

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 Petition for a Writ of Certiorari to the United
States Court of Appeals for the Ninth Circuit**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Immigration and Nationality Act (“INA”) requires the federal government to “inspect” and refer for processing any asylum seeker who is “present in the United States” or “arrives in the United States ... at a designated port of arrival[.]” 8 U.S.C. § 1225(a)(1), (a)(3), (b); *see also id.* § 1158(a). From 2018 to 2021, the government had a formalized “metering policy” under which border officials refused to inspect or process asylum seekers arriving at ports of entry along the southern border and instead turned them back to Mexico. The government did so without maintaining any official list or record of their attempt to seek asylum.

The question presented is whether the now-re-scinded metering policy violated the Administrative Procedure Act, 5 U.S.C. § 706(1), by unlawfully withholding inspection and processing as required by the INA for asylum seekers arriving in the United States at a port of entry.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE	4
I. Factual Background	4
II. District Court Proceedings	7
III. Court of Appeals Proceedings	9
IV. District Court Proceedings on Remand	14
REASONS FOR DENYING THE PETITION.....	15
I. The Decision Below Has Little Ongoing Significance.	15
II. The Ninth Circuit Correctly Resolved the Question Presented.....	21
III. The Petition Is a Poor Vehicle for Review.	33
CONCLUSION.....	34

TABLE OF AUTHORITIES

CASES

<i>Al Otro Lado v. Trump</i> , No. 25-cv-1501 (S.D. Cal. filed June 11, 2025).....	18
<i>Al Otro Lado v. Wolf</i> , 952 F.3d 999 (9th Cir. 2020)	6
<i>Am. Legion v. Am. Humanist Ass’n</i> , 588 U.S. 29 (2019)	21
<i>Barton v. Barr</i> , 590 U.S. 222 (2020)	27
<i>Bostock v. Clayton Cnty.</i> , 590 U.S. 644 (2020)	32
<i>Cap. Area Immigrants’ Rights Coal. v. Trump</i> , 471 F. Supp. 3d 25 (D.D.C. 2020)	9
<i>DHS v. Thuraissigiam</i> , 591 U.S. 103 (2020)	12, 31
<i>Garland v. Aleman Gonzalez</i> , 596 U.S. 543 (2022)	13
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	22
<i>Jennings v. Rodriguez</i> , 583 U.S. 281 (2018)	32
<i>Las Americas Immigrant Advoc. Ctr. v. DHS</i> , 783 F. Supp. 3d 200 (D.D.C. 2025)	18
<i>Leng May Ma v. Barber</i> , 357 U.S. 185 (1958)	26
<i>Loper Bright Enters. v. Raimondo</i> , 603 U.S. 369 (2024)	31

<i>Loughrin v. United States</i> , 573 U.S. 351 (2014)	27
<i>Matter of K-H-C-</i> , 5 I. & N. Dec. 312 (BIA 1953)	26
<i>McNeill v. United States</i> , 563 U.S. 816 (2011)	31
<i>Pulsifer v. United States</i> , 601 U.S. 124 (2024)	11, 23
<i>Refugee & Immigrant Ctr. for Educ. & Legal Servs. v. Noem</i> , 2025 WL 1825431 (D.D.C. July 2, 2025)	18
<i>Robinson v. Shell Oil Co.</i> , 519 U.S. 337 (1997)	23
<i>Sale v. Haitian Centers Council, Inc.</i> , 509 U.S. 155 (1993)	30
<i>Sturgeon v. Frost</i> , 577 U.S. 424 (2016)	23
<i>TransUnion LLC v. Ramirez</i> , 594 U.S. 413 (2021)	21
<i>United States v. Vazquez-Hernandez</i> , 849 F.3d 1219 (9th Cir. 2017)	24
<i>United States v. Wilson</i> , 503 U.S. 329 (1992)	23, 31
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000)	3, 11, 25, 27
<i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001)	26

STATUTES

5 U.S.C. § 706(1).....	1, 2, 7, 8, 10, 12, 13, 16, 19
------------------------	--------------------------------

5 U.S.C. § 706(2).....	16
8 U.S.C. § 1101(a)(42)(A)	4
8 U.S.C. § 1103(a)(10)	29
8 U.S.C. § 1157	27, 28
8 U.S.C. § 1157(a)(2)	28
8 U.S.C. § 1157(c)(1).....	28
8 U.S.C. § 1158	12, 13, 21, 23, 27, 29, 30, 31, 32
8 U.S.C. § 1158(a).....	30
8 U.S.C. § 1158(a)(1)	1, 4, 10, 11, 12, 21, 22, 24, 26, 27, 29, 32
8 U.S.C. § 1158(b)(1)(A)	4
8 U.S.C. § 1182(a)(6)(A)	28
8 U.S.C. § 1182(f)	1, 17, 19
8 U.S.C. § 1185(a).....	1, 17
8 U.S.C. § 1185(a)(1)	19
8 U.S.C. § 1225	12, 13, 21, 22, 23, 29, 30, 31, 32
8 U.S.C. § 1225(a).....	27
8 U.S.C. § 1225(a)(1) ...	1, 4, 12, 21, 22, 24, 26, 28, 30, 32
8 U.S.C. § 1225(a)(3)	1, 4, 21, 22, 24, 32
8 U.S.C. § 1225(b).....	1, 4, 21, 22, 24, 32
8 U.S.C. § 1225(b)(1)(A)(i)	23, 28
8 U.S.C. § 1225(b)(1)(A)(ii).....	23
8 U.S.C. § 1225(b)(2)(c)	19
8 U.S.C. § 1229a	4
8 U.S.C. § 1252(f)(1)	13
8 U.S.C. § 1324(a)(2)(B)(iii).....	28

42 U.S.C. § 265	20
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009	30
Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.....	22

RULES

Fed. R. Civ. P. 60(b)	15
Fed. R. Civ. P. 60(b)(5)	15

REGULATIONS

8 C.F.R. § 1.2	12, 31
8 C.F.R. § 100.4	4, 32
8 C.F.R. § 208.13(c)(4).....	7
19 C.F.R. § 101.1	24
62 Fed. Reg. 10,312 (Mar. 6, 1997).....	30
63 Fed. Reg. 19,382 (Apr. 20, 1998).....	31
83 Fed. Reg. 55,934 (Nov. 9, 2018)	19
84 Fed. Reg. 6,811 (Feb. 28, 2019).....	19
84 Fed. Reg. 33,829 (July 16, 2019).....	7
87 Fed. Reg. 19,941 (Apr. 6, 2022).....	20
88 Fed. Reg. 31,314 (May 16, 2023)	9, 20
89 Fed. Reg. 48,710 (June 7, 2024).....	17
90 Fed. Reg. 8,333 (Jan. 29, 2025).....	17

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<https://www.congress.gov/crs-product/IF10215> ... 20
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 Policy* (Sept. 2018),
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 content/uploads/2019/09/19-607-Mexico-
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INTRODUCTION

The Immigration and Nationality Act (“INA”) requires the federal government to “inspect[]” and refer for processing any asylum seeker who is “present in the United States” or “arrives in the United States ... at a designated port of arrival.” 8 U.S.C. § 1225(a)(1), (a)(3), (b); *see also id.* § 1158(a)(1). In 2018, the Department of Homeland Security (“DHS”) adopted a formalized “metering policy” under which border officers did not inspect and process asylum seekers. Instead, the officers stood just on the U.S. side of the southern border, identified likely asylum seekers as they arrived at ports of entry, and turned them back to Mexico right before they stepped onto U.S. soil. Respondents filed a class action challenging the metering policy and ultimately obtained a declaratory judgment that the policy violated the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(1), by unlawfully withholding inspection and asylum processing as required by the INA.

The government seeks this Court’s review of the Ninth Circuit’s decision affirming the district court’s holding that the metering policy violated § 706(1). But the government rescinded the metering policy years ago, before the district court had even entered final judgment. The question presented thus has almost no present implications, and likely no future implications either. Since June 2024, the government has restricted inspection and processing of noncitizens under 8 U.S.C. §§ 1182(f) and 1185(a), which authorize the President to “suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants” whose entry “would be detrimental to the interests of the United States.” 8 U.S.C. § 1182(f). Although the

current administration’s border policies face pending legal challenges, none of the plaintiffs’ claims in those cases turn on the question presented by the petition here. The Court’s resolution of the question presented would thus amount to little more than an advisory opinion.

The government nonetheless urges the Court to grant review just in case it decides at some point in the future to reinstate metering. But even then, the decision below provides the government with wide latitude and flexibility. The Ninth Circuit determined that the rescinded metering policy withheld required agency action under § 706(1) because the government “turned away noncitizens without taking *any* steps to keep track of who was being turned away or otherwise allowing them to open asylum applications.” Pet. App. 31a (emphasis added). “Even minimal steps,” the panel emphasized, would have sufficed to defeat a § 706(1) withholding claim. Pet. App. 32a. The panel dissent observed that the majority’s “narrow interpretation of ‘withholding’ limits the practical impact of its opinion,” Pet. App. 66a: “If—as the majority concludes—‘[e]ven minimal steps,’ such as keeping a waitlist, would evade the majority’s rule ... then the majority’s rule is good for this case only.” Pet. App. 71a.

Even if the question presented were not largely irrelevant, it would not warrant the Court’s attention. The petition does not and cannot identify any circuit split, and it is also wrong on the merits. The Ninth Circuit correctly concluded that the INA’s inspection and processing mandates are triggered under the circumstances presented by the metering policy—i.e., where asylum seekers “arrive[d]” at ports of entry but

were physically blocked by DHS officers from crossing the border.

As the Ninth Circuit explained, the government’s argument “improperly reads a fragment of statutory text in isolation,” violating the “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” Pet. App. 13a (citation omitted). Most notably, the government’s reading renders superfluous the category of noncitizens “who arrive[] in the United States,” violating the “cardinal principle of statutory construction that [courts] must ‘give effect, if possible, to every clause and word of a statute.’” *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (citation omitted).

Even worse, the government’s reading would empower border officials to render the INA’s inspection and asylum processing requirements wholly inoperable at ports of entry—the designated places where noncitizens may lawfully come into the United States—by simply blocking asylum seekers from stepping on U.S. soil. This plainly is not what Congress contemplated when it mandated inspection and processing of arriving asylum seekers.

Finally, the government urges the Court to grant review because it is “unlikely to have another opportunity to address” the question presented. Pet. 25. To be sure, the question is unlikely to arise again because it has become irrelevant. If that changes in the future, however, there are countless scenarios in which the question could present itself—most obviously in litigation over what constitutes “minimal steps” that comply with the decision below. Regardless, the government does not identify any basis for

this Court to hypothetically answer the question presented now.

STATEMENT OF THE CASE

I. Factual Background

The INA provides that noncitizens who have a well-founded fear of persecution in their home countries because of their race, religion, nationality, membership in a particular social group, or political opinion are eligible for asylum. 8 U.S.C. §§ 1158(b)(1)(A), 1101(a)(42)(A). Any noncitizen “who is physically present in the United States or who arrives in the United States ... whether or not at a designated port of arrival ... may apply for asylum.” *Id.* § 1158(a)(1). As relevant to this case, border officials must “inspect” each noncitizen arriving at a port of entry and refer for further processing those who express an intention to seek asylum or a fear of persecution. *Id.* § 1225(a)(1), (a)(3), (b). Processing results in access to the asylum system; it usually involves either an interview with an asylum officer to determine whether the applicant has a credible fear of persecution before placement into removal proceedings in immigration court, or direct placement into such proceedings, where the applicant may seek asylum and other relief. *Id.* §§ 1225(b), 1229a. Congress neither set, nor authorized the Executive Branch to set, limits on the number of people who may seek asylum. *See* C.A. ER-280.

Under federal law, ports of entry are the designated places where noncitizens may lawfully come into the United States after inspection by immigration officers. 8 C.F.R. § 100.4. For decades, the government fulfilled its statutory duty to inspect and pro-

cess asylum seekers at designated ports of entry, including those along the southern border. Pet. App. 364a–365a. Travelers would arrive at a port, enter the pre-inspection area, and present themselves to U.S. Customs and Border Protection (“CBP”) officers, who inspected them and then referred asylum seekers for further processing as required by the INA. *Id.* This changed in May 2016, however, after one of the country’s busiest ports, the San Ysidro port of entry, experienced an increase in arrivals of Haitian asylum seekers. Pet. App. 365a.

Initially, the San Ysidro port managed the influx by opening temporary holding rooms, increasing its staffing, and taking other measures to expand capacity consistent with the contingency plans in place for periods of mass migration. *Id.* The port did not turn back arriving noncitizens, nor did its leadership indicate any need to do so. C.A. 1-SER-251–252, 255–256; 4-SER-818. On May 26, 2016, the San Diego Union-Tribune published a story entitled “Surge of Haitians at San Ysidro Port of Entry,” which noted that although “more than 200 people were crowded inside the port’s pedestrian entrance,” the port had the ability to “process close to 25,000 northbound pedestrians a day.” C.A. ER-338.¹

The next day, CBP abruptly switched course and ordered officers at San Ysidro to turn newly arriving asylum seekers back to Mexico. C.A. 2-SER-270. The officers were instructed to “hold the line to prevent

¹ Sandra Dibble, *Surge of Haitians at San Ysidro Port of Entry*, S.D. Union Trib. (May 26, 2016, updated Aug. 21, 2016), <https://www.sandiegouniontribune.com/2016/05/26/surge-of-haitians-at-san-ysidro-port-of-entry/>.

any [migrants] from entering” the port. Pet. App. 384a (citation omitted). By the end of the month, CBP was turning back nearly all asylum seekers at San Ysidro. C.A. ER-712. By 2017, CBP had expanded this policy to all ports of entry across the U.S.-Mexico border, and it became routine for CBP officers to refuse to inspect or process asylum seekers, sometimes even after they had crossed onto U.S. soil. Pet. App. 366a–367a, 384a.

In April 2018, DHS formalized the policy in a memorandum, “Metering Guidance to the Directors of Field Operations overseeing operations at [ports of entry] on the U.S.-Mexico border,” which was distributed to all southern border ports of entry. Pet. App. 368a. Under the Metering Guidance, CBP officers stood just on the U.S. side of the border, identified likely asylum seekers, and physically prevented them from stepping onto U.S. soil. Pet. App. 365a–367a, 386a. The Guidance prohibited officers from “provid[ing] tickets or appointments or otherwise schedul[ing] any person for entry.” Pet. App. 5a. DHS subsequently issued an additional memorandum explicitly deprioritizing the “processing” of “persons without documents.” Pet. App. 5a–6a (brackets omitted).

As DHS continued to refuse to inspect or process asylum seekers, many of those turned away found themselves living in camps on the Mexican side of the border, near the ports of entry. Pet. App. 6a. Mexican officials, local nonprofits, and sometimes the asylum seekers themselves made unofficial lists of the people waiting to be processed. *See Al Otro Lado v. Wolf*, 952 F.3d 999, 1004 (9th Cir. 2020). CBP officials sometimes coordinated informally with the list-keepers,

but they did not maintain lists of their own. Pet. App. 6a. The growing number of asylum seekers turned back by CBP waited near the ports for weeks and then months, many without food, shelter, or safety. *See id.* (“Some were murdered in Mexico while waiting for an opportunity to be processed by U.S. officials.”).

II. District Court Proceedings

Al Otro Lado, Inc., a nonprofit immigrant rights organization, and thirteen asylum seekers (collectively “respondents”) brought a class action in the U.S. District Court for the Southern District of California, challenging the Metering Guidance. *See* Pet. App. 6a–7a. As relevant here, respondents argued that the Guidance (hereinafter “metering policy”) violated the APA, 5 U.S.C. § 706(1), by unlawfully withholding or unreasonably delaying inspection and processing of asylum seekers arriving at ports of entry. *See* Pet. App. 7a. They named as defendants the Secretary of Homeland Security, the Commissioner of CBP, and the Executive Assistant Commissioner of the CBP Office of Field Operations.

While the suit was pending, the Department of Justice and DHS promulgated a regulation (the “Transit Rule”) that made noncitizens who traveled through one or more third countries on their way to the United States ineligible for asylum if they did not previously seek and obtain a final denial of protection in at least one transit country. *See* 84 Fed. Reg. 33,829, 33,843 (July 16, 2019) (codified at 8 C.F.R. § 208.13(c)(4) (2020)). Asylum seekers turned back from ports of entry before the Transit Rule went into effect were now subject to the Rule only because the government had unlawfully refused to inspect and

process them when they initially arrived. Pet. App. 3a.

Respondents obtained a preliminary injunction blocking application of the Transit Rule to a provisional class (the “transit-rule class”) consisting of “all non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. port of entry before July 16, 2019, because of the U.S. Government’s metering policy, and who continue to seek access to the U.S. asylum process.” Pet. App. 8a (brackets omitted). The district court ordered the parties to identify class members and notify them of the injunction, and it required the government to reopen or reconsider class members’ asylum denials that were based on the Transit Rule. Pet. App. 8a–11a.

The district court subsequently certified a broader class (the “metering class”) of “all noncitizens who seek or will seek to access the U.S. asylum process by presenting themselves at a Class A [port of entry] on the U.S.-Mexico border, and were or will be denied access to the U.S. asylum process by or at the instruction of [CBP] officials on or after January 1, 2016.” Pet. App. 9a.

The district court ultimately granted summary judgment to respondents on their § 706(1) claim, converted the transit-rule class preliminary injunction into a permanent injunction, and issued declaratory relief for the metering class stating that “absent any independent, express, and lawful statutory authority, [the government’s] denial of inspection or asylum processing to [noncitizens] who have not been admitted or paroled, and who are in the process of arriving in the United States at Class A Ports of Entry, is unlawful regardless of the purported justification for doing

so.” Pet. App. 251a–256a. The district court also granted one of the named plaintiffs, Beatrice Doe, an injunction requiring the government to “tak[e] the necessary steps to facilitate [her] entry into the United States” and to “ensure her inspection and asylum processing upon arrival.” Pet. App. 253a.

In November 2021—after the district court’s summary judgment order but before final judgment—the government rescinded the metering policy. Pet. App. 10a. The government rescinded the Transit Rule in 2023, after it was vacated by a different court in separate litigation. *See Cap. Area Immigrants’ Rights Coal. v. Trump*, 471 F. Supp. 3d 25 (D.D.C. 2020); 88 Fed. Reg. 31,314, 31,335 n.74, 31,429 (May 16, 2023).

III. Court of Appeals Proceedings

The U.S. Court of Appeals for the Ninth Circuit largely affirmed the district court in a 2-1 decision. Pet. App. 137a–178a. The court of appeals sua sponte ordered the parties to brief whether the appeal should be reheard en banc and then voted against rehearing. Pet. App. 2a. The rehearing denial was accompanied by an amended panel opinion and an amended dissent. Pet. App. 1a–134a.

The panel first acknowledged that the government “rescinded the metering policy years ago.” Pet. App. 4a. The rescission did not moot the appeal, however, because the district court had entered “equitable relief”—i.e., the transit-rule class injunction—that “impose[d] ongoing obligations on the Government” that “could be modified.” Pet. App. 11a n.3. Deciding whether to uphold that remedy required “evaluat[ing] the lawfulness of the metering policy.” Pet. App. 4a.

The panel then set forth the government's primary arguments on appeal: The government "acknowledge[d] that border officials have a mandatory duty to process noncitizens, including allowing them to apply for asylum," but contended that the metering policy "did not violate § 706(1) because border officials lack any duty to noncitizens who have not stepped across the border." Pet. App. 12a. The government alternatively argued that, even if the duty to process noncitizens extended to asylum seekers turned away from ports of entry under the metering policy, the policy "did not constitute withholding of that duty within the meaning of § 706(1)." *Id.*

The panel "disagree[d] on both fronts." *Id.* It began with the text of 8 U.S.C. § 1158(a)(1), which states:

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum[.]

The parties agreed that the asylum seekers who were turned away from ports of entry under the metering policy were not "physically present in the United States." Pet. App. 13a. Their dispute was over whether such individuals fell into the second category. Respondents argued that a noncitizen "arrives in the United States ... at a designated port of arrival" if she reaches the border at a port of entry but is blocked by a CBP officer from crossing the border. The government argued that "one only 'arrives in the United States' upon stepping across the border." *Id.*

The panel agreed with respondents, explaining that the government’s reading improperly “reads a fragment of statutory text in isolation.” *Id.* A “cardinal principle of statutory construction,” the panel explained, is that courts “must give effect, if possible, to every clause and word of a statute.” *Id.* (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)). Here that meant “endeavor[ing] to give the phrase ‘arrives in the United States’ a meaning that is not completely subsumed within the phrase ‘physically present in the United States.’” Pet. App. 14a.

Considering § 1158(a)(1)’s “text and context,” Pet. App. 15a (quoting *Pulsifer v. United States*, 601 U.S. 124, 141 (2024)), the panel concluded that it was possible “to give nonredundant meaning” to both phrases: “The phrase ‘physically present in the United States’ encompasses noncitizens within our borders, and the phrase ‘arrives in the United States’ encompasses those who encounter officials at the border, whichever side of the border they are standing on.” Pet. App. 15a.

The panel observed that this reading of the statutory text finds further support in the parenthetical specifying that the phrase “arrives in the United States” includes those “at a designated port of arrival.” Pet. App. 16a. A noncitizen “who presents herself to a border official at a port of entry” thus “‘arrives in the United States ... at a designated port of arrival,’ whether she is standing just at the edge of the port of entry or somewhere within it.” *Id.*

The panel also noted that under the government’s contrary reading, a noncitizen seeking asylum while the metering policy was in effect would have been bet-

ter off “circumventing the official channels for entering the United States” and instead “surreptitiously cross[ing] the border,” at which point she would be able to apply for asylum under § 1158(a)(1). Pet. App. 17a. The panel’s construction of the statutory text better comported with “the larger context of the immigration system” by avoiding the creation of “perverse incentive[s] to enter at an unlawful rather than a lawful location.” *Id.* (quoting *DHS v. Thuraissigiam*, 591 U.S. 103, 140 (2020)).

Having concluded that “a noncitizen stopped by U.S. officials at the border is eligible to apply for asylum under § 1158(a)(1),” the panel turned to the government’s duty to inspect and process such “applicant[s] for admission” under § 1225. Pet. App. 23a. Because the definition of an “applicant for admission” in § 1225(a)(1) “is nearly identical to the language of § 1158(a)(1),” the same reasoning applied: A noncitizen stopped by officials at the border is an “applicant for admission” who must be inspected and processed by border officials under § 1225. *Id.* This conclusion aligned with the government’s own definition of “arriving alien” as an “applicant for admission coming or attempting to come into the United States at a port-of entry.” Pet. App. 24a (quoting 8 C.F.R. § 1.2).

The panel next considered the government’s argument that respondents’ § 706(1) claim failed because the metering policy merely delayed inspection and processing under §§ 1158 and 1225 for a reasonable period of time. *See* Pet. App. 27a; 5 U.S.C. § 706(1) (“The reviewing court shall ... compel agency action unlawfully withheld or unreasonably delayed.”). But under the policy, “border officials turned away noncitizens without taking any steps to keep track of who

was being turned away or otherwise allowing them to open asylum applications.” Pet. App. 31a. The panel concluded that this “wholesale refusal to carry out a mandatory duty” constituted withholding under § 706(1). *Id.* The panel noted that by taking minimal steps, the government could have “shift[ed] the § 706(1) analysis of any challenge from the withholding category into the delay category,” affording the government “wide latitude and flexibility to carry out its duties at the border.” Pet. App. 32a. Because the government had not taken any such steps, the panel did not “reach the question whether any delay would have been reasonable.” *Id.*

The panel affirmed the relief entered by the district court except for the portion of the transit-rule injunction requiring the government *sua sponte* to reopen or reconsider asylum determinations for transit-rule class members who were denied asylum under the Transit Rule. Pet. App. 40a–41a. The panel agreed with the government that this requirement was barred by 8 U.S.C. § 1252(f)(1) because it affirmatively required officials to take actions not required by the covered removal provisions. Pet. App. 41a. (citing *Garland v. Aleman Gonzalez*, 596 U.S. 543, 551 (2022)).

Judge R. Nelson dissented from the panel decision, opining that the government could use the metering policy to lawfully sidestep §§ 1158 and 1225’s inspection and processing duties. Pet. App. 43a–77a. He noted, however, that the majority’s “narrow interpretation of ‘withholding’ limits the practical impact of its opinion.” Pet. App. 66a. “If—as the majority con-

cludes—‘[e]ven minimal steps,’” would avoid the majority’s ruling in the future, “then the majority’s rule is good for this case only.” Pet. App. 71a.

Judge Bress filed an opinion dissenting from the denial of rehearing en banc, joined by Judge R. Nelson and 10 other judges. Pet. App. 114a–133a.

IV. District Court Proceedings on Remand

Although the transit-rule class injunction was still in place at the time of the Ninth Circuit’s decision, *see* Pet. App. 11a n.3, the practical effect of that injunction soon diminished. As narrowed by the panel, the injunction imposed two requirements: (1) the parties had to “make all reasonable efforts to identify” transit-rule class members; and (2) the government could not apply the Transit Rule to find class members ineligible for asylum. Pet. App. 35a, 40a.

As to the first requirement, the government reviewed 3,225 cases of potential class members with unexecuted removal orders and found only four individuals eligible for any relief under applicable screening procedures, with the last positive identification in May 2023. *See* D. Ct. Dkt. 847 at 2, 4 n.2. Respondents had identified only two class members since 2022 who were removed and sought to renew their asylum claims pursuant to the injunction. D. Ct. Dkt. 842 at 6. And while the second requirement benefited many class members who were in proceedings when the preliminary injunction issued in 2019, it had no application to any new removal proceedings because the Transit Rule was vacated in 2020. *See supra* p. 9.

Given the ever-diminishing probability of additional class members benefiting from the injunction,

the extensive efforts the parties had already undertaken to identify class members, and the continuing screening obligations the injunction imposed on the parties, respondents filed a motion under Federal Rule of Civil Procedure 60(b) asking the district court to relieve the parties of those obligations. *See* D. Ct. Dkt. 842, 853. Respondents explained that the injunction had “served its core purpose of restoring the status quo to a time-limited class,” and that “further screening [was] unlikely to result in any tangible benefit to class members.” D. Ct. Dkt. 853 at 1. The government agreed that the equities warranted the requested relief. *See* D. Ct. Dkt. 846.

The district court vacated the parties’ obligations to identify new class members, finding that respondents had “made the required showing under Rule 60(b)(5), and that the purposes of the [injunction] have been satisfied and applying it prospectively is no longer equitable given the burdens on the parties and the minimal success of screening procedures in identifying additional potential class members.” D. Ct. Dkt. 854.

REASONS FOR DENYING THE PETITION

I. The Decision Below Has Little Ongoing Significance.

The petition should be denied because it seeks review of a decision that no longer has practical import. The government rescinded both the metering policy and the Transit Rule years ago, the district court essentially dissolved the transit-rule class injunction, and the remaining declaratory judgment has no bearing on the legal justification for the government’s current management of the southern

border. Moreover, even if the government were to reimplement the metering policy at some point in the future, the panel’s “narrow interpretation” of 5 U.S.C. § 706(1) substantially “limits the practical impact of its opinion” on the government’s border policies. Pet. App. 66a (R. Nelson, J., dissenting). Indeed, even while the metering policy was in effect, the government managed noncitizen arrivals at the border using other policies wholly unaffected by the decision below. The petition thus fails to present a question sufficiently important to warrant the Court’s review.

1. All relief entered by the district court addressed specific policies the government has rescinded. The transit-rule class injunction applied to a limited subset of asylum seekers who were (a) turned back from a port of entry before the Transit Rule went into effect, and (b) subsequently inspected and processed during the 11.5-month period the Rule was in place, July 16, 2019 to June 30, 2020. Pet. App. 343a. The declaratory relief addressed the metering policy, which the government rescinded in November 2021. Pet App. 10a, 11a n.3.

As the Ninth Circuit recognized, by the time it issued its decision, the only material dispute between the parties arose from their ongoing obligations under the transit-rule class injunction. Pet. App. 4a, 11a n.3; *see* Pet App. 72a (R. Nelson, J., dissenting) (observing that respondents’ challenge to the metering policy under 5 U.S.C. § 706(2) was moot “because the memoranda promulgating the metering policy were rescinded years ago”).

The parties’ obligations under the transit-rule class injunction are now essentially over as well. The

panel vacated the portion of the injunction requiring the government to affirmatively “reopen or reconsider[] past determinations” made in removal proceedings, Pet. App. 42a, and then on remand the district court vacated the parties’ obligations to locate unidentified class members, *see supra* p. 15. The only remaining injunctive relief bars the government from applying the (now-defunct) Transit Rule to transit-rule class members. As far as respondents are aware, only one such class member currently has a pending motion before the Executive Office for Immigration Review to determine, *inter alia*, whether he is a transit-rule class member and thus covered by the injunction.²

The declaratory relief issued by the district court likewise has little ongoing legal or practical significance. Any ongoing obligations the declaratory judgment confers on the government are de minimis and in any event relevant only to the rescinded metering policy; they have no relevance to the legal justification for the government’s current border management practices. Since June 2024, CBP has restricted inspection and processing of noncitizens under 8 U.S.C. §§ 1182(f) and 1185(a), which authorize the President to “suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants” whose entry “would be detrimental to the interests of the United States.” 8 U.S.C. § 1182(f); *see id.* § 1185(a); 89 Fed. Reg. 48,710 (June 7, 2024); 90 Fed. Reg. 8,333 (Jan.

² The district court also ordered the government to facilitate the inspection and processing of one named plaintiff (Beatrice Doe) if she seeks to come to the United States; she subsequently notified undersigned counsel that she no longer is interested in doing so.

29, 2025). Although these practices are the subject of pending legal challenges, none of the claims in those cases turn on the question presented here.³

2. It is thus hard to see how the decision below is causing “untold interference with the Executive Branch’s ability to manage the southern border.” Pet. 3 (quoting Pet. App. 115a (Bress, J., dissenting)). Although the government suggests that metering has a lengthy historical precedent that the lower courts disrupted, *see* Pet. 3 (“Before this litigation, border officials had repeatedly addressed migrant surges by standing at the border and preventing aliens without valid travel documents ...”), its citation for this claim is Judge Bress’s observation that metering began in 2016 and respondents filed their suit in 2017. *Id.* (citing Pet. App. 115a). And given DHS’s own evidence that its short-lived metering experiment simply pushed asylum seekers to cross between ports of entry,⁴ it is even harder to see why DHS would ever re-implement it.

Regardless, the decision below provides the government with plenty of flexibility to adopt a new metering policy if it chooses. The Ninth Circuit deter-

³ *See, e.g., Refugee & Immigrant Ctr. for Educ. & Legal Servs. v. Noem*, 2025 WL 1825431 (D.D.C. July 2, 2025), *appeal docketed*, No. 25-5243 (D.C. Cir. July 3, 2025); *Al Otro Lado v. Trump*, No. 25-cv-1501 (S.D. Cal. filed June 11, 2025); *Las Americas Immigrant Advoc. Ctr. v. DHS*, 783 F. Supp. 3d 200 (D.D.C. 2025), *appeal docketed*, No. 25-5313 (D.C. Cir. Aug. 28, 2025).

⁴ *See* Off. of Inspector Gen., DHS, *Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* 5–7 (Sept. 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>.

mined that the rescinded metering policy withheld required agency action under § 706(1) because the government “turned away noncitizens without taking *any* steps to keep track of who was being turned away or otherwise allowing them to open asylum applications.” Pet. App. 31a (emphasis added). Because “[e]ven minimal steps” would suffice to defeat a claim that the government had “unlawfully withheld” agency action, 5 U.S.C. § 706(1), the panel stressed, its decision gave the government “wide latitude and flexibility” in determining how to inspect and process asylum seekers. Pet. App. 32a. The panel dissent agreed that the majority’s “narrow interpretation of ‘withholding’ limits the practical impact of its opinion,” Pet. App. 66a: “If—as the majority concludes—‘[e]ven minimal steps,’ such as keeping a waitlist, would evade the majority’s rule ... then the majority’s rule is good for this case only.” Pet. App. 71a.

Indeed, even while the metering policy was in effect, the government managed noncitizen arrivals at the border using other policies grounded in distinct statutory authorities wholly unaffected by the decision below. These included a new regulation that barred asylum eligibility for noncitizens who crossed the border in violation of a presidential proclamation suspending entry, *see* 83 Fed. Reg. 55,934, 55,934 (Nov. 9, 2018) (citing proclamation issued pursuant to 8 U.S.C. §§ 1182(f), 1185(a)(1)); an initiative that returned a substantial number of noncitizens to Mexico to await their immigration court hearings, *see* 84 Fed. Reg. 6,811 (Feb. 28, 2019) (announcing guidance implementing 8 U.S.C. § 1225(b)(2)(C)); and the use of public health authority to prevent asylum seekers

from accessing ports of entry and to immediately expel those who crossed between ports, *see* 87 Fed. Reg. 19,941, 19,941–42 (Apr. 6, 2022) (citing 42 U.S.C. § 265 and detailing history of Centers for Disease Control and Prevention orders). The government also coordinated with other countries to limit the number of noncitizens reaching the U.S. border, a policy that continues today.⁵

More recently, the Biden Administration implemented yet another new policy to manage ports of entry. *See* 88 Fed. Reg. 31,314, 31,317 (May 16, 2023). Through the “CBP One” mobile application, noncitizens could schedule appointments and then arrive at ports at designated times to be inspected. *Id.* While the government argues that the lawfulness of this rescinded policy would be impacted by the decision below, Pet. 24, a system that allowed noncitizens at ports to put their names on a list, using mechanisms like the CBP One app, could presumably satisfy the “minimal steps” the panel stated would be necessary to change its analysis. *See* Pet. App. 32a (noting that a “waitlist system” would be sufficient).

⁵ *See* Claire Ribando Seelke, Cong. Rsch. Serv., IF10215, *Mexico’s Migration Control Efforts*, In Focus (Sept. 10, 2025), <https://www.congress.gov/crs-product/IF10215>; Peter Meyer, Cong. Rsch. Serv., IF10371, *U.S. Strategy for Engagement in Central America: An Overview*, In Focus (Feb. 16, 2021), <https://sgp.fas.org/crs/row/IF10371.pdf>; U.S. Dep’t of State, Joint Declaration and Supplementary Agreement Between the United States and Mexico (June 7, 2019), <https://www.state.gov/wp-content/uploads/2019/09/19-607-Mexico-Migration-and-Refugees.pdf> (agreeing that Mexico will increase its own border officials to deter migration through Mexico).

In short, the decision below is presently a dead letter with few if any future implications. Because the Court’s resources are better spent on “real controversies[ies] with real impact on real persons,” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021) (quoting *Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 29, 87 (2019)), the petition should be denied.

II. The Ninth Circuit Correctly Resolved the Question Presented.

Conspicuously missing from the petition is any assertion of a circuit split over the question presented. The government offers only that “[n]o other court of appeals has adopted” the Ninth Circuit’s reading of the statutes, Pet. 3—omitting that no other court has been presented with this issue, as the government had never previously adopted a similar policy. Although the absence of any lower court disagreement is reason enough to deny the petition, the government is also wrong on the merits.

The INA requires border officials to “inspect[]” and refer for processing any asylum seeker who is “present in the United States ... or who arrives in the United States ... at a designated port of arrival.” 8 U.S.C. § 1225(a)(1), (a)(3), (b); *see also id.* § 1158(a)(1). Section 1158 sets forth the rights of noncitizens to apply for asylum, while § 1225 sets forth the obligations of border officials to inspect and process noncitizens. *See* Pet. App. 12a. The Ninth Circuit correctly concluded that these statutory mandates apply under the circumstances presented by the metering policy—i.e., where asylum seekers arrived at ports of entry but were physically blocked by CBP officers from crossing the border.

1. Congress established the modern asylum system in the Refugee Act of 1980, which it incorporated into the INA. *See* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. The Refugee Act largely codified the United States’ obligations under the 1967 United Nations Protocol Relating to the Status of Refugees—including the fundamental principle of non-refoulement, or not returning people to a country where they would be persecuted or tortured. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987).

Consistent with that decades-long commitment, § 1158(a)(1) provides that any noncitizen “who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) ... may apply for asylum[.]” 8 U.S.C. § 1158(a)(1). Section 1225 requires the federal government to “inspect[.]” each “arriving” noncitizen and refer those who indicate either an intention to apply for asylum or a fear of persecution for further processing. *Id.* § 1225(a)(1), (a)(3), (b).

In the government’s view, the metering policy circumvented these statutory requirements by blocking asylum seekers who reached ports of entry from “arriv[ing] in the United States.” Pet. 12. The government points to dictionary definitions of “arrives” and “in,” which it claims establish that a noncitizen only “arrives in the United States” when “he comes within the limits or bounds of the United States.” Pet. 12.

As the Ninth Circuit explained, the government’s argument improperly “reads a fragment of statutory text in isolation,” violating the “fundamental canon of statutory construction that the words of a statute

must be read in their context and with a view to their place in the overall statutory scheme.” Pet. App. 13a (quoting *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016)); see *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (courts determine the meaning of statutory phrases by looking to the “language itself, the specific context in which that language is used, and the broader context of the statute as a whole”). This canon reflects the commonsense principle that courts must “look at the language of the provision—the whole provision—[to] figure out what it means.” Pet. App. 13a n.4. Here, the statutory “text and context,” *Pulsifer v. United States*, 601 U.S. 124, 141 (2024), establish that the inspection and processing requirements in §§ 1158 and 1225 applied to the asylum seekers who were turned away from ports of entry under the metering policy.

As an initial matter, even in isolation the phrase “arrives in” is not as helpful to the government as it suggests. As the government notes, the verb “arrive” means “to come to the end of a journey, to a destination, or to some definite place.” Pet. 12 (quoting 1 *Arrive*, *Oxford English Dictionary* (2d ed. 1989) (def. 5.a) (brackets omitted)). But that definition does not identify where the relevant “destination” or “definite place” is. If anything, the word “arrives” cuts against the government’s preferred reading. Verb tense “is significant in construing statutes,” *United States v. Wilson*, 503 U.S. 329, 333 (1992), and here Congress used the present tense “arrives” rather than the past tense “arrived.” If Congress wanted the law to cover only noncitizens who *had arrived*, it would have said so. Indeed, § 1225(b)(1)(A)(i) and (ii) reinforce Congress’s choice of present tense to describe arriving noncitizens, requiring the government to process any

asylum seeker who is “arriving in the United States,” in the present progressive tense—which, as the government conceded below, “plausibly denotes a process of arrival.” Gov’t Opening Br. 29, No. 22-55988 (9th Cir. Dec. 20, 2022).

The government thus puts great weight on the word “in.” See Pet. 3, 12–13. But “in” is simply the correct preposition when specifying a geographic area where arrival takes place: “In ordinary English,” Pet. 3, it would make no sense to say someone arrives “at the United States” or “upon the United States.” The government’s narrow focus on the word “in” also ignores the parenthetical following “arrives in the United States,” which states that any person who arrives “at a designated port of arrival” will be inspected and may apply for asylum. 8 U.S.C. §§ 1158(a)(1), 1225(a)(1), (a)(3), (b). As the Ninth Circuit concluded, this language establishes that “a noncitizen who presents herself to a border official at a port of entry has ‘arrived in the United States at a designated port of arrival.’” Pet. App. 16a (ellipses omitted). Ports of entry on the border occupy territory right up to the international border line. See *United States v. Vazquez-Hernandez*, 849 F.3d 1219, 1223 (9th Cir. 2017); see also 19 C.F.R. § 101.1 (defining “port of entry” as “the geographical area under the jurisdiction of a port director”). A noncitizen who presents herself to a government official right at the border is thus “at” the port, just as someone standing at the front gate of a house is “at” that house.

The government argues that the phrase “whether or not at a designated port of arrival” “simply clarifies that an alien can arrive in the United States either through a port of entry or in some other location.” Pet.

17. That is a rewrite of the statutory text—Congress said “at,” not “through” a port of entry. And it said that, for the purposes of the INA’s inspection and asylum processing mandates, a person “arrives in the United States” when they are “at a designated port of arrival.” That answers the question presented.

The government’s reading has another obvious problem: It renders the category of noncitizens “who arrive[] in the United States” entirely superfluous. If, as the government urges, asylum seekers “arrive[] in” the United States only when they “actually cross[] the border and enter[] the United States,” Pet. 12, the phrase “arrives in the United States” is “completely subsumed within the phrase ‘physically present in the United States,’” Pet. App. 14a. This result violates the “cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute.” *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (citation omitted).

The government’s only response to this redundancy problem is a non sequitur involving the “entry fiction” doctrine, which provides that under certain circumstances not relevant here, noncitizens who are physically present in the United States may be treated as if they were stopped at the border. Pet. 16–17. According to the government, “Congress may have referred separately to aliens who are ‘present’ in the United States and those who ‘arrive in’ the United States simply to make clear that, despite [the entry]

fiction, aliens who have just crossed the border must be inspected and may apply for asylum.” Pet. 16.⁶

The entry fiction does not solve the government’s redundancy problem because §§ 1158(a)(1) and 1225(a)(1) already apply to those who are “present in the United States” regardless of whether they have effected an “entry.” See *Matter of K-H-C-*, 5 I. & N. Dec. 312, 317 & n.8 (BIA 1953) (collecting cases on “entry” predating the 1952 INA); accord *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citing *Leng May Ma v. Barber*, 357 U.S. 185, 188–90 (1958)). In other words, “or arrives in the United States” remains surplusage even after considering the entry fiction. Pet. 16.⁷

⁶ The government’s wild guess about Congress’s intentions is unsupported by legislative history. The central language in §§ 1158(a)(1) and 1225(a)(1) was added in 1996, as part of a series of changes intended to “improve deterrence of illegal immigration[,] ... reform the legal immigration system and facilitate legal entries into the United States.” H.R. Rep. No. 104-828, at 1 (1996) (Conf. Rep.). The 1996 legislation was not intended to limit access to asylum or to narrow the categories of noncitizens who must be inspected at ports. A searching analysis of legislative intent would support the Ninth Circuit’s decision, not the government’s post-hoc justification.

⁷ The government argues that “arriving aliens’ are subject to special legal rules that do not apply to other aliens who are physically present in the United States.” Pet. 16–17. But the government ignores its own definition of “arriving alien,” see *infra* pp. 30–31, and cites statutes relevant only to arriving aliens who are *also* stowaways or otherwise inadmissible on security grounds. Pet. 16–17. The government offers no explanation for how those purportedly “special legal rules” would give independent meaning to the phrases “physically present” and “arrives in.” On the
(cont’d)

Trapped in its own circular logic, the government ultimately throws up its hands and concludes that “[r]edundancies are common in statutory drafting.” Pet. 17 (quoting *Barton v. Barr*, 590 U.S. 222, 239 (2020)). Sure—but that does not relieve courts of their obligation to “give effect, *if possible*, to every clause and word of a statute.” *Williams*, 529 U.S. at 404 (emphasis added) (citation omitted).

That is exactly what the Ninth Circuit did. The panel’s reading “give[s] nonredundant meaning” to the two categories: “The phrase ‘physically present in the United States’ encompasses noncitizens within our borders, and the phrase ‘arrives in the United States’ encompasses those who encounter officials at the border” Pet. App. 15a. Because that reading gives meaning to every part of the statute, it is the correct one. *See Loughrin v. United States*, 573 U.S. 351, 357 (2014) (rejecting interpretation of statute’s second clause that would have made it “a mere subset of its first”).

2. The government’s remaining statutory interpretation arguments are easily dismissed.

a. The Ninth Circuit’s opinion does not “collapse[] th[e] distinction” between § 1158 and its neighbor, 8 U.S.C. § 1157. Pet. 13. The two statutes serve fundamentally different purposes. Section 1158 allows those who are physically present or arrive in the United States to apply for asylum, 8 U.S.C. § 1158(a)(1). In contrast, § 1157 allows for the admission of refugees if they are not “firmly resettled in any

contrary, these provisions simply suggest that Congress intended to apply § 1225(a)’s inspection mandate broadly. *See* Pet. App. 24a–25a.

foreign country.” *Id.* § 1157(c)(1). And unlike § 1158, § 1157 provides that the President may limit the number of refugees admitted “under this section” as consistent with “humanitarian concerns” or “the national interest.” *Id.* § 1157(a)(2). As the district court observed, even a “ cursory review of Section 1157 shows that the statute establishes a fundamentally different and separate scheme for admission of refugees” than § 1158. Pet. App. 474a–475a.⁸

b. The government invokes various statutes providing that immigration officers can remove noncitizens if, during an inspection, they conclude that the noncitizen is inadmissible, 8 U.S.C. § 1225(a)(1), (b)(1)(A)(i); making it a crime to bring a noncitizen into the United States without authorization (unless the noncitizen is presented to an immigration officer immediately upon arrival), *id.* § 1324(a)(2)(B)(iii); and providing that noncitizens who arrive in the United States at unauthorized times or places are inadmissible, *id.* § 1182(a)(6)(A). *See* Pet. 13–14. These provisions shed no light on whether the federal government may prevent an asylum seeker from being inspected at a port or applying for asylum in the first place.⁹

⁸ The government also suggests that *Cardoza-Fonseca* supports its reading of § 1158, *see* Pet. 13, but the sentences “seized upon by the government” are just “general background summaries of § 1157 and § 1158” in a case that did not “concern[] people presenting themselves at the border,” Pet. App. 22a.

⁹ Likewise, while the federal government may, with a State’s consent, deputize state law enforcement officers to “respond to ‘an actual or imminent mass influx of aliens arriving off the coast
(cont’d)”

c. The government asserts that the reference to persons “brought to the United States after having been interdicted in international or United States waters” in the parenthetical following “arrives in the United States,” 8 U.S.C. § 1158(a)(1), supports the government’s reading because it suggests “other aliens who are stopped before reaching U.S. soil” may not apply for asylum. Pet. 18. That is incorrect. That language refers only obliquely to the government’s power of interdiction at sea, and only to afford the right to apply for asylum to interdicted individuals who are later brought to the United States. Moreover, the *expressio unius* canon is irrelevant where asylum seekers who are “at a port of arrival” are already covered by the language of the parenthetical, and are therefore not excluded from the statute.

d. The government concludes by invoking the presumption against extraterritoriality. Pet. 19–21. But as the Ninth Circuit explained, “[t]he presumption that ‘federal laws will be construed to have only domestic application,’” just “begs the question” in this case, which is whether asylum seekers who arrived at land ports of entry while the metering policy was in effect “arrive[d] in the United States” for the purposes of §§ 1158 and 1225. Because the “answer is ‘yes,’” the application is domestic and the presumption against extraterritoriality “has no role to play.” Pet. App. 26a. Indeed, there is no dispute that the border officials to whom §§ 1158 and 1225’s inspection and asylum processing obligations attach are themselves on the U.S.

of the United States, or near a land border,” Pet. 13–14 (emphasis omitted) (quoting 8 U.S.C. § 1103(a)(10)), that does not establish that the Executive Branch may “prevent people from applying [for asylum] by blocking them at the border,” Pet. App. 20a.

side of the border, further confirming that the application is domestic.

The government’s reliance on *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), is misguided because that case involved Coast Guard interdictions of migrants on the “high seas,” beyond even the territorial waters of the United States. *Id.* at 159; *accord* Pet. 20. *Sale* held that the now-abrogated statutory provision at issue in that case, which prevented the return of noncitizens to specific countries, only controlled the Attorney General’s actions in deportation and exclusion hearings held within the United States. 509 U.S. at 172–73. That holding comports with the Ninth Circuit’s holding that §§ 1225 and 1158 impose inspection and asylum processing requirements on U.S. officials standing on the U.S. side of the border.

3. Remarkably, the government’s reading of “arrives in the United States” conflicts with its own regulations. The current versions of §§ 1158(a) and 1225(a)(1) were adopted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208, div. C, §§ 302(a), 604(a), 110 Stat. 3009, 3009-579, 3009-690. These provisions were among several that “refer[red] to arriving aliens, even though this term is not defined in statute.” 62 Fed. Reg. 10,312, 10,312–13 (Mar. 6, 1997). As part of IIRIRA’s implementing regulations—adopted less than six months after the act became law—the government provided a definition, which read in relevant part: “The term *arriving alien* means an alien who *seeks admission to or transit through the United States ... at a port-of-entry.*” *Id.* at 10,330 (second emphasis added). A year later, the federal government amended that part of the definition

to define an “*arriving alien*” to include “an applicant for admission coming or *attempting to come into the United States at a port-of-entry*.” 63 Fed. Reg. 19,382, 19,383–84 (Apr. 20, 1998) (emphasis added).

That definition is still a part of federal law today, *see* 8 C.F.R. § 1.2, and it directly contradicts the government’s claim that “a person ‘attempting to come into the United States’ cannot be an applicant for admission because she has not yet succeeded in crossing the border.” Pet. App. 24a. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024) (“[I]nterpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute’s meaning.”).

4. If any reading of §§ 1158 and 1225’s inspection and asylum processing requirements “defies common sense,” Pet. 14, it is the government’s, which would “creat[e] a ‘perverse incentive to enter at an unlawful rather than a lawful location.’” Pet. App. 17a (quoting *DHS v. Thuraissigiam*, 591 U.S. 103, 140 (2020)). If the government can simply turn asylum seekers away from ports of entry whenever it chooses, they are “better off circumventing the official channels for entering the United States,” because they will be able to apply for protection if they “manage[] to surreptitiously cross the border.” Pet. App. 17a. Indeed, that is precisely what happened while the metering policy was in effect. *See supra* p. 18 & n. 4. The Ninth Circuit correctly concluded that Congress would never “have created that incentive.” Pet. App. 17a; *see also McNeill v. United States*, 563 U.S. 816, 822 (2011) (“Absurd results are to be avoided.” (quoting *Wilson*, 503 U.S. at 334 (brackets omitted))).

Perhaps most absurd of all, by the government’s account, border officials can render the INA’s inspection and asylum processing requirements inoperable at ports of entry—the designated places where noncitizens may lawfully come into the United States, 8 C.F.R. § 100.4—by simply blocking asylum seekers from stepping on U.S. soil. This is plainly not what Congress contemplated when it made the asylum process available to any arriving noncitizen, 8 U.S.C. § 1158(a)(1), and characterized inspection and processing obligations in mandatory terms: The statutory text states that border officials “shall” inspect and process arriving asylum seekers, *see id.* § 1225(a)(1), (a)(3), (b)—not that border officials have the option of doing so if and when they want. *See Jennings v. Rodriguez*, 583 U.S. 281, 297 (2018) (“shall” in § 1225(b) confers a mandate upon the executive branch).

In short, it is the metering policy, not the decision below, that “undermine[d] separation of powers” by “undercut[ting] Congress’s authority’ to set asylum policy.” Pet. 22–23 (quoting Pet. App. 53a (R. Nelson, J., dissenting)).

* * *

If the government believes that §§ 1158 and 1225’s requirements are unduly burdensome, it is free to urge Congress to amend them. But those are the statutory requirements that governed when the metering policy was in effect, and that continue to govern today. Courts may only read and interpret the law as it exists, using the traditional tools in the judicial toolbox, as the Ninth Circuit correctly did here. *See Bostock v. Clayton Cnty.*, 590 U.S. 644, 680–81 (2020).

III. The Petition Is a Poor Vehicle for Review.

The government has no serious argument that the petition is a good vehicle for review given that the question presented is now entirely hypothetical. As explained in Part I, the government rescinded the metering policy years ago, the district court essentially vacated the transit-rule class injunction, and the remaining declaratory judgment has no bearing on the legal justification for the government's current management of the southern border.

The government asserts that the petition is nonetheless “an appropriate vehicle” for review because the Court is “unlikely to have another opportunity to address” the question presented. Pet. 25. To be sure, the question is unlikely to arise given its irrelevance to anything happening now. But if that changes in the future and any “untold interference” comes to pass, Pet. 3, there are countless scenarios in which the question could present itself—most obviously in litigation over what qualifies as the “minimal steps” that the government must take to ensure that it is complying with the decision below. *See supra* pp. 19–20. The government also identifies additional factual variations that it says are not resolved by the Ninth Circuit's decision—for instance, where “an alien ... is blocked by a natural or artificial barrier” from crossing the border, Pet. 14–15, or where the noncitizen is not close enough to the border to present themselves to a border official on the U.S. side, Pet. 15. But regardless of whether this future litigation materializes, the government does not identify any basis for this Court to address the question presented in an advisory opinion now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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