No. 25-5

IN THE
Supreme Court of the United States

KRISTI NOEM, SECRETARY OF HOMELAND SECURITY, ET AL.,

Petitioners,

v.

AL OTRO LADO, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF U.S. SENATOR TED CRUZ, REPRESENTATIVE DARRELL ISSA, AND SENATORS TED BUDD, MIKE LEE, KEVIN CRAMER, AND JOSH HAWLEY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are U.S. Senator Ted Cruz, Representative Darrell Issa, and Senators Ted Budd, Mike Lee, Kevin Cramer, and Josh Hawley.

Amici sit on various Committees that have jurisdiction over matters of immigration and foreign policy, including the Senate Judiciary and Foreign Relations Committees, as well as the House Judiciary and Foreign Affairs Committees. *Amici* therefore have a strong interest in courts interpreting the Immigration and Nationality Act ("INA") in conformance to the intent of Congress, which has primacy in the area of immigration policy, and thereby avoiding judicial interference with foreign affairs.

Amici were also intricately involved in the recent passage of legislation that uses statutory text nearly identical to the key clause at issue in this case.

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *Amici*'s counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This Court has long recognized "the enormous difficulties" in securing the border. *United States v. Cortez*, 449 U.S. 411, 418 (1981); *see Hernandez v. Mesa*, 589 U.S. 93, 107 (2020) (a "daunting task"). Over the last decade, the United States has faced sustained surges of aliens arriving at the southern border, with Customs and Border Protection ("CBP") recording over 8.7 million encounters at the southern border just from fiscal year 2021 through fiscal year 2024.[2] Monthly encounters repeatedly exceeded 200,000, placing an immense strain on ports of entry never intended to be large-scale processing centers.[3] Overcrowding at the ports produced an "unrelenting humanitarian crisis."[4]

The Obama and first Trump Administrations used "metering" to pace border processing during such surges. Metering meant that CBP officers would stop aliens before they crossed into the United States, forcing them to stay in Mexico until CBP officials were ready to process them.

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[2] H. Comm. on Homeland Sec., *September '24 Startling Stats* (updated Oct. 22, 2024), https://perma.cc/NE9J-4WTN.

[3] *Southwest Land Border Encounters*, U.S. Customs & Border Protection (last modified July 15, 2025), https://perma.cc/VZ6A-3AUS.

[4] Eric Reidy, *How the U.S.–Mexico Border Became an Unrelenting Humanitarian Crisis*, The New Humanitarian (May 10, 2023), https://www.thenewhumanitarian.org/news-feature/2023/05/10/how-us-mexico-border-became-unrelenting-humanitarian-crisis.

But the Biden Administration invited chaos at the border by abandoning metering in November 2021. By May 2023, border processing facilities had "reach[ed] overcapacity."[5] The system was overwhelmed. At one point, the Biden Administration lost track of nearly 85,000 sponsored alien children,[6] underscoring a systemic inability to manage migration at the scale the Biden Administration was facilitating.

The Ninth Circuit's ruling below, if not reversed, will entrench that chaos by barring the executive branch from utilizing metering to pace the flow of aliens into the United States. In doing so, that court badly misconstrued plain statutory text, usurped the policymaking authority of the political branches, granted millions of aliens a right to seek asylum never authorized by Congress, and made a hash of other provisions of the INA.

This Court should reverse.

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[5] Mireya Villarreal et al., *Border Facilities Reach Overcapacity as Migrants Surge, Chief Says*, ABC News (May 11, 2023), https://perma.cc/B95J-Q38S.

[6] Hannah Dreier, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*, N.Y. Times (Feb. 25, 2023), https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html.

ARGUMENT

I. The Ninth Circuit Seized Legislative Power by Creating an Asylum Right That Congress Never Provided.

The INA provides that an alien "who arrives in the United States" may apply for asylum and must be inspected by immigration officers. 8 U.S.C. §§ 1158(a)(1), 1225(a)(1). In its decision below, the Ninth Circuit held that an alien stopped on the Mexico side of the U.S.–Mexico border "arrives in the United States," even if he never sets foot "in" the United States. Fifteen circuit judges disagreed with that holding, which usurps the political branches' authority over immigration policy and is also contrary to the clear text of the statute.

A. The Political Branches Have Plenary Authority Over Immigration Policy.

This Court has consistently recognized the plenary power of the political branches over the admission and exclusion of aliens.

A hundred and thirty years ago, this Court held that Congress can choose to "prescribe the terms and conditions upon which [immigrants] may come to this country," or could "exclude aliens altogether," and that policy is "enforced exclusively through executive officers, *without judicial intervention*." *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895) (emphasis added). The Court said the same thing seventy years ago. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 216 (1953) (the "right to

enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate"); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (actions of executive officers under congressional authority are likewise "final and conclusive").

And just six years ago, the Court held—again—that Congress, as the primary mover, "is entitled to set the conditions for an alien's lawful entry into this country." *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 107 (2020).

There is a good reason why the authority to set rules for immigration is "a power to be exercised exclusively by the political branches of government." *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972). Excluding or admitting aliens necessarily implicates core aspects of both domestic and foreign policy, as well as national security—all areas where the political branches' power is at its apex, and the courts' authority is at its lowest. *See Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116–17 (2013).

The Ninth Circuit's decision below effectively seized that exclusively political power by creating an entitlement to seek asylum for potentially *millions* of aliens whom Congress never authorized such relief. And, as explained next, the Ninth Circuit's decision is based on a fantastical interpretation of the INA that flouts the clear text Congress enacted.

B. The Ninth Circuit's Interpretation of "In the United States" Is Egregiously Wrong.

The Ninth Circuit purported to identify a right to seek asylum that is nowhere in the INA. The court did so by interpreting the statutory word "in" to mean "outside." An alien "arriving in the United States," according to the Ninth Circuit, includes aliens arriving *near* the United States while still wholly in Mexico.

Plain Text and Similar Provisions. To state the Ninth Circuit's interpretation is to refute it. "[T]he plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Lynch v. Alworth–Stephens Co.*, 267 U.S. 364, 370 (1925). As the dissents below ably explain, the Ninth Circuit's interpretation of "arrives in" cannot mean "gets near to." *See* Pet.App.43a–66a (R. Nelson. J., dissenting); Pet.App.116a–30a (Bress, J., dissenting from the denial of rehearing *en banc*); Pet.App.134a (Bea, J., respecting the denial of rehearing *en banc*); Pet.App.179–200a (R. Nelson, J., dissenting).

Recently enacted immigration law supports the government's view. The One Big Beautiful Bill (OBBB) uses the same phrase—"arrive in the United States"—in a way that must refer to being in the United States. The OBBB says an alien can be "paroled into the United States" without a fee where (1) he "has a close family member in the United States

whose death is imminent" and "the alien *could not arrive in the United States* in time to see such family member alive if the alien were to be admitted to the United States through the normal visa process"; or (2) "the alien is seeking to attend the funeral of a close family member" and "the alien *could not arrive in the United States* in time to attend such funeral if the alien were to be admitted to the United States through the normal visa process." Pub. L. No. 119–21, § 100004(a), (b)(4)–(5) (emphases added), *available at* https://www.congress.gov/bill/119th-congress/house-bill/1/text.

Amici—who were directly involved in passage of the OBBB—meant "arrive in the United States" to mean the alien would be "*in* the United States." But the Ninth Circuit very well might say an alien "could arrive in the United States" once he is on the Mexico side of the border. That would mean the parole fee determination would turn on whether an alien *in Mexico* could nonetheless "visit" a dying relative or "attend" a funeral *in the United States*—a physical impossibility. The Ninth Circuit's interpretation of "arrive in the United States" defies both normal English and ordinary statutory construction.

Redundancy Considerations. The majority opinion below claimed its counterintuitive interpretation was required to avoid redundancy with a nearby clause providing a right to seek asylum for those who are "physically present in the United States." In the Ninth Circuit's view, that must mean "arriving in the United States" covers some set of people who are *not* "physically present in the United States."

The Ninth Circuit's approach defies logic. Congress said not once—*but twice*—that to seek asylum, the alien must be "in the United States." If there is one takeaway from that text, it is that Congress was excluding those who are *not* "in" the United States. And yet those aliens are exactly who the Ninth Circuit held are entitled to seek asylum. The court employed the presumption against redundancy to make the most important word in the statute say the opposite of what it always means.

Further, the court went out of its way to find redundancy (and adopted the most unusual "fix" imaginable), despite there being reasonable alternative interpretations that yield little-to-no overlap.

Besides the government's argument about the "entry fiction," *see* Pet.16, there is another reasonable interpretation that ensures the two clauses do address different groups. Those "physically present in the United States" when the statute was enacted are entitled to seek asylum; and then those "arriving in the United States" afterwards are also entitled to seek asylum. The difference between the two is not their physical location, but when they entered the United States. Congress was ensuring there was no doubt: the right to seek asylum applied both to those already in the country at the time of enactment and those arriving in the future.

One thing is certain: regardless of who exactly is in those two categories, they share in common the fundamental requirement that they be "in" the United

States, which is the one requirement the Ninth Circuit saw fit to construe out of existence.

Amendment History. Statutory history confirms this interpretation. The prior enacted version stated: "an alien physically present in the United States or at a land border or port of entry" may apply for asylum. Pet.App.19a (quoting 8 U.S.C. § 1158(a) (1980)). The Ninth Circuit held that this former version had "essentially the same scope" as the modern statute. Pet.App.20a. But in the old version, Congress expressly allowed aliens "at a land border or port of entry" to apply—whereas the new version deletes that language and instead requires the alien to "arrive[] in the United States."

It is difficult to imagine what else Congress could have done to make the meaning clear: it deleted the right to seek asylum while still at a land border, and it replaced that with yet another provision requiring the alien to be "in" the United States. Despite this, the Ninth Circuit held that aliens *not* in the United States and who are at land borders could nonetheless seek asylum. But after the decision below, it's as if Congress never actually amended the statute.

Presumption Against Extraterritoriality. Finally, at the risk of piling on, the presumption against extraterritoriality further confirms the Ninth Circuit's interpretation is wrong. Even plausible "interpretations of statutory language do not override the presumption against extraterritoriality." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 264 (2010). That rule assumes that Congress generally wants to avoid the "international discord that can

result when U.S. law is applied to conduct in foreign countries." *Abitron Austria GmbH v. Hetronic Int'l, Inc.*, 600 U.S. 412, 417 (2023); *see also Kiobel*, 569 U.S. at 116–17.

The Ninth Circuit, however, forces the United States to accept asylum applications from aliens located in foreign sovereign territory. Not only has Congress expressly declined to create that very right, *see* H.R. 5618, 117th Cong. (2021) (a bill "to establish humanitarian processing centers for asylum seekers along the southern border of the United States"), but doing so would risk interference with Mexico's own asylum system for aliens present within its borders, *see* Ley sobre Refugiados, Protección Complementaria y Asilo Político, art. 15, Diario Oficial de la Federación [DOF], 18-02-2022 (Mex.) (Mexican asylum law). Accordingly, the presumption against extraterritoriality provides another reason to reject the Ninth Circuit's interpretation.

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"Words no longer have meaning" if an alien outside the United States is considered "in" the United States. *King v. Burwell*, 576 U.S. 473, 500 (2015) (Scalia, J., dissenting). This Court should reject the Ninth Circuit's interpretation.

II. The Ninth Circuit's Decision Creates a Legal and Operational Crisis at the Border.

The decision below was no run-of-the-mill error of statutory interpretation: the Ninth Circuit's decision created a right to seek asylum for potentially millions of aliens, worsened by the inevitable legal and

practical difficulties with applying the court's interpretation in practice.

A. The Ninth Circuit's Ruling Invites Chaos by Eliminating Border Metering.

The ruling below imposes a positive duty on the government to process aliens who are in foreign countries, even at ports of entry not designed to function as holding facilities.

There is bipartisan agreement that metering is a necessary and beneficial tool to help alleviate border surges. The Obama Administration was the first to introduce metering in response to a "sustained, overwhelming, and unprecedented surge" of illegal aliens at the San Ysidro port of entry. Opening Br. for Defs.-Appellants at 1, *Al Otro Lado, Inc. v. Mayorkas*, Nos. 22-55988 & 22-56036 (9th Cir. filed Dec. 20, 2022). The influx left ports "in desperate need of relief." *Id.* at 10 (citing 2-ER-603). Metering not only "proactively prevented mass overcrowding" and preserved the orderly administration of asylum claims, but also allowed CBP to maintain other vital missions, such as "drug seizures and outbound currency interdiction." Reply & Resp. Br. for Defs.-Appellants at 41, *Al Otro Lado*, Nos. 22-55988 & 22-56036 (9th Cir. filed March 30, 2023) (citing 2-ER-527).

But the Ninth Circuit held below that border metering is illegal: CBP must process aliens at the Mexico side of the border, and they cannot be paced by denying access to U.S. soil. As Judge Bress warned in dissent, that decision threatens "untold interference

with the Executive Branch's ability to manage the southern border." Pet.App.115a (Bress, J., dissenting from the denial of rehearing *en banc*).

We already know what happens without metering because the Biden Administration stopped using it. The border was a chaotic humanitarian disaster, with mass overcrowding, and thousands of children went missing. The administration's only safety valve was to release untold asylum seekers directly into the interior with little-to-no vetting, in defiance of § 1225(b)(2)(A), which mandates detention of aliens "not clearly and beyond a doubt entitled to be admitted." *See also Biden v. Texas*, 597 U.S. 785, 792 (2022).

Although the Trump Administration has made the border more secure than it has ever been, there is no reason to believe that the next surge at the southern border will not risk overwhelming the system, without the availability of metering. Indeed, the absence of metering will only encourage more concerted surges.

B. The Ninth Circuit's Redefinition of "Arrive In" Unleashes Doctrinal and Practical Chaos.

By rejecting the clear distinction between those "in" the United States and those who are not "in" the United States, the Ninth Circuit's decision also causes serious doctrinal and practical problems.

For example, this Court has held that once an alien has "passed through our gates," he is entitled to "proceedings conforming to traditional standards of fairness encompassed in due process of law." *Mezei*,

345 U.S. at 212–16. Under the "entry fiction," aliens "on the threshold of initial entry" may be *physically* present in the United States but are deemed *legally* outside the United States for purposes of due process. *Id.* at 212; *see also Knauff*, 338 U.S. at 544; *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892).

In other words, this Court has refused to recognize legal presence in the United States even where there is physical presence, but the Ninth Circuit has done the inverse, conferring legal presence in the United States despite the absence of any physical presence. Besides confirming the illogic of the decision below, this also raises questions about whether asylum seekers in Mexico who are (in the Ninth Circuit's view) also in the United States are somehow legally present in the United States—and thus entitled to further legal protections even beyond seeking asylum.

Respondents may contend that the INA's use of "arriving in the United States" is a purely statutory construct, distinct from the constitutional concept of "entry," but even that view requires believing that Congress drafted the INA to conflict with basic background principles of immigration law, despite no clear evidence (really, no evidence at all) that Congress chose to take that unusual step.

The Ninth Circuit's ruling also introduces a host of line-drawing problems that Congress had studiously avoided by using clear statutory text. If crossing the border is no longer the demarcation, then how close to the border must an alien be to qualify as "reach[ing] [his] destination," as the Ninth Circuit's approach calls it? Pet.App.16a. A mile from the border? Ten

miles? In Guatemala? Over the ocean or in the Gulf of America on their way to the United States?

To be sure, the Ninth Circuit's original panel opinion described its holding as applying to aliens on the United States's "doorstep," Pet.App.162a, but the amended opinion deleted that phrase. As Judge Bress pointed out, "if the amended opinion is now extending our asylum and inspection laws to persons in Mexico even further away from the United States' 'doorstep,' the amended opinion has only aggravated a core ambiguity about how far into Mexico the court's decision reaches." Pet.App.121a n.1 (Bress, J., dissenting from the denial of rehearing *en banc*).

This issue is further complicated by the fact that the United States operates border preclearance operations in other countries, which allow individuals seeking entry to the United States to be screened before getting anywhere close to American soil, and they are typically not reprocessed upon physically entering the United States.[7] These facilities are present in airports in places like Aruba, The Bahamas, Bermuda, Ireland, and the United Arab

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[7] *See* 8 C.F.R. § 235.5(b) ("In the case of any aircraft, vessel, or train proceeding directly, without stopping, from a port or place in foreign territory to a port-of-entry in the United States, the examination and inspection of passengers and crew required by the Act and final determination of admissibility may be made immediately prior to such departure at the port or place in the foreign territory and *shall have the same effect under the Act as though made at the destined port-of-entry in the United States*.") (emphasis added).

Emirates.[8] If an alien "arrives" at one of these facilities, does he have a statutory right to seek asylum? Under the text of the INA, the answer is no, because he is not "in the United States." But the Ninth Circuit's opinion suggests yes, which could cause logistical problems for CBP's processing of travelers, not to mention the obvious international and diplomatic tensions that might arise from individuals seeking asylum from the United States while still thousands of miles away in a foreign country.

III. The Ninth Circuit's Decision Makes a Hash of Other Statutory Provisions.

The Ninth Circuit's decision also conflicts with or renders illogical numerous other statutory provisions.

A. Section 1225(b)(2)(C): "Remain in Mexico."

Section 1225(b)(2)(C) states, "In the case of an alien … who is arriving on land … from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a." 8 U.S.C. § 1225(b)(2)(C). This is part of the statutory authority for President Trump's effective "Remain in Mexico" policy.

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[8] *Preclearance Locations*, U.S. Customs & Border Prot., https://www.cbp.gov/travel/preclearance#pc_ports (last modified May 12, 2025).

But the Ninth Circuit's interpretation of "arrives in the United States" creates serious tension with the authority in § 1225(b)(2)(C). If an alien "arrives" when he is still in Mexico, how could the Attorney General "return" that alien to Mexico? He is *still in* Mexico. He is not being returned anywhere. *See* Pet.13.

B. Section 1157: Two Bites at the Apple.

Section 1157(c) authorizes the Attorney General to "admit any refugee who is not firmly resettled in any foreign country," including Mexico. 8 U.S.C. § 1157(c). Imagine an alien who arrives at the Mexico side of the border. He could seek asylum under the Ninth Circuit's interpretation of § 1158 because he has arrived "in the United States" (despite being in Mexico). And if that fails, he could just seek refugee status under § 1157(c) because he is in Mexico but not firmly resettled there.

The two provisions operate in tandem, providing certain authorities where aliens are in the United States, and different authorities where the aliens are outside the United States. But the Ninth Circuit has now conflated the two, at least in certain circumstances, and thus some aliens manage to fall in both buckets. *See* Pet.13.

C. The Decision Circumvents the Bar on Class-Wide Relief Under § 1252(f)(1).

The Ninth Circuit granted class-wide declaratory relief, but that was an improper end-run around 8 U.S.C. § 1252(f)(1), which states that only this Court can "enjoin or restrain the operation" of certain provisions "other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." This Court has held that § 1252(f)(1) "prohibits lower courts from … order[ing] federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." *Garland v. Aleman Gonzalez*, 596 U.S. 543, 550 (2022).

To be sure, the lower court here did not issue a class-wide *injunction*, but it did issue class-wide declaratory relief. And "we have long presumed that officials of the Executive Branch will adhere to the law as declared by the court. As a result, the declaratory judgment is the functional equivalent of an injunction." *Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008); *see Poe v. Gerstein*, 417 U.S. 281, 281 (1974).

Accordingly, despite not being labeled an injunction, class-wide declarative relief "order[s] federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." *Aleman Gonzalez*, 596 U.S. at 550.

This is not the first time a lower court "thought it could sidestep § 1252(f)(1)." *United States v. Texas*, 599 U.S. 670, 690 (2023) (Gorsuch, J., concurring in the judgment). In *Texas*, the district court "purported to 'vacate'" agency action, on the theory that it "does not offend § 1252(f)(1), because it does not entail an order directing any federal official to do anything." *Id.* at 690–91. "It's a clever workaround, but it doesn't succeed." *Id.* at 691. Section 1252(f)(1) bars not just injunctions but *any* "restrain[t]" on the government—and there is little doubt that declaratory relief qualifies. *See Franklin v. Massachusetts*, 505 U.S. 788, 827–28 (1992) (Scalia, J., concurring in part and concurring in the judgment) (arguing declaratory and injunctive relief are equally disruptive to "performance of executive functions").

Common sense confirms this conclusion. There was no reason to issue class-wide declaratory relief unless it did something to restrain government officials—and that is precisely why that relief violated § 1252(f)(1).

* * *

At every turn, the Ninth Circuit's decision defies text and common sense, and—if not reversed—it will yield untold chaos at the southern border.

CONCLUSION

For the foregoing reasons, *Amici* urge the Court to reverse.

Respectfully submitted,

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