NOT YET SCHEDULED FOR ORAL ARGUMENT
No. 19-5272

IN THE

United States Court Of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

O.A., *et al*.,

Appellees

v.

DONALD J. TRUMP, as President of the United States, *et al*.,

Appellants

On Appeal from the United States District Court for the District of Columbia
Case No. 18-cv-02718 before the Hon. Randolph D. Moss

BRIEF OF *AMICI CURIAE* SENATOR PATRICK J. LEAHY, SENATOR BOB MENENDEZ, SENATOR RICHARD DURBIN, SENATOR RON WYDEN, SENATOR SHELDON WHITEHOUSE, SENATOR RICHARD BLUMENTHAL, SENATOR JEFF MERKLEY, SENATOR CORY BOOKER, SENATOR MAZIE HIRONO, REP. JERRY NADLER, AND REP. ZOE LOFGREN IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel submits the following certification:

(A) Parties, Intervenors, and *Amici*. Except for the following *Amici Curiae*, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for the Appellants and the Brief for the United Nations High Commissioner for Refugees ("UNHCR"): Senator Bob Menendez, Senator Richard Durbin, Senator Mazie Hirono, Rep. Jerry Nadler, and Rep. Zoe Lofgren. The *Amici Curiae* who submit this brief in support of Appellees are all individuals.

(B) Rulings Under Review. References to the rulings at issue appear in the Brief for Appellants.

(C) Related Cases. This case has not previously been before this Court or any other court for appellate review. To the best of counsel's knowledge, all references to related cases appear in the Brief for Appellants.

Dated: August 21, 2020

s/ Susan Baker Manning
Susan Baker Manning

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CERTIFICATE OF COUNSEL AS TO SEPARATE BRIEFING

Pursuant to Circuit Rule 29(d), I certify that it is necessary to separately file the following Brief of *Amici Curiae*. As members of the Legislative Branch, *amici* are uniquely qualified to address Congress's intent in drafting the provisions of the Immigration and Nationality Act relevant to this case. Accordingly, *amici* are able to provide the Court with relevant insight, expertise, and a perspective that no other *amici curiae* is capable of providing.

August 21, 2020

s/ Susan Baker Manning
Susan Baker Manning

GLOSSARY

DOJ: Department of Justice

INA: Immigration & Nationality Act

UN: United Nations

UNHCR: Office of the United Nations High Commissioner for Refugees

1951 Refugee Convention: Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150

1967 Protocol: Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE[1]

Amici are nine members of the United States Senate and two members of the United States House of Representatives:

a. **Senator Patrick J. Leahy** has represented the State of Vermont since 1975, and is the longest-serving current member of the United States Senate. Senator Leahy voted to enact the initial version of 8 U.S.C. § 1158(a) and has participated in every revision to the present day.

b. **Senator Bob Menendez** has represented the State of New Jersey since 2006, and represented New Jersey's Thirteenth Congressional District in the House of Representatives from 1992 to 2006. Senator Menendez is the Ranking Member and former Chairman of the Senate Foreign Relations Committee.

c. **Senator Richard Durbin** has represented the State of Illinois in the Senate since 1997, and represented Illinois' Twentieth Congressional District in the House of Representatives from 1983 to 1997. Senator Durbin is the Democratic Whip and the Ranking Member of the Senate Judiciary Committee's Subcommittee on Immigration.

[1] All parties consent to the filing of this brief provided that it is timely filed and otherwise consistent with the rules of the Court. No person other than the named *Amici Curiae* and their outside counsel authored this brief in whole or in part or provided funding related to it.

d. **Senator Ron Wyden** has represented the State of Oregon since 1996, and represented Oregon's Third Congressional District in the U.S. House of Representatives from 1981 to 1996.

e. **Senator Sheldon Whitehouse** has represented the State of Rhode Island since 2007. Senator Whitehouse previously served as the Attorney General of Rhode Island from 1999 to 2003.

f. **Senator Richard Blumenthal** has represented the State of Connecticut since 2011. Senator Blumenthal previously served five terms as the Attorney General of Connecticut.

g. **Senator Jeff Merkley** has represented the State of Oregon since 2009. In addition, Senator Merkley served in the Oregon House of Representatives from 1999 to 2009, including serving as the Speaker from 2007 to 2009.

h. **Senator Cory Booker** has represented the State of New Jersey since 2013. Senator Booker was the thirty-sixth Mayor of Newark, New Jersey from 2006 to 2013.

i. **Senator Mazie Hirono** has represented the State of Hawaii since 2013 and represented Hawaii's Second Congressional District in the House of Representatives from 2007 to 2013.

j. **Representative Jerry Nadler** has represented the Tenth Congressional District of the State of New York since 1992. Representative Nadler is the

Chairman of the House Judiciary Committee, which has jurisdiction over immigration policy.

k. **Representative Zoe Lofgren** has represented the Nineteenth Congressional District of the State of California since 1995. Representative Lofgren is the Chair of the House Judiciary Committee's Subcommittee on Immigration and Citizenship.

As Members of Congress, *amici* have a strong interest in ensuring that the Department of Justice and the Department of Homeland Security comply with their duties to manage the asylum system consistent with the detailed and often-revisited immigration laws. As members of the Legislative Branch, *amici* are uniquely well suited to address Congress's unambiguous intent to ensure that a refugee's manner of entry is not to be given dispositive weight in the asylum process. Congress's resolve in this regard is reflected in the text of the statute, its legislative history, and Congress's clearly expressed intent to comply with the United States' treaty obligations.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for the Appellants.

SUMMARY OF ARGUMENT

Our landmark asylum laws have protected religious, ethnic, and other refugees for generations, and—in this Nation of immigrants—those laws follow an

even older tradition of welcoming individuals who flee tyranny and persecution. *See, e.g.*, James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785) (writing in support of our country's "generous policy [of] offering an Asylum to the persecuted and oppressed of every Nation and Religion, [which] promised a lustre to our country"); S. Rep. No. 97-485, at 124 (1982) (Senator Edward M. Kennedy describing the purpose of the Refugee Act of 1980) ("Immigration is both America's past and future. . . . It strengthens the economic and cultural life of our country. And it assures that America will always be a home for the homeless."). Longstanding U.S. law is crystal clear that one's point of entry into the United States shall not bar any person from having the merits of their asylum claim heard.

The present text of Section 1158(a)(1) of the Immigration and Nationality Act ("INA") states that:

> *Any* alien who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival* and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 235(b) of this title.

8 U.S.C. § 1158(a)(1)) (1996) (emphasis added). To the extent the Attorney General and Secretary of Homeland Security have discretion in implementing the

Nation's asylum laws,[2] this discretion is limited, including by the express provisions of Section 1158:

> The Attorney General may by regulation establish additional limitations and conditions, *consistent with this section* [1158], under which an alien shall be ineligible for asylum under [1158(b)(1)].
>
> The Attorney General may provide by regulation for any other conditions or limitations on the consideration of an application for asylum *not inconsistent* with this chapter.

Id. §§ 1158(b)(2)(C), (d)(5)(B) (emphasis added). The statute's plain and unambiguous language means what it says. Section 1158(a)(1) reflects Congress's specific, bipartisan intent to ensure that an individual's point of entry into the United States is not a bar to presenting an asylum claim. Any agency regulations regarding the consideration of an asylum application or eligibility for asylum must be consistent with the entire framework of Section 1158. Against these clear limits, the Rule (implementing the Presidential Proclamation) "renders all aliens who enter the United States across the southern border after November 9, 2018, except at a designated port of entry, ineligible for asylum." Aliens Subject to Bar on Entry Under Certain Presidential Proclamations; Procedure for Protection Claims, 83 Fed. Reg. 55,934 (Nov. 9, 2018) (as extended by 84 Fed. Reg. 3665 (Feb. 12, 2019) and

[2] The Attorney General shares rulemaking authority with the Secretary of Homeland Security. 6 U.S.C. § 552(d); 8 U.S.C. § 1103(a). Because both acted jointly in issuing the Rule, for the purposes of this brief, references to the Attorney General are also applicable to the Secretary of Homeland Security.

84 Fed. Reg. 21,229 (May 8, 2019)) ("Rule"); Proclamation No. 9822, Addressing Mass Migration Through the Southern Border of the United States, 83 Fed. Reg. 57,661 (Nov. 9, 2018) ("Proclamation").

Accordingly, the district court concluded that the Rule is inconsistent with 8 U.S.C. § 1158 and "is, therefore, 'unlawful.'" Op. at 62. *Amici* agree with the district court that the Rule "exceeds the authority that Congress conferred on the Attorney General and the Secretary of Homeland Security to 'establish additional limitations and conditions' on asylum that are 'consistent with' § 1158." *Id.* (quoting 8 U.S.C. § 1158(b)(2)(C)). Because the Rule is contrary to the plain text and intent of the statute, this Court should affirm the district court's judgment vacating the Rule.

Although not everyone who seeks asylum will be successful, the Attorney General does not have authority to prevent via regulation the adjudication of the merits of an asylum claim based solely on one's place of entry. The current language of Section 1158 could not be more clear that any person "who arrives in the United States []whether or not at a designated port of arrival . . . may apply for asylum." This language aligns with Congress's stated intent that even those subject to the expedited removal process under Section 1225(b)[3] would have an "opportunity . . .

[3] *See Make the Rd. New York v. Wolf*, 962 F.3d 612, 618 (D.C. Cir. 2020) ("In July 2019, the Secretary [of Homeland Security] decided to expand the reach of the expedited removal process to its statutory limit, sweeping in all individuals without

[to] claim[] asylum [and] have *the merits* of his or her claim promptly assessed." H. R. Conf. Rep. No. 104-828, at 209 (1996) (emphasis added). This unambiguous dictate of U.S. law also implements our international treaty obligations. The President has made no secret of his disagreement with the policy decisions codified in Section 1158(a)(1). But in our democratic system, laws may not be overturned by Executive *fiat*.

ARGUMENT

I. DECADES OF LEGISLATIVE HISTORY REFLECT STRONG BIPARTISAN SUPPORT FOR ASYLUM LAWS THAT DO NOT PENALIZE REFUGEES "ON ACCOUNT OF THEIR ILLEGAL ENTRY OR PRESENCE" IN THE COUNTRY IN WHICH THEY SEEK ASYLUM.

Over the course of many decades, Congress has worked on a bipartisan basis to safeguard asylum in the United States for refugees persecuted abroad. Congress has long "review[ed] immigration policy in light of America's best interest, yet with full regard for our immigrant heritage and our humanitarian traditions." S. Rep. No. 97-485, at 124 (1982) (Senator Edward M. Kennedy).

This context matters. The foundation of the present INA was built in the aftermath of World War II—when the international community resolved that future refugees would not be abandoned like many were during that war—and the United

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documentation who have resided in the United States for less than two years."); *accord* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019).

States took a leading role in drafting the 1951 Refugee Convention. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; *see also* Dr. Paul Weis, U.N. High Commissioner for Refugees, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* 4-13 (1990), https://www.refworld.org/docid/53e1dd114.html ("*Travaux Préparatoires*"); Br. UNHCR at 5-6. The United States advocated for codifying the principle that refugees present in a country of refuge without authorization should not be penalized "on account of their illegal entry or presence" into a country of refuge. 1951 Refugee Convention art. 31, ¶1; *see Travaux Préparatoires* at 201-20. And domestically, the United States enacted the initial version of the INA, which passed Congress with bipartisan support in 1952. Pub. L. No. 82-414, 66 Stat. 163 (1952).[4] While this version of the INA did not fully address our immigration and asylum issues, Congress continued to work in a bipartisan manner to develop more comprehensive legislation.

By 1968, the United States ratified the UN Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, which adopted all of

[4] The INA of 1952 passed in the House with the support comprised of 107 Democrats and 170 Republicans, or 71% of voting Members. *See House Vote #165 in 1952 (82nd Congress)*, GOVTRACK (last visited Aug. 19, 2020), https://www.govtrack.us/congress/votes/82-1952/h165. It passed in the Senate with 69% of voting Senators comprised of 25 Democrats and 32 Republicans. *See Senate Vote #298 in 1952 (82nd Congress)*, GOVTRACK (last visited Aug. 19, 2020), https://www.govtrack.us/congress/votes/82-1952/s298.

the substantive provisions of the 1951 Convention—including an expanded definition of refugee[5] as well as Article 31, which addresses "Refugees Unlawfully in the Country of Refuge." The Senate voted *unanimously* to provide advice and consent to ratification of the 1967 Protocol. *See* UN Protocol Relating to the Status of Refugees, *approved by the Senate* Oct. 4, 1968, 606 U.N.T.S. 267. And the United States officially acceded to the 1967 Protocol on November 1, 1968.

As relevant here, under the 1967 Protocol, the definition of a "refugee" covers those people who cannot return to their country of origin because of a well-founded fear of being "persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." 1967 Protocol art. I(2)–(3); Br. UNHCR at 7-8. And pursuant to the 1967 Protocol's adoption of Article 31, the United States "shall not impose penalties, on account of [] illegal entry or presence, on refugees who . . . enter or are present in [its] territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." The fundamental humanitarian principles animating the 1951 Refugee Convention, as incorporated in the 1967 Protocol, remain settled international law and are clearly reflected in domestic asylum law.

[5] The definition of "refugee" in the 1967 Protocol eliminated the geographic and temporal limits of the 1951 Refugee Convention. *See* 1967 Protocol art. I(2)–(3).

Notably, a strongly bipartisan Congress amended the INA in the Refugee Act of 1980 to implement the United States' treaty obligations under the 1967 Protocol and to create "a comprehensive United States refugee resettlement and assistance policy." Pub. L. No. 96–212, 94 Stat. 102 (1980); S. Rep. No. 96-256, at 1 (1979). *Amicus* Senator Leahy voted for the Refugee Act of 1980, along with 50 fellow Democrats, 33 Republicans, and one Independent.[6] In explaining the law's purpose, Congress declared:

> [I]t is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas, efforts to promote opportunities for resettlement or voluntary repatriation, aid for necessary transportation and processing, admission to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States.

Pub. L. No. 96-212, § 101(a), 94 Stat. 102 (1980). The Refugee Act of 1980 thus "reflects one of the oldest themes in America's history—welcoming homeless refugees to our shores" and "gives statutory meaning to our national commitment to human rights and humanitarian concerns." S. Rep. 96-256, at 1 (1979).

Congress intended for the Refugee Act's asylum provisions to "be construed consistent with the [1967] Protocol." S. Rep. No. 96-590 at 20 (1980); *see also Sale*

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[6] Fifteen Senators abstained, and none opposed. *See Senate Vote #262 in 1979 (96th Congress)*, GOVTRACK (last visited Aug. 19, 2020), https://www.govtrack.us/congress/votes/96-1979/s262.

v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 169 n.19 (1993). This includes our implementation of who is eligible for asylum—i.e., who qualifies as a "refugee"—which the Refugee Act defined in INA Section 201 (codified at 8 U.S.C. § 1101(a)(42)(A)) as "any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 437 (1987) ("[T]he definition of 'refugee' that Congress adopted" in the Refugee Act "is virtually identical to the one prescribed by . . . the [1951] Convention"). This also applies to our Nation's commitment to Article 31(1) of the 1951 Refugee Convention, as adopted by the 1967 Protocol, that refugees would not be penalized "on account of their illegal entry or presence" in the United States. 1967 Protocol art. I, ¶1; *see also Cardoza-Fonseca,* 480 U.S. at 436-37 ("If one thing is clear from the legislative history of . . . the entire 1980 Act, it is that one of Congress's primary purposes was to bring United States refugee law into conformance with the 1967 [Protocol]"). Key here, Congress added INA Section 208 (codified at 8 U.S.C. § 1158), which provided:

> The Attorney General shall establish a procedure for *an alien physically present in the United States or at a land border or port*

> *of entry, irrespective of such alien's status*, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of [8 U.S.C. § 1101(a)(42)(A)].

Pub. L. No. 96-212, § 201(b), 94 Stat. 105 (emphasis added). The Conference Report explained that this text was "based directly upon the language of the [1967 Protocol] and it [was] intended that the provision be construed *consistent with the Protocol*." H.R. Conf. Rep. No. 96-781, at 161 (1980) (emphasis added).[7] Congress has subsequently amended the INA more than 40 times since 1980,[8] and has

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[7] Consistent with the 1967 Protocol, Congress also included certain limits on eligibility for asylum in the Refugee Act, designed to prevent aliens posing an actual danger to the United States from obtaining asylum. *See* Pub. L. No. 96–212, §§ 201(a), 208(b), 94 Stat. 102, 105 (1980) (excluding from the definition of "refugee," and thus barring eligibility for asylum, aliens who had "participated in the persecution of any person on account of race, religion, nationality, membership in a particular group, or political opinion").

[8] *See* Health Programs Extension Act of 1980, Pub. L. No. 96-538, 94 Stat. 3192 (1980); Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611 (1981); Pub. L. No. 98-454, 98 Stat. 1732 (1984); Department of the Interior and Related Agencies Appropriations Act, 1985, Pub. L. No. 98-473, 98 Stat. 2028 (1984); Revised Organic Act of the Virgin Islands, Amendments, Pub. L. No. 99-396, 100 Stat. 842 (1986); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-47 (1986); Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3543 (1986); Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3657 (1986); Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, 101 Stat. 1399 (1987); Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, 102 Stat. 2614 (1988); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4473 (1988); Pub. L. No. 101-238, 103 Stat. 2100 (1989); Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, Pub. L. No. 101-246, 104 Stat. 30 (1990); National Institutes of Health Revitalization Act of 1993, Pub. L. No. 103-43, 107 Stat. 210 (1993); Departments of Commerce, Justice, and State, the

Judiciary, and Related Agencies Appropriations Act, 1995, Department of Justice and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, 108 Stat. 1765 (1994); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 2024 (1994); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4306 (1994); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1268 (1996); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-562 (1996); Immigration and Nationality Act, Amendments, Pub. L. No. 105-73, 111 Stat. 1459 (1997); Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-642 (1998); International Religious Freedom Act of 1998, Pub. L. No. 105-292, 112 Stat. 2814 (1998); Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. No. 106-95, 113 Stat. 1312 (1999); Intelligence Authorization Act for Fiscal Year 2000, Pub. L. No. 106-120, 113 Stat. 1632 (1999); American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1254 (2000); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1478 (2000); Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1633 (2000); Visa Waiver Permanent Program Act, Pub. L. No. 106-396, 114 Stat. 1638 (2000); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2002, Pub. L. No. 107-56, 115 Stat. 345 (2001); Family Sponsor Immigration Act of 2002, Pub. L. No. 107-150, 116 Stat. 74 (2002); United States Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, 117 Stat. 940 (2003); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2879, 2886 (2003); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 3353-55 (2004); Irish Peace Process Cultural and Training Program Act of 1998, Amendments and Extension, Pub. L. No. 108-449, 118 Stat. 3470 (2004); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3740, 3741 (2004); Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 306-09, 322 (2005); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 3054 (2006); Violence Against Women and Department of Justice Reauthorization Act of 2005, Technical Amendments, Pub. L. No. 109-271, 120 Stat. 762 (2006); Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 2364, 2365 (2007); Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, 122 Stat. 859-60, 862 (2008); Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. No. 110-293, 122 Stat. 2963 (2008); Child Soldiers Accountability Act of 2008, Pub.

steadfastly maintained that noncitizens present in the United States who may be able to establish refugee status may seek asylum through a fair and "systematic procedure"—and shall not be penalized in the ability to seek asylum due to entry at a place other than a port of arrival. *See* Pub. L. No. 96–212 §§ 101, 208, 94 Stat. 102, 105 (1980). The "refugee" definition does not turn on manner of entry.

The INA's consistency with the 1967 Protocol was, at that time, clearly understood by the DOJ. In its final rule implementing Section 208, the DOJ recognized that the Refugee Act sought to regularize U.S. refugee policy by creating "a statutory basis for asylum"; defining "refugee based on the definition . . . [in the] 1967 Protocol to the UN Convention Relating to the Status of Refugees"; and "requir[ing] the Attorney General to establish a procedure through which aliens already in the United States could apply for asylum on the basis of refugee status." Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30,674, 30,675 (July 27, 1990).

L. No. 110-340, 122 Stat. 3736 (2008); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5071, 5074 (2008); Human Rights Enforcement Act of 2009, Pub. L. No. 111-122, 123 Stat. 3481 (2009); International Adoption Simplification Act, Pub. L. No. 111-287, 124 Stat. 3058 (2010); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 111 (2013).

II. THE CURRENT TEXT OF SECTION 1158 IS CLEAR THAT THE ABILITY TO SEEK ASYLUM DOES NOT DEPEND ON WHETHER AN INDIVIDUAL ARRIVES THROUGH A DESIGNATED PORT OF ENTRY.

In keeping with this bipartisan history, Congress enacted the current statutory text relevant to this appeal as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), as incorporated into the Omnibus Consolidated Appropriations Act. Pub. L. No. 104-208, 110 Stat. 3009 (1996). Specifically, Congress revised the text of Section 1158(a)(1) to more expressly codify the broad availability of asylum—regardless of entry through a port of arrival:

> Any alien who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival* and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

Pub. L. No. 104-208, § 604(a), Div. C., 110 Stat. 3690 (codified at 8 U.S.C. § 1158(a)(1)) (emphasis added). The clarification of Section 1158(a)(1) and related provisions[9] was driven, in part, by the addition of an expedited removal process

[9] *See, e.g.*, 8 U.S.C. § 1225(a)(1) ("An alien present in the United States who has not been admitted or who arrives in the United States (*whether or not at a designated port of arrival* and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission."); *id.* § 1225(a)(2) ("An arriving alien *who is a stowaway* is not eligible to apply for admission or to be admitted and shall be ordered removed upon inspection . . . [but] if the alien indicates an *intention to apply for asylum under section 208* or a fear of persecution, the officer shall refer

under Section 1225(b)[10] and the need to ensure that the asylum process would be available to all aliens with a credible fear of persecution—regardless of the manner of entry. *See* H. R. Conf. Rep. No. 104-828, at 209 (1996) (explaining that aliens who could be subject to the new expedited removal process under Section 1225(b) would have an "opportunity . . . *[to] claim[] asylum [and] to have the merits of his or her claim promptly assessed*[,]" and if credible, to transfer their case to the normal (non-expedited removal) proceedings); *see also* H. Rep. No. 104-469, at 158 (1996) ("Under this [expedited removal] system, there should be *no danger* that an alien with a genuine asylum claim will be returned to persecution") (emphasis added); 142 Cong. Rec. S10572 (Sept. 16, 1996) (describing the credible fear process as "ensur[ing] that those who genuinely fear persecution at home can remain here"). Specifically, an individual in the expedited removal process receives an interview with an asylum officer, who determines whether the applicant has a "credible fear of persecution"—that is, whether "there is a significant possibility" she is a "refugee." 8 U.S.C. § 1225(b)(1).

The IIRIRA's balancing of measures to protect national security while upholding our international obligations and founding principles was initially voted

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the alien for an interview under subsection (b)(1)(B). A stowaway may apply for asylum only if the stowaway is found to have a credible fear of persecution under subsection (b)(1)(B).").

[10] *See Make the Rd. New York*, 962 F.3d at 619-21 (describing details of the expedited removal regulations).

on as a standalone bill in the Senate and then again as part of the appropriations bill in 1996. The standalone bill was passed 97 to 3, and the final law passed with robust bipartisan support in the Senate, with 22 Democrats and 50 Republicans voting in favor. The law also passed with bipartisan support in the House, with 88 Democrats and 190 Republicans voting in favor.

The text of this carefully crafted provision of Law could not be clearer that "any alien" present in the United States may seek asylum *based on a credible fear of persecution*, regardless of where they enter the country. The President is not empowered to overturn this Law.

III. THE EXECUTIVE MAY NOT ADOPT A RULE THAT PLAINLY CONTRADICTS THE INA AND EXCEEDS THE BOUNDARIES OF DELEGATED AUTHORITY.

The Attorney General's rulemaking authority is broad, but not limitless. Congress expressly constrained the scope of that rulemaking authority by statute, specifying that any regulation must be *consistent* with the other requirements of the INA. In Section 1158(b)(2)(C), Congress authorized the Attorney General to "by regulation establish additional limitations and conditions, *consistent with* this section [1158], under which an alien shall be ineligible for asylum under [§ 1158(b)(1)]." (emphasis added). Similarly, under Section 1158(d)(5)(B), "[t]he Attorney General may provide by regulation for any other conditions or limitations on the

consideration of an application for asylum *not inconsistent with this chapter*." (emphasis added).

As noted by the district court, "[a]ll [parties] agree that a regulation barring all aliens who enter the United States from Mexico outside a designated port of entry from applying for asylum would be 'inconsistent with' § 1158(a)(1) and, thus, *ultra vires*." Op. at 56. Clearly, such regulation would exceed the scope of authority to create conditions or limitations on the consideration of applications for asylum conferred under Section 1158(d)(5)(B). This unlawful exercise of authority is not permitted through Section 1158(b)(2)(C) either. *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1272-73 (9th Cir. 2020) ("[L]imitations promulgated under the eligibility subsection of the statute must be consistent with . . . the entirety of section 1158—not just consistent with [the eligibility] subsection."). But that is precisely the effect of the Rule. The Rule categorically eliminates consideration of the merits of asylum claims for those who enter along the southern border with Mexico at a place other than a port of arrival—regardless of an otherwise credible fear of persecution based on "race, religion, nationality, membership in a particular social group, or political opinion," § 1158(b)(1)(B)(i)—because asylum officers must "enter a negative credible fear determination" based solely on the alien's point of entry into the country. 8 C.F.R. § 208.30(e)(5)(ii) (citing the conditions of 8 C.F.R. § 208.13(c)(3); *see* Appellants' Br. at 13 (describing the Rule's amendment

of the credible fear procedure to require entry of a negative credible fear determination for entry in violation of the Proclamation) (quoting 83 Fed. Reg. at 55,952). Taken together, the Rule and Proclamation do not implement the law—they re-write it to impose a categorical penalty against seeking asylum based solely on a noncitizen's place of entry.

The Appellants make two primary arguments as to why the Rule and Proclamation are ostensibly "consistent with" Section 1158(a)(1)'s provision stating that any alien may apply for asylum regardless of whether he or she arrived through a designated port of entry. First, Appellants contend that Section 1158(a)(1) merely provides that an alien may *apply* for asylum regardless of the place of entry or arrival, but says nothing about whether that application may be *automatically denied* because of the place of entry or arrival. Appellants' Br. at 46-48. The Appellants thus suggest that Section 1158(a)(1) creates a paper exercise, and does not provide any substantive protections for noncitizens—notwithstanding Congress's clear intent that the place of entry not be a categorical bar to a meritorious asylum claim, as discussed above.

The Ninth Circuit has already properly rejected this argument as irreconcilable with the statutory text and Congress's clear intent:

> Defendants contend that even if Congress unambiguously stated that manner of entry has no effect on an alien's ability to apply for asylum, it can be the sole factor by which the alien is rendered ineligible. The argument strains credulity. To say that one may

> apply for something that one has no right to receive is to render the right to apply a dead letter. There simply is no reasonable way to harmonize the two.
>
> Clearly, the Attorney General may deny eligibility to aliens authorized to apply under § 1158(a)(1), whether through categorical limitations adopted pursuant to § 1158(b)(2)(C) or by the exercise of discretion in individual cases. But Congress's judgment that manner of entry should have no impact on ability to apply necessarily implies some judgment that manner of entry should not be the basis for a categorical bar that would render § 1158(a)(1)'s terms largely meaningless. Basic separation of powers principles dictate that an agency may not promulgate a rule or regulation that renders Congress's words a nullity. *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980) ("As we have held on prior occasions, [an agency's] 'interpretation' of the statute cannot supersede the language chosen by Congress.").

East Bay Sanctuary Covenant v. Trump, 349 F. Supp. 3d 838, 857-58 (N.D. Cal. 2018), *aff'd East Bay*, 950 F.3d at 1272 (The government's "argument is unconvincing. We avoid absurd results when interpreting statutes. . . . Explicitly authorizing a refugee to file an asylum application because he arrived between ports of entry and then summarily denying the application for the same reason borders on absurdity.") (citing *Rowland v. Cal. Men's Colony, Unit II Men's Adv. Council*, 506 U.S. 194, 200-01 (1993)); *see also Marincas v. Lewis*, 92 F.3d 195, 203 (3rd Cir. 1996) (interpreting Refugee Act of 1980 and concluding that "[w]hen Congress directs an agency to establish a procedure . . . it can be assumed that Congress intends that procedure to be a fair one").

Second, the Appellants argue that "the [R]ule establishes an eligibility bar [to asylum] based on contravening a Presidential proclamation, not merely manner of entry." Appellants' Br. at 45; Defs.' Br. at 22. The district court properly concluded that this is a distinction without a difference. Op. at 60. Both the Rule and Proclamation are expressly aimed at the issue of unauthorized entry across the U.S.-Mexico border. *See, e.g.*, 83 Fed. Reg. 55,934-95 (discussing the "Purpose of This Interim Final Rule" and describing issues associated with "aliens who enter unlawfully between ports of entry along the southern border, as opposed to at a port of entry"); 83 Fed. Reg. 57,661 (discussing the unlawful entry of aliens into the United States between ports of entry on the southern border). The Appellants do not explain why a regulation incorporating a Presidential proclamation prohibiting entry except under lawful conditions warrants a different analysis than that which would be applied to any other regulation. As explained above, the INA implements our international obligations under the 1967 Protocol, including the requirements of Article 31 of the 1951 Refugee Convention, which obligates the United States to afford "Refugees *Unlawfully* in the Country of Refuge" a meaningful opportunity to apply for asylum. Neither the President nor the Attorney General are empowered to rewrite the Law.

The Appellants made a similar argument in *East Bay*, which the court properly rejected:

> Defendants suggest that, even if the manner of entry deserves little weight as a general matter, violation of a Presidential proclamation is of particularly grave consequence and is therefore distinct from an "ordinary" entry violation. The asserted distinction is not supported by evidence or authority. And if what Defendants intend to say is that the President by proclamation can override Congress's clearly expressed legislative intent, simply because a statute conflicts with the President's policy goals, the Court rejects that argument also. No court has ever held that § 1182(f) "allow[s] the President to expressly override particular provisions of the INA." *Trump v. Hawaii*, 138 S. Ct. 2392, 2411 (2018).

East Bay I, 349 F. Supp. 3d at 859, *aff'd* 950 F.3d at 1272(affirming that "the Rule is 'not in accordance with law'").

In the INA, Congress vested the Attorney General with discretion, subject to specific limitations, to grant asylum, and to establish regulatory "limitations and conditions, *consistent with this section*, under which an alien shall be ineligible for asylum." 8 U.S.C. §§ 1158(b)(1)(a) & 1158(b)(2)(C) (emphasis added). Neither the Attorney General's discretion to grant asylum nor his rulemaking authority permit him to make the failure to enter through a designated port of entry a categorical bar to asylum where Congress, by statute, expressly provided that such conduct would *not* make an individual ineligible for asylum.

The Attorney General cannot escape the statutory limitations on his authority by citing to an extant or future Presidential proclamation, where, as here, that proclamation is or would be in violation of duly enacted Law. The President "cannot take away the [Attorney General's] statutory authority or exercise it himself." *Main*

St. Legal Servs., Inc. v. Nat'l Sec. Council, 811 F.3d 542, 558 (2d Cir. 2016). Likewise, the President cannot expand the Attorney General's statutory authority in contravention of an express statute. As discussed below, Executive Branch officials, including the President and Attorney General, are cabined by their limited constitutional authority: they may not legislate and are required to execute the Law as written.

IV. THE RULE CONTRAVENES THE LAW AND THUS VIOLATES THE SEPARATION OF POWERS.

The separation of powers among three independent, coequal Branches of Government is fundamental to our constitutional democracy. *See* U.S. CONST. arts. I, II, III; *see generally* The Federalist No. 51 (Madison) (discussing the importance of checks and balances in our democracy). "[C]onvenience and political considerations of the moment do not justify a basic departure from the principles of our system of government." *New York Times Co. v. United States*, 403 U.S. 713, 742-43 (1971) (Marshall, J., concurring).

As Article I, Section 1 of the Constitution provides, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1. Congress alone is vested with power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the [Powers enumerated in Article I, Section 8] and all other

Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8.

As Members of Congress, we committed to uphold the Constitution by "well and faithfully" enacting "all Laws" of the Federal Government. 5 U.S.C. § 3331 (congressional oath of office). This is a monumental responsibility in furtherance of justice. We do not make Laws lightly. There must be sufficient agreement that a Law is in the best interests of our great country, both in its purpose and in its specific language. As Members of the Legislative Branch, we engage in significant inquiry, analysis, and debate in order to build consensus among the numerous legislators to pass a Law. This is the hard work of Democracy. And when we pass a Law, we mean it. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("The first and most important canon of statutory construction is the presumption 'that a legislature says in a statute what it means and means in a statute what it says there.'").

The Executive Branch may not supersede or overturn a duly enacted Law. On the contrary, the Constitution expressly provides that the President "shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. Put simply, the President is bound by the Laws that Congress enacts. In executing the Law, the Executive Branch may, with requisite notice and comment, issue administrative rules and regulations as appropriate. But rulemaking cannot be used to defeat congressional intent and express statutory language. *See Chevron, U.S.A., Inc. v.*

Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("The judiciary . . . must reject administrative constructions [] which are contrary to clear congressional intent.").

In accordance with international law and with bipartisan support, Congress has long made the clear in the Law that "[a]ny 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 the alien's status, may apply for asylum." 8 U.S.C. § 1158(a)(1). The Executive Branch has a duty to faithfully execute this Law. The Rule, however, categorically prevents consideration of the merits of an asylum claim solely because an individual crossed the southern border outside a designated port of entry. This Rule is contrary to the letter and intent of the Law. As the district court concluded, it is, therefore, unlawful. The Executive Branch of the moment may not like this Law, but only the Congress, through legislation, can change it. Congress has not done so.

CONCLUSION

For the foregoing reasons, *amici* respectfully suggest that this Court affirm the district court's decision.

Dated: August 21, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a 14-point proportionally spaced serif font.

I further certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,487 words excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(f) and Local Rule 32(e)(1).

In compliance with Federal Rules of Appellate Procedure 29(a)(4)(E), I further certify that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than amicus curiae or their counsel contributed money that was intended to fund preparing or submitting this brief.

s/ Susan Baker Manning
Susan Baker Manning

CERTIFICATE OF SERVICE

I hereby certify that, on August 21, 2020, I caused the foregoing document to be electronically filed with the Clerk of the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Susan Baker Manning
Susan Baker Manning