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 BIPARTISAN FORMER OFFICIALS OF THE DEPARTMENTS OF HOMELAND SECURITY, STATE, AND JUSTICE AND THE IMMIGRATION AND NATURALIZATION SERVICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

RAYMOND P. TOLENTINO
Counsel of Record
ALEXANDER J. KASNER
ELISSA R. LOWENTHAL
COOLEY LLP
1299 Pennsylvania Ave., N.W., Suite 700
Washington, DC 20004
(202) 842-7800
rtolentino@cooley.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*

Amici curiae are former high-ranking officials of the U.S. Departments of Homeland Security (DHS), State, and Justice and the U.S. Immigration and Naturalization Service (INS) who served in both Republican and Democratic Administrations.[1] *Amici* submit this brief to offer their firsthand experience and expertise on U.S. immigration policy and practice—and to underscore the unworkable nature of the government's extreme and unprecedented position before this Court.

As former officials who have served in the past six presidential administrations, *amici* have spent their careers dedicated to ensuring that the U.S. government adheres to its international and domestic commitments to provide humanitarian protections to the world's refugees. Some *amici* have worked as senior officials, lawyers, and frontline asylum officers within INS. Others have directed immigration policy within DHS. And still others have overseen human rights and refugee law and policy within the U.S. Department of State and the National Security Council.

In each of their respective roles, *amici* have worked tirelessly to ensure that the United States adheres to its statutory and international obligations to protect refugees while simultaneously carrying out domestic laws and regulations governing refugee admissions and asylum. And while *amici* may differ in their views on the wisdom and effectiveness of certain policies implemented at the Southern border, all agree

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to this brief's preparation and submission.

that the government's extraordinary turnback policy at issue here is contrary to U.S. law and flouts our country's most profound values and international commitments.

A full list of *amici* appears in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

Asylum is neither an obstacle to border enforcement nor a luxury to be doled out only when the government deems it convenient. It is a central pillar of United States immigration law—one that reflects our country's enduring commitment to help form a more perfect union by protecting and welcoming vulnerable people who arrive at our Nation's doorstep fleeing from persecution. To make good on that foundational promise, Congress established rules and procedures to ensure that asylum seekers are evaluated in a fair and orderly manner based on their individual circumstances rather than categorical assumptions about who they are or where they come from. These procedural safeguards are not just bureaucratic red tape that the government may disregard or alter at will. Instead, the asylum process is designed to ensure the integrity, efficiency, and fairness of our asylum system. These statutory and regulatory procedures—including (as relevant here) the requirements set forth in 8 U.S.C. § 1158 (setting forth those migrants eligible to apply for asylum) and § 1225 (spelling out the minimum process they are due)—afford every asylum applicant the opportunity to demonstrate his or her eligibility for relief.

At the same time, the U.S. asylum system must be administered in a manner that accounts for

evolving enforcement priorities and ever-shifting migration patterns. As former government officials, *amici* are well acquainted with the increasing numbers of migrants arriving at the Southern border, particularly over the last two decades. These developments have tested our country's resources and personnel. Particularly during periods of extreme pressure at the border, temporary adjustments must sometimes be made to U.S. asylum policy to ensure an orderly process. Those short-term measures, in turn, can understandably delay the asylum process for applicants who have made their way to our Nation's threshold. But *temporarily delayed* access to asylum is a different matter entirely than policies that *categorically and indefinitely deny* access to asylum, as the government urges here. *See* 5 U.S.C. § 706(1) (authorizing suit for "agency action unlawfully withheld or unreasonably delayed"). Slamming the door shut on those who seek sanctuary on our shores is antithetical to the core principles underlying U.S. immigration law.

Over the last decade, multiple presidential administrations have, at times, attempted to regulate the arrival of asylum seekers at ports of entry in response to resource constraints and influxes of immigrants at the border. Although colloquially referred to as "metering," these attempts to control the timing of entry for asylum seekers have ranged from informal waiting lists to more formal policies turning asylum seekers away from the border for indefinite periods. The practice first emerged in 2016 at a single port of entry on the Southern border as a temporary solution initiated by port-of-entry personnel to limit the daily flow of asylum seekers. Under the first Trump Administration, however, the practice became widespread, leading lower courts to determine that the policy

unlawfully denied access to asylum. And no prior administration has read U.S. immigration law, particularly Sections 1158 and 1225, to hold that government officials can replace a line with a locked door and thus bar any such applicants from seeking asylum.

Yet the government seeks to do just that here. The government argues that an asylum seeker's physical presence in the United States is a prerequisite to any entitlement to process. And the government further insists that a turnback policy that denies any process to asylum applicants at the Southern border is lawful so long as U.S. officials simply refuse to let applicants enter a port of entry and thus cross the border. In service of this interpretation, the government cites to Section 1158, which says that only a migrant who is "physically present in the United States or who *arrives in* the United States," including "at a designated port of arrival" "may apply for asylum." 8 U.S.C. § 1158(a)(1) (emphasis added). Because the statute uses the present tense verb "arrives" and the preposition "in," the government reasons, a migrant must set two feet within the United States to seek asylum: If the United States can thwart that, by whatever means, then it owes the migrant nothing further.

The courts below rightly rejected this reading. Contrary to the government's contorted interpretation, Section 1158 covers two sets of people: (1) those already within the United States and (2) those who arrive at U.S. ports of entry. This view reflects the settled understanding of those like *amici* who have overseen the asylum process for decades and have deep familiarity with the immigration laws cited in the government's brief and with the regulations, policies, and practices implementing them.

The government's interpretation is not only wrong on the law; it is also dangerous, counterproductive, and unnecessary. The government's view, which asserts that physical presence in the United States is necessary to seek asylum, encourages asylum applicants to cross the border by any means necessary—like paying cartels to facilitate their passage or attempting to enter the United States between ports of entry.

Rather than incentivizing more dangerous alternatives by straining the relevant immigration laws beyond their meaning, the government could and should respond with tailored policies that use all the tools in its vast legislative and regulatory toolbox. Adopting an extreme policy that categorically turns back those who have arrived at a port of entry but have not yet stepped across the threshold ignores more targeted methods that retain statutorily required access to asylum.

Finally, the government's turnback policy will backfire. Sustained antipathy to our asylum-related commitments is more likely to further complicate immigration enforcement problems than to solve them. Such antipathy also undermines the international system of refugee protection, which includes agreements, arrangements, and practices that rely on the expectation that Nations will honor them. For the United States, a longstanding leader in refugee protection, to turn away asylum seekers with no process endangers lives and signals that other countries may do the same.

Based on their extensive experience in the field, *amici* fully appreciate the importance of judicial deference to the Executive Branch's enforcement of

immigration laws. But that deference must yield where, as here, the government runs roughshod over its statutory authority, the international commitments that give rise to the statutes in question, and decades of practice. At bottom, nothing in U.S. immigration law requires or permits the government to categorically restrict access to asylum to those who have arrived at a U.S. port of entry but are still a few inches away from the border.

For these reasons, and for those set forth below, this Court should affirm the Ninth Circuit's judgment.

ARGUMENT

I. Decades of U.S. Asylum Law and Border Policies Demonstrate a Commitment to Processing Asylum Applicants.

Before addressing the merits of the government's misbegotten turnback policy, *amici* first survey the history and development of U.S. asylum law and border policies. For decades, the United States has demonstrated a consistent commitment to ensuring that asylum seekers have access to an asylum adjudication process, even as border policies fluctuate and patterns of migration shift.

A. Development of U.S. Asylum Law

1. The right to seek and enjoy asylum is not just a U.S. legal requirement; it is an internationally recognized human right and a vital global commitment.[2] Its origins trace to the Universal Declaration of Human

[2] UNHCR, *Who We Protect: Asylum-Seekers*, https://perma.cc/3BFV-46U7.

Rights,[3] the 1951 Convention Relating to the Status of Refugees, and the 1967 Protocol Relating to the Status of Refugees, each passed by the U.N. General Assembly. These foundational agreements recognized the pressing need for international guidelines on the treatment of refugees, given the millions displaced in the aftermath of World War I and World War II.[4]

On November 1, 1968, the United States acceded to the 1967 Protocol, which incorporated Articles 2 through 34 of the 1951 Convention.[5] As a State Party, the United States committed to not return or expel refugees to territories where they would face a threat to their life or freedom on account of race, religion, nationality, membership in a particular social group, or political opinion (a guarantee known as "non-refoulement"). *See* Convention Relating to the Status of Refugees art. 33, 189 U.N.T.S. 150 (July 28, 1951). Importantly, the Convention's prohibition against refoulement applies not only to asylum seekers who are within a nation's territory, but also to those who are "at its borders, or, when outside its territory, under the State's jurisdiction (i.e. under the State's effective control)."[6] The United States codified this obligation into

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[3] G.A. Res. 217A (III), at art. 14 (Dec. 10, 1948).

[4] UNHCR, *About UNHCR: the 1951 Refugee Convention*, https://perma.cc/V5W3-Y6HB.

[5] U.S. Citizen & Immigration Services (USCIS), *Refugee Timeline* (Jan. 24, 2025), https://perma.cc/R782-EDGZ.

[6] UNHCR, *Access to Territory & Non-Refoulment* (Mar. 6, 2025), https://perma.cc/L9B2-7PZ4; *see also* UNHCR, *Handbook on Procedures & Criteria for Determining Refugee Status & Guidelines on International Protection*, at 42-43 (Feb. 2019), https://perma.cc/62Y2-MDS7 ("The competent official (e.g.,

domestic law through the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. Recognizing the "historic policy" of the United States "to respond to the urgent needs of persons subject to persecution in their homelands," *id.* § 101(a), the Refugee Act also sought to provide durable protection to those who meet the Protocol's definition of a refugee (whether the United States encounters them within its borders, at the threshold of the country, or abroad), while also providing organization and process for overseas refugee admissions.[7]

To that end, the Refugee Act recognized two pathways to refugee protection for those fleeing persecution to the United States. Under the first route, now codified as Section 1157, the United States would select and admit refugees who are outside the country. *See* Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 103 (1980 statute); 8 U.S.C. § 1157 (current). Refugee resettlement, which often implicates complex foreign policy considerations, relies on pre-identification by the U.S. government of potentially eligible groups of applicants abroad, based on global emergencies or humanitarian concerns. Under the second route, now codified as Section 1158, the U.S. government would consider granting asylum to individuals already

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immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. He should be required to act in accordance with the principle of non-refoulement and to refer such cases to a higher authority.").

[7] *See* Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 11-12, 32-33 (1981).

present in the United States and to those at its borders. *See* Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 105 (1980 statute); 8 U.S.C. § 1158 (current). Unlike refugee admissions, the asylum process requires applicants to make it to the United States, or at least to a port of entry, on their own. Once the asylum applicant arrives, the United States then provides the applicant an opportunity to establish individualized eligibility for asylum. Both Sections 1157 and 1158 were meant to work in tandem with the process requirements set forth in 8 U.S.C. § 1225, which requires that immigration officers inspect noncitizens "seeking admission" into the United States. *See* 94 Stat. 105.

Although the Refugee Act codified pathways to refugee and asylum status, Congress envisioned that the details of implementation would develop through regulations consistent with the law. In particular, the Refugee Act required the creation of an "asylum procedure" that would enable "an alien physically present in the United States *or at a land border or port of entry* . . . to apply for asylum." 94 Stat. 105 (emphasis added).

2. a. In the ensuing years, the U.S. Refugee Admissions Program emerged as the interagency mechanism for identifying, adjudicating, and resettling refugees to the United States with the participation of the Departments of State, Justice, and Health and Human Services.[8] In contrast, the asylum process was initially managed within the Department of Justice, making use of INS adjudicators within each District

[8] USCIS, *The United States Refugee Admissions Program (USRAP) Consultation & Worldwide Processing Priorities* (Sept. 17, 2025), https://perma.cc/5PX8-B93S.

office or immigration judges who considered requests for asylum in deportation and exclusion proceedings.[9] Recognizing the need for more specific knowledge and expertise, the Justice Department created a separate Asylum Corps in 1990 to manage affirmative asylum applications.[10] That same year, further regulations adjusted the procedures for adjudicating and granting asylum cases, without undermining the fundamental right of access to the asylum process.[11]

b. In 1996, Congress significantly reformed the Immigration and Nationality Act of 1952 (INA) with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (IIRIRA).[12] Among other major changes, IIRIRA merged the bifurcated systems of exclusion proceedings (for individuals charged as *inadmissible*) and deportation proceedings (for those charged as *deportable*) to create today's removal process. *See* 8 U.S.C. § 1229 *et seq.*

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[9] Executive Office of Immigration Review, *Evolution of the U.S Immigration Court System: Pre-1983* (Apr. 30, 2015), https://perma.cc/E5DD-Q5PF.

[10] Walter A. Ewing, Ph.D. & Benjamin Johnson, *Asylum Essentials: The U.S. Asylum Program Needs More Resources, Not Restrictions*, Immigration Policy Center, at 2 (2005), https://perma.cc/8L6B-KG5R.

[11] Gregg A. Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges & Opportunities*, 9 Am. Univ. Int'l L. Rev. 43, 43-44 (1994).

[12] Kathleen Bush-Joseph, *Outmatched: The U.S. Asylum System Faces Record Demands*, Migration Policy Institute (MPI), at 9 (Feb. 2024), https://perma.cc/BP5P-PWZF.

IIRIRA also established new procedures for assessing asylum applicants who sought to enter the United States without proper documentation. For those asylum applicants, IIRIRA created a mechanism for "expedited removal" if those asylum seekers could not establish a credible fear of persecution. *See* 110 Stat. 3009-580.[13] IIRIRA also tightened eligibility requirements for asylum, including by imposing a one-year filing deadline for asylum applications.[14]

Finally, Section 604 of IIRIRA amended 8 U.S.C. § 1158(a)(1) to reflect the current definition of a migrant eligible to apply for asylum. While "physical presence" remained as one category of eligibility, IIRIRA changed the wording of the other: "an alien . . . at a land border or port of entry" became "[a]ny alien . . . who arrives in the United States (whether or not at a designated port of arrival)." *Compare* Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 105, *with* Pub. L. No. 104-208, § 604(a), 110 Stat. 3009-546, 3009-690. As a matter of practical effect and legal interpretation, this wording "did not somehow work a major change in the law." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1012 (9th Cir. 2020); *id.* at 1028-29 (Bress, J., dissenting) (same). After all, the newly added concept of "arrival"—as explained by the relevant House of Representatives Subcommittee—"was selected specifically by Congress in order to provide a flexible concept," denoting "a process." *Id.* at 1012 (quoting *Implementation of Title III of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996: Hearing Before the Subcomm. on Immigration & Claims of the H. Comm. on the*

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[13] *Id.* at 9-10.

[14] *Id.* at 9.

Judiciary, 105th Cong. 17-18 (1997) (Rep. Lamar Smith)). "An alien apprehended at any stage of this process, whether attempting to enter, at the point of entry, or just having made entry, should be considered an 'arriving alien' for the various purposes in which that term is used in the newly revised provisions of the INA." *Id.*

B. U.S. Efforts in the 21st Century to Manage the Southern Border

1. In the early 2000s, nearly all unauthorized noncitizens encountered at the Southern border fit a similar profile: "Mexican nationals, mostly adult men, seeking seasonal work after crossing the border between authorized ports of entry."[15] Accordingly, U.S. border policy focused primarily on increasing personnel and technology given that processing for noncitizens was less complex.[16] The Bush Administration doubled security funding from $4.6 billion at the beginning of his presidency to $10.4 billion by FY 2007 and increased the number of border patrol agents from approximately 9,000 agents in 2001 to nearly 15,000 agents by 2007.[17] Focusing on detection and monitoring, the government implemented improved technology assets, expanded the use of aerial vehicles, and relied on "state-of-the-art detection technology" to

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[15] Alan Bersin, Nate Bruggeman & Ben Bohrbaugh, *Migration at the U.S.-Mexico Border*, MPI, at 3 (Jan. 2024), https://perma.cc/WTY6-AAJU.

[16] *Id.* at 1.

[17] The White House, Pres. George W. Bush, *President Bush's Plan for Comprehensive Immigration Reform*, https://perma.cc/NTM2-TTC6.

reduce illegal immigration.[18] Importantly, the Bush Administration also increased infrastructure investment by expanding detention capacity at the border to process noncitizens detained at the border more efficiently.[19]

The Obama Administration likewise committed additional funding and resources for infrastructure and personnel along the Southern border.[20] But by 2014, the pattern of illegal migration began to shift: Unaccompanied minors and families primarily from Central America began to arrive at the border, seeking asylum rather than temporary seasonal work.[21] This change increased the complexity of border processing.[22] The previous influxes of mostly Mexican male nationals seeking temporary work, not humanitarian protection, could thus be processed and repatriated "in an expedited manner without complex court determinations about legal status [and] extended shelter or care requirements."[23] By contrast, it can take months or years to process asylum applicants, leading to a backlog in applications.[24]

2. In March 2016, toward the end of the Obama Administration, an increasing flow of Haitian migrants funneled through the Southern border port of

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[18] *Id.*

[19] *Id.*

[20] Bersin, *supra* note 15, at 2-3.

[21] *Id.* at 3, 20-21.

[22] *Id.* at 3.

[23] *Id.* at 4.

[24] *Id.*; Sean Lonergan, *Clearing the Asylum Backlog*, The Regulatory Review (Nov. 27, 2025), https://perma.cc/7AR9-RCXH.

entry at San Ysidro, California.[25] With capacity dwindling (despite increased staffing and the creation of temporary holding rooms), officials began to stop migrants at the border line outside the port, directing them instead to get a ticket from Mexican officials—which would reserve a place in line for later processing. JA35-36, 190, 196.[26] Notably, the decision to implement such "metering" at San Ysidro was not an official administration policy, but rather a makeshift approach by officials on the ground. JA35, 197.

Nevertheless, the policy of "metering" began to spread during the first Trump Administration. By 2017, all ports of entry along the Southern border implemented the practice. To be sure, as demonstrated in San Ysidro, temporary influxes of migrants occasionally strained port resources. But metering began to depart from this rationale, transforming into something that could not fairly be described as "metering" at all. Officers began to refuse to process asylum seekers altogether, even after they had crossed the border. In April 2018, DHS issued its formal Metering Guidance memorandum to all Southern border ports, instructing employees to physically prevent asylum seekers from crossing the border. Pet. App. 368a. It is unclear why DHS continued to use the term "metering" for this process, which is more accurately described as "turnback" or "pushback."

The government combined this turnback policy with several other restrictions on the asylum process.

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[25] Jean Guerrero, *U.S. Resumes Haitian Removals Amid Surge at the Border*, KPBS (Sept. 22, 2016), https://perma.cc/4MW3-67J2.

[26] *See also* James Fredrick, *'Metering' at the Border*, NPR (June 29, 2019), https://perma.cc/J652-5A7R.

For instance, in May 2018, the first Trump Administration put in place a "zero-tolerance program"—criminally prosecuting all adults crossing the border, regardless of whether they claimed asylum.[27] The government also implemented the Migrant Protection Protocols—colloquially known as "Remain in Mexico"—beginning in 2019. Under these Protocols, even migrants from Central and South America who sought asylum at ports of entry and somehow managed to receive processing nonetheless had to wait in Mexico while their asylum claims were adjudicated.[28]

The Biden Administration elected to wind down the previous administration's turnback policy. In November 2021, U.S. Customs and Border Protection (CBP) issued new guidance explaining that, "[a]bsent a [port of entry] closure, officers . . . may not instruct travelers that they must return to the [port of entry] at a later time." JA139. Instead, the Biden Administration expanded the use of tools such as CBPOne—a mobile application developed during the waning months of the first Trump Administration.[29] Using CBPOne, migrants could schedule asylum appointments at designated ports of entry, though the number of available appointments was limited.

The second Trump Administration has now dramatically departed from all previous border policies. To begin, the government has ended the use of the

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[27] Bersin, *supra* note 15, at 24.

[28] *The "Migrant Protection Protocols": an Explanation of the Remain in Mexico Program*, American Immigration Council (ACI) (Feb. 1, 2024), https://perma.cc/7QPH-KDXN.

[29] *See CBP One: An Overview*, ACI (Mar. 24, 2025), https://perma.cc/PXH3-5CPA.

CBPOne application.[30] It also announced that the Migrant Protection Protocols that were implemented during the first Trump Administration would resume. Exec. Order No. 14165, 90 Fed. Reg. 8467 (Jan. 20, 2025). And now the government seeks legal permission to implement the turnback policy, although (as Respondents correctly noted in opposing *certiorari*) the current Administration has not yet used any form of metering in practice. *See* U.S. Br. 7. Instead, President Trump has invoked 8 U.S.C. §§ 1182(f) and 1185(a) to suspend noncitizens' ability to enter the United States through the Southern border or seek asylum.[31] *See* 8 U.S.C. § 1182(f) (granting president power to suspend entry of noncitizens if "the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States").

II. The Government's Reading of Section 1158 Is Wrong and Would Jeopardize U.S. Border Security and International Commitments.

As former government officials, *amici* have firsthand experience implementing the patchwork of statutes that bear on this case. *Amici* are thus intimately familiar with the domestic and international legal commitments that govern our Nation's asylum system. Based on their decades of experience, *amici*

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[30] Muzaffar Chishti, Kathleen Bush-Joseph & Coleen Putzel-Kavanaugh, *Unleashing Power in New Ways: Immigration in the First Year of Trump 2.0*, MPI (Jan. 13, 2026), https://perma.cc/EM7P-B7PY.

[31] The White House, *Guaranteeing the States Protection Against Invasion* (Jan. 20, 2025), https://perma.cc/J3HV-CPC9.

respectfully urge the Court to reject the government's advisory request to sign off on its proposed turnback policy for two mutually reinforcing reasons.

First, the government's reading cannot be squared with the plain text of the governing statutes and implementing regulations. Section 1158 contemplates eligibility for asylum for two different groups of noncitizens: those who are already in the United States, and those who are actively seeking admission at the U.S. border, whether they have crossed the border line or are waiting to be processed just beyond it. The government's contrary interpretation is incorrect and would unsettle decades of consistent application of the statute in which both groups of noncitizens fell under Section 1158's process.

Second, the government's reading supports a policy that is not only unnecessary, but counterproductive. If the government gets its way, asylum seekers would have every incentive to circumvent ports of entry—where orderly processing occurs. The government's turnback policy thus encourages illegality. Further, the policy undermines the framework of humanitarian protection established under the Refugee Convention and its Protocol, which is implemented by U.S. law and relied upon by countries around the world.

A. The Courts Below Correctly Interpreted U.S. Immigration Law to Require the Government to Process Asylum Seekers Who Arrive at Border Ports of Entry

The government contends that, under Section 1158, only persons who are physically present within

the United States can seek asylum. But as the courts below rightly concluded, that strained interpretation flouts the text of Section 1158, and invites this Court to discard thirty years of asylum law and implementing regulations. The Court should turn down that invitation and reject the government's unprecedented and distorted view of U.S. asylum law.

1. Section 1158 provides that two groups of noncitizens may apply for asylum: "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 . . .), irrespective of such alien's status . . . ." 8 U.S.C. § 1158(a)(1) (emphasis added). The two-category approach to asylum applicants is a longstanding feature of U.S. immigration law. As *amici* explained above, these twin routes mirror the establishment of asylum protections in the Refugee Act, obligating the Attorney General to "establish a procedure for an alien physically present in the United States *or at a land border or port of entry*." 8 U.S.C. § 1158(a) (1980) (emphasis added). "[B]oth versions" of Section 1158—the prior iteration in the Refugee Act, and the current language—"draw a distinction" between "an alien who is already 'physically present'" and those "in the process of arriving." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1012 (9th Cir. 2020).

Indeed, just like its predecessor provisions, Section 1158 delineates these two groups of eligible asylum seekers through a disjunctive "or"—separating those noncitizens physically present in the United States from a second, distinct group (those who "arrive[] in the United States"). *See United States v. Woods*, 571 U.S. 31, 45 (2013) ("[The] ordinary use" of "or" "is almost always disjunctive, that is, the words it

connects are to be given separate meanings."). The latter category must be read to encompass noncitizens who have *not* yet established physical presence within the borders of the United States, to give Section 1158 its natural meaning. "To read the [latter] clause, following the word 'or,' as somehow repeating that requirement" of physical presence, "even while using different words, is to disregard what 'or' customarily means." *Loughrin v. United States*, 573 U.S. 351, 357 (2014); *see also Pulsifer v. United States*, 601 U.S. 124, 142 (2024) (rejecting petitioner's construction of the statute in part because it would render a subparagraph "meaningless: It does no independent work. Remove it from the statute, and what is left will make the exact same people eligible (and ineligible) for relief.").

Resisting Section 1158's basic framework, the government treats physical presence within U.S. territory as a prerequisite for *all* asylum-eligible noncitizens. On that view, a noncitizen is not covered by Section 1158 if she is standing one foot from the U.S.-Mexico border and attempting to enter a port of entry. U.S. Br. 14 (A noncitizen may apply for asylum "only when he crosses the border and actually enters the United States."). But "or" means "or," not "and." The government's reading would make the "arrives in" clause superfluous—everything after the "or" in Section 1158 would be meaningless if "physical presence" was both necessary and sufficient to apply for asylum. The government's "construction thus effectively reads 'or' to mean 'including'—a definition foreign to any dictionary we know of." *Loughrin*, 573 U.S. at 357.

2. The structure of U.S. asylum law confirms what the text of Section 1158 already makes clear. *See*

Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989) ("It is a 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."). As *amici* are aware through their enforcement of asylum procedures, the meaning of "arrives in" is illuminated by Section 1158's interplay with Section 1225, which sets out the processes for inspecting applicants for admission.

In particular, Section 1225 requires process for those who are in the midst of arriving in the United States at a port of entry, even if they are not yet physically present within the United States. To wit, if an "alien . . . who *is arriving* in the United States . . . indicates . . . an intention to apply for asylum under section 1158 of this title . . . the officer *shall* refer the alien for an interview by an asylum officer." 8 U.S.C. § 1225(b)(1)(A)(ii) (emphasis added). Likewise, Section 1225 mandates that "[a]n asylum officer *shall* conduct interviews of aliens referred under subparagraph (a)(ii)"—that is, those noncitizens "who [are] *arriving* in the United States"—including at "a port of entry." 8 U.S.C. § 1225(b)(1)(B)(i) (emphasis added).

Accordingly, Section 1225 anticipates that there are migrants properly seeking process for Section 1158 asylum who have not yet established physical presence in the United States, but are in the midst of doing so.[32] *E.g.*, Pet. App. 47(a) (R. Nelson, J., dissenting)

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[32] By contrast, asylum seekers who have already established a "physical presence" in the United States often submit an application directly to USCIS (the affirmative asylum process). If the application cannot be granted in the first instance, and if the applicant does not have lawful status, USCIS may refer the case to the immigration court, where an applicant may renew their

(agreeing that those "in the process of arriving" may entail persons not "physically within" the United States). In turn, the only group of asylum seekers to whom Section 1225 could refer here must be those who "arrive[] in" the United States. Consequently, interpreting a physical presence requirement as a necessary condition under Section 1158 would be possible only by excising multiple provisions of Section 1225.

Various courts agree with this understanding of the interplay between Sections 1158 and 1225. *E.g.*, *Wolf*, 952 F.3d at 1011-12 (Section 1158's application to those "who may not yet be in the United States" is "reinforced . . . by the language of section 1225(b)."); *Al Otro Lado, Inc. v. Mayorkas*, 619 F. Supp. 3d 1029, 1034 n.5 (S.D. Cal. 2022) (Section 1158(a) "bestows upon noncitizens who are in the process of arriving at a Class A [port of entry]—but who are still physically outside the international boundary line at the [port of entry]—a right to apply for asylum, and § 1225 . . . sets forth specific asylum processing duties Defendants must undertake to give meaning to that right."). As those courts correctly recognized, Section 1158 permits those arriving at the border (but have not yet crossed the border into the United States) to seek asylum in our country.

3. The en banc dissent below recognized this tension but brushed it aside, concluding that Section 1225 does not mean what it says. Because asylum proceedings cannot feasibly "take place anywhere other than . . . the United States," the dissent reasoned, only

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application as a defense against removal. Other individuals may apply for asylum for the first time during removal proceedings as a defense from removal (the defensive process).

those already in the United States are entitled to them. Pet. App. 118a (Bress, J., dissenting).[33] In addition to twisting the plain language of Section 1158, that approach fails to grapple with the "arriving" language of Section 1225 and neglects the historical practice and backdrop of border control. As *amici* know from their professional experience and expertise, individuals who have reached the threshold of our country are eligible to seek asylum, which often commences within the port of entry. Even if the process is sometimes delayed—with overcrowding or unpredictable conditions requiring temporary, ad hoc solutions—those delays must be reasonable and cannot prevent asylum seekers from access to process, which can eventually take place within the United States.

4. If all that were not enough, thirty years of regulations defining "arriving alien" for purposes of Section 1225 have clarified that asylum applicants who arrive at the U.S. border and a port of entry are entitled to process, regardless of whether they have crossed the border. In 1997, INS implemented IIRIRA by defining "arriving alien" to mean, in relevant part, any "alien who seeks admission to or transit through the United States . . . at a port-of-entry." 62 Fed. Reg. 10312, 10330 (1997). The current version of the regulations likewise defines an arriving noncitizen to mean "an applicant for admission coming or attempting to come into the United States at a port-of-entry." 8 C.F.R. § 1.2. To "attempt[]" to come within the United

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[33] This argument, which presupposes that ports of entry are *within* the United States, is also in tension with the "entry fiction" argument adopted by Judge Ryan Nelson in justifying the government's position, in which "those at ports of entry" have *not* "entered the country." Pet. App. 191a-192a.

States must encompass more than those who in fact do so; it more naturally includes people who reach a port of entry in hopes of admission.

5. Equally unavailing is the government's attempt to cite Section 1157 as reason to limit the reach of Section 1158. In the government's telling, the refugee statute (Section 1157) and asylum statute (Section 1158) are mutually exclusive and turn solely on which side of the border the applicant is located. U.S. Br. 16-17 ("Section 1157 governs 'admission to the United States' for refugees outside the country . . . , while Section 1158 governs asylum for aliens already 'in the United States[.]"). Because Section 1157 is "cap[ped]" and "limited" in ways that Section 1158 is not, it would "allow[] aliens outside the United States to bypass Section 1157's provision" and gain the benefits of the purportedly friendlier Section 1158 provisions by making their way to the Southern border. *Id.* at 17.

But the government's arguments fundamentally misunderstand that Sections 1157 and 1158 are not so neatly differentiated. In particular, the government oversimplifies in characterizing Section 1157 as "stricter" than Section 1158. U.S. Br. 17. True, there is no statutory limitation on the annual number of asylum grants, whereas the number of refugee admissions is based on an annual presidential determination. *Id.* But refugees can receive immediate federal assistance, while asylum seekers do not.[34] The legal status of asylees is also more perilous, as the government may terminate their protections for a wider range of reasons than for refugees. *Compare* 8 U.S.C. § 1157(c)(4) (permitting termination of refugee status only if the "alien was not in fact a refugee . . . at the

[34] *See* Bush-Joseph, *supra* note 12, at 8.

time of the alien's admission"), *with* 8 U.S.C. § 1158(c)(2) (permitting termination of asylum status if, among other circumstances, the noncitizen no longer meets the definition of a refugee, has committed any of a range of crimes, is a danger to the country, or firmly resettled to another country by agreement). Moreover, the overseas refugee admissions process falls within the discretion of the Executive Branch, whereas the asylum process is a primary mechanism for ensuring non-refoulement under the Refugee Act and under international instruments. *See* 8 U.S.C. § 1157(a)(2); *supra* Part I.A. In short, the government's misguided appeal to practical concerns is no reason to unsettle the text and structure of the Nation's asylum laws.

B. The Government's Reading of Section 1158 Would Frustrate U.S. Immigration Enforcement

The government is right that "policing the border" is a "difficult," "important," and "daunting task." U.S. Br. 35. But it is wrong that these challenges justify executive rewriting of the statute or the use of a turnback policy, a novel practice that is inconsistent with *amici*'s on-the-ground experience and this Nation's (and the world's) broader commitment to refugee protection.

Even setting aside the serious legal defects infecting the government's position, *see supra* Part II.A, the Administration's proposed turnback policy is unnecessary and self-defeating. When it comes to border management, the government has many tools at its disposal. Instead of using other available and more calibrated means, the government seeks permission to adopt a draconian policy that, in the informed view of

amici, would exacerbate the challenges confronting border officials at the Southern border, while abandoning our Nation's longstanding commitment to asylum seekers and endangering international stability along the way. The Court must not go down this mistaken path.

1. Activity at ports of entry at the Southern border has doubtlessly increased since the turn of the century. But the government overstates the unprecedented and uncontrollable nature of the congestion to justify its proposed turnback policy. U.S. Br. 5-6. Apprehensions along the Southern border have risen and fallen over the last two administrations due to emergency, exogenous factors—including a global pandemic—as well as U.S. policy decisions.[35]

These ebbs and flows represent the cyclical nature of activity at the Southern border.[36] And the country's success in mitigating the strain on immigration resources comes from its implementation of myriad enforcement tools. While no single policy is a silver bullet, immigration officials (including *amici*) have used a combination of strategies to effectively confront the challenge without foreclosing access to the asylum process altogether—a legally meaningful difference under

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[35] *See, e.g.*, Jessica Bolter & Doris Meissner, *Crisis at the Border? Not by the Numbers*, MPI (June 2018), https://perma.cc/B7U7-GLR8; Colleen Putzel-Kavanaugh & Ariel G. Ruiz Soto, *With New Strategies at & Beyond the U.S. Border, Migrant Encounters Plunge*, MPI (Oct. 2024), https://perma.cc/WWM9-PJXF.

[36] *See, e.g.*, Tom K. Wong, Gabriel De Roche & Jesus Rojas Venzor, *The Migrant 'Surge' at the U.S. Southern Border is Actually a Predictable Pattern.*, Washington Post (Mar. 15, 2021), https://perma.cc/3K6B-73SW (describing cyclical nature of migration patterns due to weather).

the Administrative Procedure Act. *See* 5 U.S.C. § 706(1) (scrutinizing "agency action unlawfully withheld or unreasonably delayed"—but not justifiably restrained).

For example, the Biden Administration increasingly employed the CBPOne mobile application, which allowed migrants to make appointments and provide biographical information in advance to streamline processing. JA138. Although imperfect, this technology-based solution reduced illegal entries into the United States and instilled order at ports of entry through the use of appointments.[37] Numerous administrations have also expanded the use of expedited removal to manage border congestion.[38] When used appropriately, expedited removal allows border personnel to assess quickly whether a noncitizen has expressed a fear of persecution or torture and to make a preliminary determination of whether that fear is credible. 8 U.S.C. § 1225(b).

Increased funding for border agents and asylum officers also reduces the burden at the Southern border by lowering processing times and reducing congestion at ports of entry. JA171.[39] Similarly, improving port-adjacent capacity through the use of temporary

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[37] Elliot Spagat, *It May Be the End for the Border App that Became 'a Salvation' for Migrants to Legally Enter the U.S.*, PBS News (Jan. 20, 2025), https://perma.cc/2RE5-WH8S.

[38] *See Expedited Removal Explainer*, ACI (Feb. 20, 2025), https://perma.cc/G6DG-4D6T.

[39] *See also, e.g.*, CBP, John Davis, *Border Crisis: CBP's Response*, https://perma.cc/93AV-QECY (June 30, 2023) (attributing improved border processing and management to $1.1 billion in emergency supplemental funding from Congress).

shelters and holding areas allows migrants to claim asylum upon arrival at the U.S. border—and enables U.S. border personnel to make credible fear determinations in an orderly manner. JA169-70.

Despite the availability of these and other border management tools, the government reaches far beyond its statutory authority to advocate for a sweeping turnback policy that only exacerbates the very problems it purports to solve. Preventing asylum applicants from being inspected and processed at ports of entry frustrates, rather than furthers, the government's goal of securing the border and ensuring orderly processing. To begin, the government's underlying contention—that physical presence within the United States is the sole route to asylum—pushes migrants to undertake dangerous measures to cross the border between ports of entry, whether by sea or by land (at non-monitored crossing points).[40] Unauthorized entries between ports of entry mean that Border Patrol agents will have to deploy increased resources to monitor those areas, often in terrain that is inhospitable and dangerous. A redirection of officers will also disrupt economic activity at ports of entry, by diverting officers from processing commerce at official entry points. In 2019, for instance, the reassignment of officers from ports of entry to other areas of the border led to a fivefold increase in wait times, in turn

[40] Bertha Alicia Bermúdez Tapia, *From Matamoros to Reynosa: Migrant Camps on the U.S.-Mexico Border*, 22 Contexts 1, 30-37, at 30-32 (Mar. 2, 2023) ("Metering . . . did increase clandestine crossings with the goal of circumventing the metering hurdle.").

frustrating "the $1.7 billion-a-day in goods that crosses the border between the United States and Mexico."[41]

Moreover, the experience of *amici* has shown that other undesirable outcomes come from an absolutist turnback policy. Making physical presence necessary and denying access to ports of entry for pedestrians has caused some asylum seekers to run down vehicle lanes to reach the border, subjecting themselves to danger and disrupting commerce. JA148, 214-15. Imposing an across-the-board block on accessing the asylum process at ports of entry also gives additional income to drug cartel members and "coyotes" who smuggle migrants across the border.[42] And preventing asylum seekers from accessing ports of entry also comes with a host of humanitarian risks, such as an increase in drowning deaths from attempts to cross at river borders.[43] Finally, the turnback policy endorsed by the government puts increased pressure on the Mexican side of the Southern border through a proliferation of migrant encampments that become hotspots for crime, sexual violence, and corruption as noncitizens wait to be processed. JA233.[44] All of this constitutes a policy

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[41] Maria Sacchetti, et al., *Wait times at U.S.-Mexico border soar as officers are reassigned to deal with migrants*, Washington Post (Apr. 10, 2019), https://perma.cc/N6VD-NDMJ.

[42] Tapia, *supra* note 40, at 33.

[43] *Id.* at 33-34.

[44] *See also What is causing the growing humanitarian crisis along the U.S.-Mexico border?*, International Rescue Committee (Apr. 25, 2019), https://perma.cc/W7KX-XZVP (explaining that "organized criminals and corrupt Mexican officials are using [metering] . . . to extort and victimize migrants forced to remain in border towns").

shift that counterproductively makes the border far more dangerous, so much so that the State Department has had to issue travel advisories to U.S. citizens. JA233.

2. The right to seek and enjoy asylum along with non-refoulement are also foundational to international order; and with over 8.4 million asylum seekers globally, they are a centerpiece of foreign affairs.[45] The turnback policy embraced by the government in this case contravenes our country's legal and international commitments and imperils the international cooperation we need to manage the Southern border.

a. The enforcement of the government's turnback policy through an absolute "physical presence" within the United States requirement incentivizes improper and counterproductive on-the-ground conduct.

For instance, asylum seekers have, even with a metering policy in place, crossed the border to speak to immigration officers "on U.S. soil," and then were "turned back to Mexican soil and told to go to another port of entry." JA156-57. Yet Section 1225 mandates that immigration officers (1) inspect noncitizens before removing them from the United States and (2) refer them for interviews if they indicate an intent to seek asylum. *See* 8 U.S.C. § 1225(a)(3) ("All aliens . . . *shall* be inspected by immigration officers.") (emphasis added); *id.* § 1225(b)(1)(A)(ii) ("If . . . the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer *shall* refer the alien for an interview by an asylum officer.") (emphasis added). By making physical presence within the United States necessary, the

[45] UNHCR, *supra* note 2.

government invites border officials to do whatever is needed to stop asylum applicants short of the border or improperly force applicants back across—because once back in Mexico, the law would offer applicants no right to process at all.

Further, a turnback policy (which is ostensibly justified based on resource concerns) encourages ports of entry to overstate capacity issues. Indeed, the evidence produced in this litigation shows that immigration officials intentionally misrepresented that ports of entry had reached the maximum capacity to turn back asylum applicants at the border. JA159-60 ("Q. So you were instructed to lie to people when turning them back; is that right? A. We were instructed, yes."). Yet a coherent and functional immigration system requires accurate reporting from its ports of entry to determine how to deploy officers and fund improvements. The government's desired heavy-handed 100% turnback policy will therefore jeopardize the efficiency and integrity of border management.

b. In addition to its obligations under domestic law, the United States is bound by treaty to principles of non-refoulement. *See supra* Part I.A.[46] This is no empty gesture; a signatory must put in place "[m]echanisms" for both "assessment" and "for entry

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[46] Bo Cooper, *Procedures for Expedited Removal & Asylum Screening Under the Illegal Immigration Reform & Immigrant Responsibility Act of 1996*, 29 Conn. L. Rev. 1501, 1503 & n.8 (1997) (citing Section 241(b)(3) of the INA, which "imprint[s]" treaty obligation of non-refoulement "nearly verbatim in our domestic law").

and stay related to the principle of non-refoulement."[47] The government's proposed use of a full turnback policy and its reading of Section 1158 run orthogonal to these commitments. And weakened U.S. adherence to international principles of non-refoulement is not harmless; it gives license to other Nations to do the same—frustrating the ability of migrants across the globe to seek refuge and unsettling the status quo that aims to encourage burden-sharing among refugee-receiving Nations.

Needless to say, these international commitments are important to uphold in their own right. But through legislation, they have become deeply embedded in the domestic law that the government is sworn to uphold. And by violating these obligations, the United States risks undermining U.S. credibility on the global stage and betraying our longstanding commitments to refugees, asylum seekers, and other displaced people seeking refuge in the United States of America.[48]

Our Nation should not take lightly the United States' dereliction of its commitment to asylum. And this Court should not countenance a drastic turnback policy that flies in the face of U.S. asylum law, defies our international obligations, and makes our country and our borders more chaotic and less safe.

CONCLUSION

The Court should affirm the decision below.

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[47] U.N. Human Rights Off. of the High Comm'r, *The Principle of* Non-refoulement *Under International Human Rights Law*, https://perma.cc/D5X6-8FU3.

[48] *Id.*

Respectfully submitted,

RAYMOND P. TOLENTINO
Counsel of Record
ALEXANDER J. KASNER
ELISSA R. LOWENTHAL
COOLEY LLP
1299 Pennsylvania Ave.,
N.W., Suite 700
Washington, DC 20004
(202) 842-7800
rtolentino@cooley.com

Counsel for Amici Curiae

February 2026

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LIST OF *AMICI CURIAE*

Scott Busby

Senior Advisor, Human Rights First

Deputy Assistant Secretary of State, Bureau of Democracy, Human Rights and Labor, U.S. Department of State, 2013-2023; Director, Human Rights and Refugee Protection, National Security Council, The White House, 2009-2010, 1997-2000; Director, Office of Policy and Resource Planning, Bureau of Population, Refugees, and Migration, U.S. Department of State, 2001-2005; Associate General Counsel, INS, U.S. Department of Justice (DOJ), 1995-1997; Asylum Officer, INS, DOJ, 1991-1992

Phyllis Coven

Fellow, Advanced Leadership Initiative, Harvard University

Ombudsman, USCIS, DHS, 2021-2023; District Director, Los Angeles and New York, USCIS, DHS, 2012-2017; Director of International Affairs, INS, DOJ, 1995-1998; Deputy Associate Attorney General, DOJ, 1993-1995

Mary Giovagnoli

Ombuds for Unaccompanied Children, Administration for Children and Families, U.S. Department of Health and Human Services, 2024-2025; Deputy Assistant Secretary for Immigration Policy, DHS, 2015-2017; Senior Advisor, Office of Congressional Relations, USCIS, DHS, 2005-2008; Associate Chief Counsel, USCIS,

DHS, 2003-2005; Associate/Assistant General Counsel, INS, DOJ, 1997-2003

Harold Hongju Koh

Sterling Professor of International Law and former Dean at Yale Law School

Senior Adviser to the State Department Legal Adviser's Office, 2021; Legal Adviser, U.S. Department of State, 2009-2013; Assistant Secretary of Democracy, Human Rights and Labor, U.S. Department of State, 1998-2001; Attorney-Adviser, Office of Legal Counsel, DOJ, 1983-1985

Yvette LaGonterie

Adjunct Lecturer, City University of New York, Baruch College, Marxe School of Public and International Affairs

Senior Policy Advisor, Office of International Affairs, DHS, 2010; Director of International Operations, Operations Center, DHS, 2009; Senior Policy Advisor, USCIS, DHS, 2004-2006; Deputy Director, Office of International Affairs, U.S. Immigration and Customs Enforcement, DHS, 2003-2004; Deputy Director, Office of International Affairs, INS, DOJ, 2000-2003; Regional Attache for Latin America and the Caribbean, U.S. Embassy Mexico City, USCIS, 1996-1999; Director, New York Asylum Office, USCIS, 1994-1996; Immigration Office Director, U.S. Consulate General in Monterrey, Mexico, USCIS, 1990-1994

Joseph E. Langlois

District Director, Europe, Middle East, and Africa, U.S. Embassy Rome, USCIS, DHS, 2017-2020; Associate Director, Refugee, Asylum and International Operations Directorate, USCIS, DHS, 2013-2017; Deputy Associate Director, Refugee, Asylum and International Operations Directorate, USCIS, DHS, 2011-2013; Director, Asylum Division, INS, DOJ, 2001-2003; Deputy Director, Asylum Division, INS, DOJ, 1997-2001; Director, Newark Asylum Office, INS, DOJ, 1995-1997; Asylum Officer and Supervisory Asylum Officer, San Francisco Asylum Office, INS, DOJ, 1991-1995

Michael H. Posner

Jerome Kohlberg Chair in Ethics and Finance & Director, Center for Business and Human Rights, New York University Stern School of Business

Assistant Secretary of State, Bureau of Democracy, Human Rights and Labor, U.S. Department of State, 2009-2013; President, Human Rights First, 2007-2009; Executive Director, Human Rights First,1978-2007

Grover Joseph Rees

United States Ambassador, retired

Deputy Assistant Secretary of State for International Organizations, U.S. Department of State, 2008-2009; General Counsel, INS, DOJ, 1991-1993

Anne Richard

Assistant Secretary of State for the Bureau of Population, Refugees and Migration, U.S. Department of State, 2012-2017

Marta Rothwarf

Associate General Counsel, Office of the General Counsel, Executive Office for Immigration Review, DOJ, 2003-2026; Asylum Officer, USCIS, DHS, 1994-2003

Joanna Ruppel

Chief, Refugee and International Operations Division, USCIS, DHS, 2017-2023; Chief, Refugee Affairs Division, USCIS, DHS, 2016; Chief, International Operations Division, USCIS, DHS, 2008-2015; Deputy Chief, Asylum Division, USCIS, DHS, 2003-2007; Asylum Officer and Supervisory Asylum Officer, INS, DOJ, 1992-2003

Eric Schwartz

Professor of Public Affairs and Chair, Global Policy, Hubert H. Humphrey School of Public Affairs, University of Minnesota

Assistant Secretary of State for the Bureau of Population, Refugees, and Migration, U.S. Department of State, 2009-2011; Special Assistant to the President for National Security Affairs and Senior Director, National Security Council, The White House, 1996-2001; Director, National Security Council, The White House, 1993-1996

Barbara Strack

Chief, Refugee Affairs Division, Refugee, Asylum, and International Operations Directorate, USCIS, DHS, 2005-2018; Acting Executive Associate Commissioner, Office of Policy & Planning, INS, DOJ, 2000-2001; Special Assistant to Executive Associate Commissioner, Office of Policy & Planning, INS, DOJ, 1995-2000

† Current institutional affiliations are listed for identification purposes only.