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 IMMIGRATION LAW PROFESSORS AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are law professors whose research, scholarship, and teaching focus on immigration law. Amici bring a rich understanding of the Immigration and Nationality Act (INA) and its interpretation, and they write out of concern for government practices that deny migrants meaningful and timely access to the asylum

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

process. Amici also have a strong professional interest in the proper disposition of claims involving the rights of asylum seekers under the INA. They submit this brief to address the proper interpretation of 8 U.S.C. §§ 1158(a)(1), 1125(a)(1), 1225(a)(3), and 1225(b), which should be understood to allow noncitizens to request asylum when they are at the threshold, but not yet physically within, the United States. To hold otherwise would undermine the bedrock principles of asylum law and permit manipulation of jurisdictional rules that could imperil individuals who seek access to the asylum process at the U.S. border. Amici are listed in the Appendix; they submit this brief in their individual capacities and reference their university affiliations for identification purposes only.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners argue that the government can use coercive power to "meter" asylum seekers—a practice used by United States Customs and Border Protection officers to turn away asylum seekers, including by blocking individuals who are just steps away from crossing the border at a port of entry into the United States—and deny them access to the asylum process the INA requires. To accomplish this, petitioners ask this Court to ignore the plain language, statutory context, history, and purpose behind 8 U.S.C. §§ 1158 and 1225, so that they may evade their congressionally mandated duties to asylum seekers who have presented themselves at a port of entry but are not yet within the territorial United States. Since asylum provisions were added to the INA in 1980, Congress, the executive branch, and the judiciary have understood arrival as a process that begins on one side of the border and ends once inside the United States. The acts that amended the asylum provisions of

the INA—including the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)—reinforced the settled understanding that a noncitizen "arrives" or is "arriving" in the United States when she presents herself at a port of entry.

A noncitizen who presents herself to immigration officers at a port of entry, even if she is not yet physically within the United States, "arrives in" (Sections 1158(a)(1) and 1225(a)(1)) or is "arriving in" (Section 1225(b)(1)) the United States within the meaning of the INA. Congress drafted language to match the border's complexity, conferring rights on the asylum seeker when she "arrives in" the United States, and requiring the inspection of "arriving" persons—including certain persons who may not yet have crossed the line to stand on United States soil. 8 U.S.C. §§ 1158(a)(1), 1225(a)(1), 1225(a)(3), 1225(b)(1); *see also* 8 C.F.R. § 1.2. This interpretation is the only one that accords with the settled meaning of these phrases in the context of federal immigration law, which is more expansive than their ordinary meaning to reflect the complex realities of border crossings. The terms "arrives" and "arriving" have referred to the process of crossing the border—which begins on foreign soil and ends inside the United States—in legislation dating back 200 years. And immigration statutes often apply to people "arriving in" the United States, even when those people are not yet on United States soil. So too must the obligation to process an asylum seeker begin when she has reached a port of entry, even if, while stopped at the threshold of the border, she is still standing on foreign soil. This understanding is confirmed by the history and purpose of the relevant statutes.

Amici submit this brief to support respondents' argument that an asylum seeker who presents herself to

an official at the threshold of the United States at a port of entry "arrives in" or is "arriving in" the United States under 8 U.S.C. §§ 1158(a)(1), 1225(a)(1), and 1225(b)(1). The plain text, context, history and purpose behind these provisions support this understanding. When class members were stopped by immigration officers at the threshold of the United States, they were undoubtedly in the process of "arriving in the United States" under 8 U.S.C. § 1225(b). The Court should affirm the Ninth Circuit's decision and confirm that the terms "arrives" and "arriving" denote a process rooted in decades of immigration law and at the very heart of the United States' statutory obligations to asylum seekers.

ARGUMENT

I. PRESENTING AT A PORT OF ENTRY IS SUFFICIENT TO "ARRIVE IN" OR BE "ARRIVING IN" THE UNITED STATES UNDER THE INA

The INA instructs that a noncitizen who "arrives in the United States" may apply for asylum and must be inspected by immigration officers. 8 U.S.C. § 1225(a)(1); *see also id.* § 1158(a)(1). As the Ninth Circuit correctly held, "the phrase 'arrives in the United States' encompasses those who encounter officials at the border" when presenting themselves to an immigration official at a port of entry. Pet. App. 15a. Contrary to that decision—and to the long-understood meaning of these provisions—petitioners assert that the ordinary meaning of this language suggests that, when a noncitizen "arrives in" or is "arriving in" the United States, she must be physically present in the territory of the United States. Pet. Br. 2-3, 11. This is wrong.

The plain text of Sections 1158 and 1225 makes clear that presenting oneself at a port of entry is sufficient to

"arrive in" the United States. *See infra* Section A. Furthermore, the terms "arrives in" or is "arriving in" must be understood in the context of federal immigration law as referring to an ongoing process of arrival that encompasses noncitizens who are at a port of entry but have not yet crossed the border to the United States. *See infra* Section B. This understanding is further reflected by other INA provisions (Section C, *infra*) and relevant agency interpretation (Section D, *infra*).

A. The Plain Text Of Sections 1158 And 1225 Establishes That Presenting Oneself At A Port Of Entry Is Sufficient To "Arrive In" The United States

The plain text of Sections 1158(a)(1), 1225(a)(1), and 1225(b)(1) shows that to "arrive in" or be "arriving in" the United States encompasses presenting oneself at the border. Section 1158(a)(1) describes two categories of noncitizens who may seek asylum:

> Any alien who is [1] physically present in the United States or [2] *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 in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. § 1158(a)(1) (emphasis added). Similarly, Section 1225(a)(1) mandates certain noncitizens to be treated as applicants for admission, stating:

> An alien [1] present in the United States who has not been admitted or [2] *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) shall be deemed for purposes of this chapter an applicant for admission.

Id. § 1225(a)(1) (emphasis added). Section 1225(a)(3) directs that all applicants for admission, as defined in Section 1225(a)(1), "shall be inspected by immigration officers." And, relevant to this Section's analysis, Section 1225(b)(1)(A)(ii) further describes the inspection mandate imposed on immigration officers by Section 1225(a)(3), requiring immigration officers to refer certain noncitizens arriving in the United States for a credible fear interview:

> If an immigration officer determines that an alien ... *who is arriving in the United States* ... is inadmissible ... and 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[.]"

Id. § 1225(b)(1)(A)(ii) (emphasis added).

The language used in Sections 1158(a)(1) and 1225(a)(1) differentiates between two different categories of eligible asylum seekers: someone who is already "physically present" or "present" in the United States, and someone who "arrives in" the United States. This distinction is demonstrated by the use of the disjunctive "or" in the statutory language. *See, e.g.*, *United States* v. *Woods*, 571 U.S. 31, 45 (2013) (the "ordinary use" of the word "or" "is almost always disjunctive, that is, the words it connects are 'to be given separate meanings'"). Accordingly, the statute reflects Congress's intent that

asylum seekers in either category be appropriately inspected and, at minimum, referred for screening.

By setting out two categories of eligibility, Congress intended the phrases "[physically] present in the United States" and "who arrives in the United States" to mean different things. These categories must be interpreted distinctly. *See Duncan* v. *Walker*, 533 U.S. 167, 167-168 (2001) ("This Court's duty to give effect, where possible, to every word of a statute … makes the Court reluctant to treat statutory terms as surplusage. This is especially so when the term occupies so pivotal a place in the statutory scheme[.]" (internal citation omitted)); *see also Pulsifer* v. *United States*, 601 U.S. 124, 143 (2024) (an "odd word or stray phrase, which might have escaped Congress's notice" may be superfluous, but "the canon against surplusage applies with special force" when applied to text "so evidently designed to serve a concrete function"). As the Ninth Circuit correctly explained, "it is possible to give nonredundant meaning to those 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, whichever side of the border they are standing on." Pet. App. 15a.

The parenthetical "(whether or not at a designated port of arrival)" in Sections 1158 and 1225 underscores that a noncitizen who "arrives in" the United States need not be "physically present" (Section 1158) or "present" (Section 1225) there. A noncitizen is "at a designated port of arrival" regardless of which side of the border she is standing on. For this reason, "[t]he two categories overlap, because one might be both physically present in the United States (that is, standing on U.S. soil) while presenting oneself to a border official at a port

of entry." Pet. App. 15a. But that does not mean the categories cannot be given separate effect, as each one "includes people not included in the other, such that every clause and word of the provision has meaning." *Id.*

The categorical terms here are located directly next to each other within a short provision, which further indicates that they are not redundant. The Court has "often noted that when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume[s]' that Congress intended a difference in meaning." *Loughrin* v. *United States*, 573 U.S. 351, 358 (2014) (alteration in original). The evidence that Congress intended a difference in meaning seems even clearer here, where Congress chose to include an alternative to "physically present in" the United States not just within the same section or provision, but within the same sentence. To give nonredundant effect to this specific statutory language, these categories must be treated as distinct classes of eligibility.

The verb tense used in Sections 1158 and 1225 underscores that the category of asylum seekers who "arrive[] in" the United States do not need to be physically present in the country. Verb tense "is significant in construing statutes." *United States* v. *Wilson*, 503 U.S. 329, 333 (1992). When considering the verb "to arrive," the uses of the present tense ("arrives") in Sections 1158(a)(1) and 1225(a)(1) and present progressive tense ("is arriving") in Section 1225(b)(1)(A)(ii) indicate an ongoing or continuing action. *See, e.g.*, *Carr* v. *United States*, 560 U.S. 438, 448 (2010) (contrasting the present tense, which indicates "'the future as well as the present,'" to the present perfect tense, which "'denot[es] an act that has been completed'"); *United States* v. *Balint*, 201 F.3d 928, 933 (7th Cir. 2000) ("[U]se of the present

progressive tense, formed by pairing a form of the verb 'to be' and the present participle, or '-ing' form of an action verb, generally indicates continuing action."). Even the government itself conceded below that the word "arriving" "plausibly denotes a process of arrival." Pet. C.A. Br. 29, *Al Otro Lado, Inc.* v. *Mayorkas*, No. 22-55988 (9th Cir. Dec. 20, 2022).

The verb forms in the statutes here reflect that whereas an asylum seeker who has "arrived" in the country has culminated her journey and therefore is physically present in the United States, an asylum seeker who "arrives" or is "arriving in" the country is still in the process of her journey and is not necessarily on United States soil. In other words, because "arrives" and "arriving in" reflect ongoing or continuing action, they naturally comprise a category of asylum seekers who need not be physically present in the United States.

B. In The Immigration Context, "Arrives In" And "Arriving In" Refer To The Process Of Arriving, Which Includes Noncitizens Who Are At, But May Not Have Yet Crossed, The Border

In addition to the plain language of the statute, the phrase "arrives in" must be interpreted in the context of United States immigration law. Petitioners say that the "ordinary English" understanding of the term supports their interpretation that a person who "arrives in" the United States must be within its borders. Pet. Br. 2-3, 11. But if the phrase does not clearly favor the process of arriving as discussed above, it is at best ambiguous, and "[w]hen words have several plausible definitions, context differentiates among them. That is just as true when the choice is between ordinary and specialized meanings." *United States* v. *Hansen*, 599 U.S. 762, 775 (2023); *see also Medical Marijuana, Inc.* v. *Horn*, 604

U.S. 593, 603 (2025) ("When a word carries both an ordinary and specialized meaning, we look to context to choose between them."). Even if it were true that "ordinary English speakers[] use[] 'arrives in' to mean those physically present" in a designated place, Pet. App. 188a (R. Nelson, J., dissenting), the phrase "arrives in" is used here in the context of immigration law, in which it takes different meaning. Because the phrase has a different meaning in this particular legal context, the meaning in its legal context should prevail. *See Sekhar* v. *United States*, 570 U.S. 729, 733 (2013) ("[A]s Justice Frankfurter colorfully put it, 'if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'"); Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 73 (2012) ("Sometimes context indicates that a technical meaning applies. … And when the law is the subject, ordinary legal meaning is to be expected, which often differs from common meaning.").

The relevant meaning of "arrives in" and "arriving in" in the context of federal immigration law encompasses the full process of arrival, which includes reaching the threshold of the border and culminates in processing into the United States. Accordingly, the class members who reached a port of entry but were physically prevented by border officials from crossing the threshold into the United States belong to a historic category of people who "arrive in" the United States under federal immigration law.

A historical examination reflects this meaning in the immigration context. The phrases "arrives in" and "arriving in" have appeared in United States immigration statutes since the nation's earliest laws. The Steerage Act of 1819, for example, used the present progressive form, "arriving in," when referring to the requirements

for passenger manifests on ships carrying noncitizens to the United States. An Act Regulating Passenger Ships and Vessels, Pub. L. No. 15-46, § 4, 3 Stat. 488, 489 (1819). Congress took a similar approach in the 1875 Immigration Act, mandating that noncitizens on ships "arriving in" the United States be subject to onboard inspection before passengers could "land" at United States ports. An Act Supplementary to the Acts in Relation to Immigration; Oriental Exclusion Act of 1875, Pub. L. No. 43-141, § 5, 18 Stat. C477, C477-C478. Like the class members, the ships and occupants contemplated under the 1875 Immigration Act were arriving in the country through ports of entry but were not yet physically present on United States soil.

Other statutory provisions demonstrate that "arriving in the United States" applies to people who are not yet on United States soil, according to court decisions. For example, Section 1353a of the INA governs overtime pay for immigration officers processing people "arriving in the United States." In *DeLano* v. *United States*, the court considered a government directive instructing that, with respect to Section 1353a, pay for officers inspecting noncitizens "arriving in" the United States began at "the point in Canada where inspection begins." 393 F.2d 517, 518 (Ct. Cl. 1968). Earlier cases illustrate the same principle. In *United States* v. *Central Vermont Railway*, the court held that a statute authorizing overtime compensation for processing of passengers from "trains [] arriving in the United States from a foreign port" to a designated port of entry extended to "inspections and examinations [] made en route" even while still in Canada. 16 F. Supp. 864, 865 (D. Vt. 1936). These examples are representative of the complexity of processing people at the border, showing that it has long required a definition of "arriving in" that is inclusive of

people who have not yet stepped foot in the United States when at a port of entry. They further illustrate that, in the immigration context, the phrase "arriving in" has long been understood to refer to people and vehicles *in the process* of crossing into the United States, including those who are not yet physically present in the United States.

C. Other INA Provisions Contemplate "Arriving In" The United States As A Process

In 1996, Congress enacted the current versions of Sections 1158 and 1225 in IIRIRA, which amended the existing INA. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 208, 235, 110 Stat. 3009, 579, 690. IIRIRA amended the wording of 8 U.S.C. § 1158 from protecting any "alien … at a land border or port of entry" to protecting any "alien … who arrives in the United States (whether or not at a designated port of arrival)." IIRIRA also amended Section 1225, which, in addition to specifying that a noncitizen who "arrives in the United States (whether or not at a designed port of arrival)" is an applicant for admission, *id.* § 1225(a)(1), also mandated that immigration officers inspect applicants for admission, *id.* § 1225(a)(3), and refer "an alien … who is arriving in the United States" for processing if that individual expresses an intent to apply for asylum or expresses a fear of persecution during inspection, *id.* § 1225(b)(1). These IIRIRA provisions were enacted against the backdrop of the then-current INA, which used the phrase "arriving in" and "arrival in" the United States to denote a process of arrival at a port of entry. The context of other INA provisions suggests that the use of the phrases "arrives in" and "arriving in" the United States in Sections 1158 and 1225 include a process that begins outside the territorial United States.

To properly construe the phrases "arrives in" and "arriving in" in Sections 1158 and 1225, courts "presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988). The INA, which IIRIRA amended, reflects in its other provisions that "arrives in" and "arriving in" are properly understood to refer to the process of arrival at a port of entry of the United States, and not to the end result of physical presence within the United States. As a matter of statutory interpretation, courts must look to the statute as a whole, which includes how other provisions are used. *See Maracich* v. *Spears*, 570 U.S. 48, 65 (2013) ("It is necessary and required that an interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning."). And because, "[a]s [the Court] ha[s] said before, it is a 'normal rule of statutory construction' that 'identical words used in different parts of the same act are intended to have the same meaning,'" *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 571 (2012), the phrase "arriving in" should be interpreted as having the same meaning throughout the INA.

Other INA provisions repeatedly use the phrase "arriving in" to refer to the process of arrival with respect to "arriving" vessels or individuals that are near, but not yet in the territory of, the United States. For example, the INA prohibited any "person," including a "commanding officer of any vessel or aircraft *arriving in* the United States from … bring[ing] to the United States … any alien … with intent to permit or assist such alien to enter or land in the United States in violation of law." 8 U.S.C. § 1287 (emphasis added). Similarly, in another INA provision, Congress prohibited certain individuals "arriving in" the United States with an "alien

stowaway" from allowing "the stowaway to land in the United States." *Id.* § 1231(d)(2)(B). And in the 1952 version of the Act, Congress permitted immigration officers to inspect and order the onboard detention of noncitizens "arriving at ports of the United States" who had not yet landed on United States soil. An Act to Revise the Laws Relating to Immigration, Naturalization, and Nationality, Pub. L. No. 82-414, § 232, 66 Stat. 163, 196 (1952). Again, in these provisions, Congress used the phrase "arriving in" to denote presence near the territory of the United States, but not actual presence within the country. In doing so, these provisions clearly refer to an ongoing process of arriving at a port of entry, one which includes events before landing or stepping on American soil.

D. Agency Interpretation Affirms That "Arrives In" And "Arriving In" Refer To The Process Of Arriving At A Port Of Entry

When discussing agency implementation of IIRIRA, House Judiciary Chairman and IIRIRA sponsor Lamar Smith (R-Tx.) specifically acknowledged that Congress's concept of an "arriving alien" throughout the bill was intended to be broad. As Chairman Smith explained: "The term 'arriving alien' was selected specifically by Congress in order to provide a flexible concept that would include all aliens who are in the process of physical entry past our borders … whether attempting to enter, at the point of entry, or just having made entry." *Implementation of Title III of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Hearing Before the Subcommittee on Immigration and Claims of the H. Comm. On the Judiciary*, 105th Cong. 17-18 (1997) (correspondence dated Feb. 3, 1997 to Immigration and Naturalization Service from Chairman Smith). Chairman Smith further stated that "'[a]rrival' in this context

should not be considered ephemeral and instantaneous but, consistent with common usage, as a process." *Id.* at 18. Chairman Smith made clear in his remarks that the concept of "arriving in" or "arrives in" is not rigid, but rather, that it is a "flexible concept" that refers to a "process of physical entry" that includes those "attempting to enter, at the point of entry." *Id.* at 17-18.

True to this, longstanding agency interpretation confirms that the terms "arrives in" and "arriving in" refer to the process of arriving at a port of entry, which involves a noncitizen's activities before stepping foot in the United States. Such longstanding interpretation is "especially useful in determining the statute's meaning." *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 394 (2024).

In 1997, in implementing IIRIRA just months after its passage, the Immigration and Naturalization Service (INS) promulgated a regulation defining "arriving alien"[2] to include "an alien who seeks admission to or transit through the United States … at a port-of-entry." *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10,312, 10,330 (Mar. 6, 1997) (codified at 8 C.F.R. § 1.1(q) (1997)). The INS noted that "[a]liens who have not yet established physical presence on land in the United States cannot be considered as anything other than arriving aliens." *Id.* at 10,313. One year later, in 1998, the INS amended the definition of an "arriving alien" to include "an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking

[2] IIRIRA did not define "arriving alien," but it gave the Attorney General the power to do so. 8 U.S.C. § 1103(a)(3) (1996).

transit through the United States at a port-of-entry." 8 C.F.R. § 1.2. Later, in 2011, the Department of Homeland Security (DHS) promulgated regulations which adopted the same definition of "arriving alien." *Immigration Benefits Business Transformation, Increment I*, 76 Fed. Reg. 53,764, 53,778 § 1.2 (Aug. 29, 2011).

Through this definition, which remains in effect, the INS and DHS recognized "arriving" as an ongoing process, specifically inclusive of individuals at a port of entry who have not yet stepped foot on United States soil. This agency interpretation of "arriving alien" accords with petitioners' understanding of "arrives" and "arriving" in Sections 1158 and 1225 as encompassing noncitizens seeking to present themselves at a port of entry to the United States.

Congress has not taken any action that would derogate from this interpretation. In fact, it has chosen not to override this agency interpretation in recent years. In 2021, the Congressional Research Service issued a report highlighting the conflicting interpretations of Sections 1158 and 1225 of the INA at issue in this case. Smith, *The Department of Homeland Security's "Metering" Policy: Legal Issues*, Cong. Rsch. Serv. (July 7, 2023). The report noted that "Congress may consider clarifying the statutory framework governing aliens seeking admission." *Id.* at 6. Even after that report's release, Congress did not direct DHS to conform its regulations with a different interpretation of the relevant statute. When presented with the 2018 Asylum Abuse Reduction Act, a bill that would have prevented migrants from applying for asylum at the border, Congress let the bill die without committee action or votes. S. 3372, 115th Cong., § 2 (2018). The INS and DHS's definition of "arriving alien," and Congress's apparent acceptance of such definition, suggest the phrases "arrives

in" and "arriving in" in the INA refer to noncitizens in the process of presenting at a port of entry.

II. THE INA REFLECTS CONGRESS'S PURPOSE TO FACILITATE ACCESS TO THE ASYLUM PROCESS

If the Court finds that the plain text and context of the INA are ambiguous, it should also consider the history and purpose behind the asylum provisions of the INA. *See, e.g.*, *United States* v. *Rahimi*, 602 U.S. 680, 717-729 (2024) (Kavanaugh, J., concurring) ("History, not policy, is the proper guide" to interpreting vague constitutional text, including through "scrutiniz[ing] the stated intentions and understandings of the Framers and Ratifiers[.]"); *Sackett* v. *EPA*, 598 U.S. 651, 671-673 (2023) (looking to statutory history and other sources to define a "not … well-known term of art"); *King* v. *Burwell*, 576 U.S. 473, 498 (2015) (looking to congressional intent when examining the Affordable Care Act, stating, "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter."); *CIR* v. *Lundy*, 516 U.S. 235, 253-262 (1996) (Thomas, J., dissenting) (looking to congressional intent and legislative history, specifically Senate Reports, to determine the length of time taxpayers can collect a refund under the relevant statute). The history and purpose behind the asylum provisions of the INA further supports amici's interpretation of the plain text and context of the INA, indicating that Congress broadly sought to protect asylum seekers when drafting the statute.

A. The Refugee Act Of 1980 Protects Asylum Seekers And Incorporates International Treaty Obligations Into Federal Immigration Law

The Refugee Act of 1980, which established the modern United States asylum system, amended the INA to provide a permanent and systematic procedure for the protection and processing of asylum seekers and admission of refugees to the United States. The legislative history of the Refugee Act evinces clear congressional intent to protect individuals seeking asylum within the United States and to facilitate their access to such protections.

The Refugee Act was drafted to "reflect[] one of the oldest themes in America's history—welcoming homeless refugees to our shores." S. Rep. No. 96-256, 1 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 141. In enacting the Refugee Act, Congress intended to "give statutory meaning to our national commitment to human rights and humanitarian concerns[.]" 125 Cong. Rec. 23,231, 23,231-23,232 (1979) (statement of Sen. Kennedy); *see also In re S-P-*, 21 I. & N. Dec. 486, 492 (B.I.A. 1996) (quoting Senator Kennedy's statement and holding that "[s]uch an approach is designed to afford a generous standard for protection in cases of doubt."). True to this commitment, the Refugee Act created "a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States[.]" Refugee Act of 1980, Pub. L. No. 96-212, § 101(b), 94 Stat. 102, 102.

In addition to the new procedure for refugee admission, the law made a formal asylum application process for any noncitizen "physically present in the United States or at a land border or port of entry, irrespective

of such alien's status." Refugee Act § 208(a) (current version, with similar language, at 8 U.S.C. § 1158). In doing so, Congress deliberately replaced an administrative process which had been "ad hoc," "inadequate," and "discriminatory." 125 Cong. Rec. at 23,232 (statement of Sen. Kennedy). This was "in the best interest of the United States," which is "the only country in the world that is a genuine country of the refugees which has been energized and given substance by people who came to our country to start anew." *Id.* at 23,239 (statement of Sen. Boschwitz).

The Refugee Act also reflects Congress's intent to amend asylum law to incorporate international treaty obligations into federal immigration law. The Refugee Act was designed to make our law "conform[] to … the United Nations Convention and [P]rotocol relating to the status of refugees[.]" 125 Cong. Rec. at 23,232 (statement of Sen. Kennedy). The United States acceded to the Protocol, which incorporated Articles 2 through 34 of the Convention, in 1968 to "broaden the extension of asylum and status for those fleeing persecution … [g]iven the American heritage of concern for the homeless and persecuted, and our traditional role of leadership in promoting assistance for refugees[.]" Johnson, *Special Message to the Senate Transmitting the Protocol Relating to the Status of Refugees*, The American Presidency Project (Aug. 1, 1968). Congress did this by amending the language of the INA to more closely hew to the language of the U.N. Convention and Protocol, which Congress understood as the "fundamental change under the legislation." *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong. 27 (statement of Representative Fish). The Court has previously

recognized this intent. *See INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 436-437 (1987) ("If one thing is clear from the legislative history … it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees … to which the United States acceded in 1968.").

Accordingly, the text of the Refugee Act and its subsequent iterations should be read in light of the requirements imposed by the U.N. Convention and Protocol. These obligations make clear that State parties like the United States should protect asylum seekers—protections that should extend to those who are at the border of the United States at a port of entry. *See, e.g.*, 1951 Convention Relating to the Status of Refugees, art. 31, § 1, July 28, 1951, 189 U.N.T.S. 150, 174 (precluding State parties from "impos[ing] penalties, on account of their illegal entry or presence, on refugees …, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence"). The Convention and Protocol's obligations have been further interpreted by the United Nations High Commissioner for Refugees (UNHCR) Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, which, as this Court has observed, provides "significant guidance in construing the Protocol," and is "widely considered useful in giving content to the obligations that the Protocol establishes." *Cardoza-Fonseca*, 480 U.S. at 439 n. 22. The UNHCR Handbook recommends that nations adopt procedures satisfying certain "basic requirements," including that "[t]he competent official (e.g., immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State should … be required to … refer such cases to a higher

authority." UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, pt. 2(A), 192 (i) (1979, Geneva, re-edited 1992). The language "at the border" indicates that the Convention and Protocol sought to protect asylum seekers who reached a border, even when not "in the territory" on the other side. By codifying the requirements imposed by the U.N. Convention and Protocol into the INA, Congress also intended to incorporate this protection for asylum seekers when they present themselves at the border of the United States but are not yet on American soil.

B. The History And Purpose Of IIRIRA, Which Amended The INA, Shows Congress Intended For "Arrives In" To Refer To An Ongoing Process Of Arriving At A Port Of Entry

As previously discussed, in 1996, IIRIRA amended the wording of 8 U.S.C. § 1158 from protecting any "alien … at a land border or port of entry" to protecting any "alien … who arrives in the United States (whether or not at a designated port of arrival …)." In amending this language, Congress did not alter its purpose to protect asylum seekers or to abide by international treaty obligations, as incorporated into the INA by the Refugee Act. Rather, Congress made this change with the purpose of preserving noncitizens' access to the asylum process. *See Hall* v. *Hall*, 584 U.S. 59, 74 (2018) ("Congress, we have held, 'does not alter the fundamental details' of an existing scheme with 'vague terms' and 'subtle device[s].'") (second alteration in original).

While petitioners argue that the rewording of Section 1158 indicates a change in meaning, Pet. 18-19, neither petitioners nor lower court records provide evidence that Congress intended any such change. Petitioners also do not provide evidence that Congress, by

amending the language in Section 1158, intended to limit enforcement of federal immigration law or empower border officials to bypass its requirements at a port of entry.

In fact, the legislative history of IIRIRA shows that, when Congress amended the relevant language in 8 U.S.C. § 1158(a)(1), it intended that the phrase "arrives in" mean the process of arrival at a port of entry, and to include those "at the border." Section 1158(a)(1) was amended in the Omnibus Consolidated Appropriations Act, *see* Pub. L. No. 104-208, which adopted language from H.R. 2022, titled the "Immigration Control and Financial Responsibility Act of 1996." H.R. 2202, 104th Cong. § 1 (1995). According to the House Judiciary Committee's (Committee) Report on H.R. 2202, the Committee intended the amendments to asylum law to "streamlin[e] the asylum process, while ensuring that no alien [would] be returned to persecution." H. R. Rep. No. 104-469, *Immigration in the National Interest Act of 1995, Report on H.R. 2202*, at 175 (1996). The Report described the amended asylum language as providing that "any alien who is physically present in the United States *or at the border of the United States*, regardless of status, is eligible to apply for asylum." *Id.* at 259 (emphasis added).

This language in the Committee's Report evinces clear drafting intent that an individual be able to seek asylum when she arrives "*at the border of the United States*," and not only if she is already "*physically present in*" the country. This is evidenced by the disjunctive "or," which, as discussed above (Section I.A), differentiates two distinct concepts. This distinction supports an understanding that the legislative drafters of Section 1158 intended for "physically present in the United States" and "who arrives in the United States" to mean different things. The terms "arriving at" or "arriving in"

the United States (drawing on the language from Sections 1158 and 1225) sensibly encompass the Committee's Report language about arriving "at the border of the United States." The terms are also distinct from being "physically present in the United States" and not synonymous as petitioners suggest. *See* Pet. Br. 14-15.

The Committee's Report reflects that Congress engaged in an extensive and deliberative drafting process when arriving at this distinction. The Report was crafted after a nine-day markup in September and October of 1995, during which time Congress considered 103 amendments, *see* H. Rep. No. 104-469 at 182-205, and conducted a hearing on the bill with witness testimony from experts and impacted groups, *see id.* at 182 ("19 witnesses, representing 19 organizations, with additional material submitted by 5 individuals and organizations"). Given this measured process, the Committee surely understood the changes it was making to the INA at the time it drafted this report. *See HCSC-Laundry* v. *United States*, 450 U.S. 1, 8 n.7 (1981) ("[E]xtended hearings, … Committee considerations, and … floor debates all reveal that Congress was well informed … and made a deliberate decision.").

CONCLUSION

The plain text and applicable legal context of 8 U.S.C. §§ 1158(a)(1), 1225(a)(1), 1225(a)(3), and 1225(b)(1)(A)(ii) clearly indicate that the phrases "arrives in" and "arriving in" encompass asylum seekers who present themselves at ports of entry of the United States. Even if the Court finds ambiguity in this text, the history and purpose of these provisions further underscores that Congress intended to protect asylum seekers presenting themselves at a port of entry.

For these reasons, the Court should affirm the Ninth Circuit's decision.

Respectfully submitted.

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APPENDIX

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