" category is limited to

 6   aliens who have already crossed the border.

 7   Even if you think that there is some

 8   ambiguity in the term "arriving," though, the

 9   correct approach is to use the clarity of

10   "arrives" to resolve the ambiguity in

11   "arriving." You shouldn't use the ambiguity,

12   potentially, in "arriving" as an excuse to

13   ignore the clear word, "arrives."

14   Similarly, we've heard attempts to

15   replace "arrives in the United States" with

16   "arrives at a land border" or "arrives at the

17   threshold" or "knocks on the door." None of

18   those terms are the terms Congress actually

19   used in the statute. Moreover, even when a

20   previous version of the statute said "arrives

21   at a land border," this Court still interpreted

22   that to refer to aliens in the United States.

23   We've relatedly heard a suggestion

24   that the alien arrives "at" the port of entry

25   because the port goes right up to the border.

1   We don't think that's accurate. The entrance

2   to the port might be something like a quarter

3   mile from the border. So, even if you think

4   the question is whether the person arrives "at"

5   the port, the person hasn't arrived at the

6   port. More importantly, the real question is

7   whether the person arrives in the United

8   States.

9   Finally, Respondents' position raises

10   serious line-drawing problems. It's not clear

11   from their position whether you have to be at

12   the front of the line, the back of the line, or

13   the middle of the line. It's not clear whether

14   they're distinguishing between someone who is

15   stopped by a border officer versus someone who

16   is stopped by the Rio Grande versus someone who

17   is stopped by the border wall versus someone

18   who's stopped by Mexican authorities working in

19   concert with the United States, which is

20   something that could happen in response to

21   Justice Kavanaugh's question. I don't think we

22   ourselves go into Mexico, but we could

23   cooperate with the Mexican authorities to stop

24   people from reaching the border of the United

25   States.

1   Our position avoids all of those

2   line-drawing problems because Congress drew a

3   clear line here. It said that if you're

4   outside the United States, you -- you can apply

5   for refugee admission under Section 1157. If

6   you're in the United States, whether you've

7   been here for a long time or you've just

8   arrived, you can apply for asylum.

9   The Court should respect the line that

10   Congress drew.

11   CHIEF JUSTICE ROBERTS: Thank you,

12   counsel.

13   The case is submitted.

14   (Whereupon, at 12:37 p.m., the case

15   was submitted.)

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