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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

AL OTRO LADO, INC., *et al.*,

Plaintiffs,

vs.

KIRSTJEN M. NIELSEN, *et al.*,

Defendants.

Case No. 3:17-cv-02366-BAS-KSC

Hon. Cynthia A. Bashant

BRIEF OF IMMIGRATION LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO PARTIALLY DISMISS THE SECOND AMENDED COMPLAINT

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I. INTEREST OF AMICI CURIAE

Amici curiae are **Deborah Anker** (Clinical Professor of Law and founding Director, Harvard Immigration and Refugee Clinical Program at Harvard Law School), **Alina Das** (Professor of Clinical Law and Supervising Attorney at New York University School of Law, and Co-Director of the Immigrant Rights Clinic), **Denise L. Gilman** (Clinical Professor and Director, Immigration Clinic, University of Texas at Austin School of Law), **Anil Kalhan** (Professor of Law, Drexel University Thomas R. Kline School of Law), **Ira Kurzban** (Adjunct Faculty, University of Miami School of Law), **Stephen Legomsky** (John S. Lehmann University Professor Emeritus, Washington University in St. Louis School of Law), **Nancy Morawetz** (Professor of Clinical Law and Co-Director, Immigrant Rights Clinic at New York University School of Law), **Sarah Paoletti** (Practice Professor of Law at the University of Pennsylvania Law School), **Margaret L. Satterthwaite** (Professor of Clinical Law at New York University School of Law), **Jayashri Srikantiah** (Professor of Law and founding Director, Immigrants' Rights Clinic at Stanford Law School), and **Michael J. Wishnie** (William O. Douglas Clinical Professor of Law, Yale Law School).[1]

Amici curiae are law professors who research, write, and practice in the area of immigration and refugee law. They bring a rich understanding of the United States' obligations to enforce the United Nations Convention Relating to the Status of Refugees of 1951 via the Immigration and Nationality Act ("INA"), and the broader principles underlying the international law commitment to the principle and practice of *non-refoulement*. They write out of concern for government practices that deny migrants meaningful and timely access to the asylum process, as well as the legal rationales proffered to justify them. *Amici* write to stress that the INA, the principles of *non-refoulement*, and the constitutional constraints on the executive branch cannot be obviated by preventing refugees who present themselves at the U.S. border from

[1] All academic affiliations are listed for identification purposes only.

crossing. Such a legal construction would undermine the bedrock principles of asylum law, and permit a legal manipulation of jurisdictional rules that could carry dangerously into the future.

II. INTRODUCTION

The government views Maria (and each other plaintiff) as a player in a football game. In its view, she gained statutory and constitutional rights only if a panel of judges, examining slow-motion video angles, determines that she crossed the plane into the U.S. end zone. If border guards held her inches short of that plane, the government argues, she has no rights at all.

Amici submit that asylum is no game. The border is not a football field, and neither the U.S. Code nor the Constitution halts abruptly at a pinpoint in the desert or an eddy in a river. The "border" is more than a cartographical concept. It is built of ports of entry, of mountains, rivers, tidal areas that are land one hour and water six hours later, and of many places where, as the Complaint alleges, U.S. power regularly crosses the cartographer's line. Congress chose prepositions and gerundives to match the border's complexity, conferring rights on the asylum seeker when she is "at" the border, granting rights to an "arriving" class. 8 U.S.C. § 1158(a)(1); *see also* 8 C.F.R. § 1.2; 8 C.F.R. § 235.3(b)(1)(i), (b)(4). And as Constitutional jurisprudence teaches, if all that held an asylum seeker from the engineer's line was the force or suasion of a burly lineman cloaked with federal authority, then perforce that plaintiff had already reached a place where the applicant's rights are found.

For this reason, *Amici* begin with the special significance of Plaintiffs' procedural arguments. The question whether a plaintiff has arrived "at" our border is fact-intensive. The Complaint alleges that each new Individual Plaintiff presented himself or herself "at [a] port of entry"—which is always on U.S. soil—spoke with U.S. Customs and Border Protection officers at the port, and either requested asylum or expressed an intent to do so. On the current record, the government's label of eight individuals as "Extraterritorial Plaintiffs," *see* Defendants' Memorandum in Support

of Their Motion to Partially Dismiss the Second Amended Complaint [Dkt. 192-1] ("the Motion" or "Mot.") at 2 n.1, 6–11 & 18–25, should be rejected.[2] Review of the requirements of the INA and Constitution requires facts, not labels.

Second, even if the Complaint had not alleged that each plaintiff "crossed the plane," it would state cognizable claims. Defendants argue that the CBP officials who spoke to the new Individual Plaintiffs, and who refused to process Plaintiffs' asylum requests, were on U.S. soil—and yet speaking face-to-face with new Individual Plaintiffs who somehow were not. While it finds no basis in the Complaint, even this theory—that refugees who present themselves at the cartographer's line have no right to make the asylum claim they orally deliver there—runs counter to the statute and the Constitution. *Amici* show below that the inspection and asylum provisions of the Immigration and Nationality Act apply both to (1) non-citizens physically present in the U.S. *and* (2) non-citizens who are "arriving" in this country. Under the statute's express terms and implementing regulations, the latter group includes the new Individual Plaintiffs.

Plaintiffs also state a Fifth Amendment claim because they plainly were denied a statutory right to access the asylum system without due process of law. Defendants cannot deprive Plaintiffs of this right by forcefully barring the applicant reaching the line from crossing it. Defendants' arguments ignore Supreme Court precedent holding that extraterritorial application of the Constitution—if indeed these events were extraterritorial—turns not on formalism, but on practical considerations.

Last, *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), does not authorize the *refoulement* of Plaintiffs. Although the United States' *non-refoulement*

[2] *Amici* do not address Defendants' arguments that the Second Amended Complaint should be dismissed as to organizational Plaintiff Al Otro Lado or any of the Individual Plaintiffs who were part of the original complaint in this action, and who Defendants recognize as having each alleged that he or she crossed into the U.S. and applied for asylum (the so-called "Territorial Plaintiffs"). *Amici* understand that the asserted grounds for dismissal were previously addressed and rejected by the Court. *See* Dkt. No. 166; Mot. at 29 n.9 (noting that Defendants raise certain issues to preserve them for appeal).

obligations do not extend to the high seas, an asylum applicant just steps from the border—who is indeed "at" the border—is not on the high seas, or in any place comparable to the high seas. She is fully protected from *refoulement* by U.S. law.

Amici therefore respectfully suggest that Defendants' Motion to Dismiss should be denied as to the eight new Individual Plaintiffs.

III. DEFENDANTS CANNOT EVADE THEIR LEGAL DUTIES BY INTERCEPTING ASYLUM SEEKERS STEPS FROM U.S. SOIL.

A. Governing Law Requires that the Extraterritoriality Arguments Be Reviewed Only Upon a Full Factual Record.

The premise of Defendants' Motion is that the eight new Individual Plaintiffs assert no valid claims because "when they approached the border to the territorial United States at the San Ysidro, Laredo, or Hidalgo ports of entry [they] were prevented by CBP officers or Mexican immigration officials from physically crossing the international boundary." Mot. at 2. Defendants assert that the new Individual Plaintiffs' claims should be dismissed outright because (1) Defendants' "duties under the INA are not triggered until an alien is physically present in the United States," *id.* at n.1, (2) the new Individual Plaintiffs have no due process rights because "the Fifth Amendment does not apply to aliens outside the United States," *id.* at 18, and (3) "the United States does not have any *non-refoulement* obligation to aliens outside its borders," *id.* at 23. In short, the government contends that everything turns upon a cartographer's line that the Plaintiffs did not reach.

At this point, however, the only record is the Complaint. And the Complaint does not allege the Defendants' theory. Rather, it alleges (at minimum) that each new Individual Plaintiff:

- spoke to CBP officials;
- requested asylum (or expressed an intent to do so); and
- made the request while "at [a] port of entry."

See Compl. ¶¶ 29 & 154–56 (Roberto); *id.* ¶¶ 30, 162, & 165–67 (Maria and her two children); *id.* ¶¶ 31 & 174–75 (Juan and Úrsula); *id.* ¶¶ 32 & 181 (Victoria); *id.* ¶¶

33, 185, & 187–88 (Bianca); *id.* ¶¶ 34 & 193 (Emiliana); and *id.* ¶¶ 35 & 199 (César). It is undisputed that all U.S. ports of entry "are located within the territorial United States." Mot. at 11. Thus, the allegation that each new Individual Plaintiff presented himself or herself "at" a port of entry where he or she spoke to CBP officials is a plain assertion that each new Individual Plaintiff had sufficient "presence" in the United States to seek asylum. *See, e.g.*, *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002) ("All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party."). Whatever the significance of cartography to the ultimate question whether a plaintiff was "at" the border, the question depends on a factual record that does not yet exist. Given the importance of the legal questions presented, *Amici* suggest that the Court should resolve them only upon development of that factual record.

B. Even If the New Individual Plaintiffs Were Turned Back Steps from the Border, They State Cognizable Claims.

It has been nearly forty years since Congress amended the INA to replace the *ad hoc* refugee and asylum system that grew up over the preceding century to establish "for the first time a comprehensive United States refugee resettlement and assistance policy." S. Rep. No. 96-256, at 1 (1979). The Refugee Act of 1980 amended the INA to "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. Explaining the purpose of the law, 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.

Id. § 101(a), 94 Stat. at 102. The 1980 Act 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. No. 96-256, at 1.

Defendants contend that the new Individual Plaintiffs and CBP officials spoke athwart the map-maker's line: each new Individual Plaintiff, they argue, "spoke to a CBP officer *in the United States* but never herself crossed the border." Mot at 2 n.1 (emphasis added). Even if the Court were to accept what the Complaint contradicts, it should rule Defendants wrong on the law. U.S. law indisputably provides that the government may not strip Plaintiff's rights by barring asylees at the border from "breaking the plane."

1. Under the INA, CBP Officials May Not Deny the New Individual Plaintiffs Access to the Asylum Process.

The INA's asylum provisions extend to persons like the new Individual Plaintiffs who are in the process of arriving in the United States, even if—as Defendants suggest happened here—CBP officers stop them a few feet from the border. CBP officials acted under color of U.S. law, and whether they kept Plaintiffs from breaking the plane by exerting force from the "U.S. side" of the mapmaker's line, or whether they used "pre-checkpoints" to screen out asylum seekers on the other side of the line, their very ability to exert governmental power on Plaintiffs shows that those Plaintiffs had reached the place where U.S. power exists: that is, the Plaintiffs were "at" the border. Both the text and broader statutory scheme of the INA require that when a noncitizen in that place indicates either an intention to apply for asylum or a fear of persecution to a U.S. immigration officer, that person's must be processed.

a. Extraterritorial Application of U.S. Statutes

Courts analyze whether a statute applies extraterritorially using a two-step framework. *W. Geco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018). First, the court considers "whether the presumption against extraterritoriality has

been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016). "While the presumption can be overcome only by a clear indication of extraterritorial effect, an express statement of extraterritoriality is not essential. 'Assuredly context can be consulted as well.'" *Id.* at 2102 (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010)).

If the statute clearly indicates that it applies extraterritorially, the analysis is complete because "[t]he scope of an extraterritorial statute [] turns on the limits Congress has (or has not) imposed on the statute's foreign application[.]" *Id.*; *see also Rodriguez v. Swartz*, 899 F.3d 719, 747 (9th Cir. 2018) (the presumption against the extraterritorial application of a statute "can be overcome when actions 'touch and concern the territory of the United States . . . with sufficient force to displace the presumption'") (quoting *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 124–25, (2013)). If the statute does not clearly indicate that it applies extraterritorially, the court will consider "whether the case involves a domestic application of the statute . . . by looking to the statute's 'focus.'" *RJR Nabisco*, 136 S. Ct. at 2101. "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Id.*

b. The Statutory Text Makes Asylum Available to Noncitizens Who Are at, But May Not Have Yet Crossed, the Border.

Congress did not require that the applicant for asylum have fully crossed the map-maker's line. The statutory text sets out three different categories of noncitizens who may seek asylum: (1) aliens "physically present in the United States"; (2) those who are "arriving" in the United States; and (3) aliens who are "otherwise seeking admission" to the United States. 8 U.S.C. § 1158(a)(1). These are distinct categories.

Congress signified by noncitizens who are "arriving in the United States" or "otherwise seeking admission" a class of persons distinct from those "physically present" in the country.

Section 1158(a)(1) describes two categories of persons 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). Just as Section 1158(a)(1) makes "[a]ny alien … who ***arrives*** in the United States" eligible to apply for asylum, Section 1225(b)(1) also requires that an immigration officer to refer the asylum request of "an alien … who ***is arriving*** in the United States" for proper evaluation.

> 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[.]"

8 U.S.C. § 1225(b)(1)(A)(ii) (emphasis added).

Consistent with these asylum-specific provisions, Section 1225(a)(1) defines "applicant for admission" as including an alien who arrives in the United States:

> 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 . . .) shall be deemed for purposes of this chapter an applicant for admission.

8 U.S.C. § 1225(a)(1) (emphasis added). The duty of immigration officers to inspect noncitizens—which will, in appropriate circumstances, trigger the duty to refer the noncitizen for an asylum interview—builds on the Section 1225(a)(1) definition of "applicant for admission," but is framed even more broadly:

> All aliens (including alien crewmen) [1] ***who are applicants for admission*** or [2] ***otherwise seeking admission*** or readmission to or transit through the United States shall be inspected by immigration officers.

8 U.S.C. § 1225(a)(3).

In each of the cited statutes, Congress carefully distinguished the categories from each other. First, each of the provisions uses the disjunctive "or." This makes clear that a person in any one of the categories must be appropriately inspected and have his asylum claim addressed. *See, e.g.*, *Loughrin v. United States*, 573 U.S. 351, 357 (2014) (the "ordinary use" of the word "or" "is almost always disjunctive, that is, the words it connects are to be given separate meanings") (internal quotation omitted). Second, by setting out distinct categories of eligibility, Congress intended the terms "[physically] present in the United States" and "who arrives in the United States" (or "who is arriving in the United States") to mean different things, under the familiar canon against surplusage. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001). Third, the use of the present tense ("arrives") and present progressive tense ("is arriving") of the verb "to arrive" indicates an ongoing or continuing action. *See, e.g.*, *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."). A guest may not have entered the house, and still we refer to him as an "arriving guest."

The hole in Defendants' argument appears most starkly in their elisions of the text. The Motion refers to non-citizens who have "arriv[ed]" in the United States. *See* Mot. at 8 & 9 (alteration in original). But the statute does not say "arrived"; it says "arrives" and "arriving." The text does not require a noncitizen to complete her arrival, but only that she be in the process of doing so. Noncitizens like Plaintiffs who request asylum or express a fear of persecution in a face-to-face conversation with CBP officials are in the process of "arriving in the United States" even if those officials physically stop them from stepping across the cartographer's line.

The third category of noncitizens who must be inspected, and whose asylum claims must be processed, are those who are "otherwise seeking admission" within

the meaning of Section 1225(a)(3). The Complaint describes how each new Individual Plaintiff specifically sought admission to the United States—in some cases repeatedly—and was turned back by CBP officials. *See* Compl. ¶¶ 29 & 154–56 (Roberto); *id.* ¶¶ 30, 162, & 165–167 (Maria and her two children); *id.* ¶¶ 31 & 174–75 (Juan and Úrsula); *id.* ¶¶ 32 & 181 (Victoria); *id.* ¶¶ 33, 185, & 187–88 (Bianca); *id.* ¶¶ 34 & 193 (Emiliana); and *id.* ¶¶ 35 & 199 (César). Although Defendants assert that Plaintiffs were not "'seeking admission' in the manner prescribed by statute and regulation," Mot. at 8, the Complaint is clear that the new Individual Plaintiffs were in fact seeking admission. As to the claim that they were not seeking admission "in the manner prescribed by statute and regulation," this is incorrect for all the reasons discussed above. And, of course, the new Individual Plaintiffs were not able to *formally* apply for asylum only because of Defendants' Turnback Policy and the unlawful actions of CBP officers.

c. Agency Interpretation of the INA Confirms That Asylum Is Available to Noncitizens Who Are at, But May Not Have Yet Crossed, the Border.

Although "arriving alien" is not a term expressly defined by statute, long-standing agency interpretation of the INA confirms that Sections 1158(a)(1), 1225(b)(1), and 1225(a)(3) apply to noncitizens who are at the border and seeking entry, but who may not yet have crossed the border.

> Arriving alien means an applicant for admission ***coming or attempting to come into the United States*** at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport.

8 C.F.R. § 1.2; *see also* 8 C.F.R. § 235.3(b)(1)(i), (b)(4) (describing the procedure for an "arriving alien" to apply for asylum and the duties of immigration officers under the INA). The present progressive tense phrase "coming . . . into the United States" refers to ongoing or continuing action, not the act of having already come

into the United States. It refers to individuals at the border and in the active process of entering the United States, whether or not they have yet reached U.S. soil. And "attempting to come into the United States" could not be plainer. It also refers to a continuing action and necessarily excludes those who have *accomplished* what the government asserts as the requirement—full presence in the United States. This phrase plainly refers directly to individuals who are at or near the border and actively seeking to enter the United States, but have not yet done so. Agency interpretation of the statute is strong evidence that Sections 1158(a)(1), 1225(b)(1), and 1225(a)(3) apply to noncitizens like the new Individual Plaintiffs who are in the process of entering this country, even when they have not yet crossed the border. *Ruiz-Diaz v. United States*, 618 F.3d 1055, 1060 (9th Cir. 2010) ("When . . . Congress has expressly conferred authority on the agency to implement a statute by regulation, the regulations have 'controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'") (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984)).

During the rulemaking process, Rep. Lamar Smith, Chairman of the House Judiciary Committee's Subcommittee on Immigration and Claims, commented on Congress's intent in adopting the term "arriving alien":

> ***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***, regardless of whether they are at a designated port of entry, on a seacoast, or at a land border…. "Arrival" in this context should not be considered ephemeral or instantaneous but, consistent with common usage, as a process. ***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***.

Implementation of Title III of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Hearing Before the Subcomm. 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) (emphasis added). An alien "attempting to enter" the United States necessarily has not yet entered. Chairman Smith's comments confirm that the statutory text was intentional: Congress meant to reach aliens who are in the active process of entering the United States, even if they have not yet taken the last steps to cross the border.

d. *Sale* Does Not Support Defendants' Statutory Interpretation.

Defendants cite *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993), in support of the assertion that "CBP's duties to 'inspect,' 'refer,' or 'detain' an alien are triggered *only* if the alien is on American soil." Mot. at 7–8 (emphasis in original). *Sale* does not say that. The footnote that Defendants cite merely quotes Section 1158(a)(1) without relevant commentary. *See id.* at 8 (citing *Sale*, 509 U.S. at 162 n.11).

A narrow decision, *Sale* was driven by the unique facts of the 1990s Haitian migration crisis. The Supreme Court analyzed whether INA § 243(h), 8 U.S.C. § 1253(h) (1988) ("Withholding of deportation or return") (since abrogated), and U.S. treaty obligations controlled the interdiction of Haitian migrants outside the territorial waters of the United States and their subsequent return to Haiti. The Court held that neither set of obligations "applies to action taken by the Coast Guard *on the high seas*." *Sale*, 509 U.S. at 159 (emphasis added). *Sale*'s review of the interdiction and summary repatriation of Haitian migrants on the high seas has no bearing on whether or how Sections 1158(a)(1), 1225(b)(1), and 1225(a)(3) apply to the current policy of turning back refugees at the U.S.-Mexico border. *Cf. United States v. Delgado-Garcia*, 374 F.3d 1337, 1348 (D.C. Cir. 2004) (finding that immigration-related statute applies extraterritorially, and distinguishing *Sale* because the statute at issue in *Sale* referenced a domestic official, the Attorney General, and deportation proceedings the Attorney General was not authorized to conduct outside the country).

2. CBP Officials May Not Deny Plaintiffs Access to the Asylum Process Without Due Process.

Even if the Court were to assume *arguendo* that a Plaintiff stood on Mexican soil when she informed CBP officers that she sought asylum, she nevertheless states a cognizable claim that CBP's summary refusal to permit access to the asylum process violated the Due Process Clause.

The reach of the Constitution is not determined with simple reference to a line on the map. In *Boumediene v. Bush*, 553 U.S. 723, 759 (2008), the Supreme Court reviewed more than a hundred years of precedent regarding the Constitution's geographic scope, including the *Johnson v. Eisentrager*, 339 U.S. 763 (1950), *Reid v. Covert*, 354 U.S. 1 (1957), and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), cases Defendants rely upon. The Court found "a common thread uniting all [the] cases: the idea that extraterritoriality questions turn on objective factors and practical concerns, not formalism." *Boumediene*, 553 U.S. at 764; *see also Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir. 2012) ("The Supreme Court has held in a series of cases that the border of the United States is not a clear line that separates aliens who may bring constitutional challenges from those who may not.").

Following *Boumediene*, in the recent *Rodriguez* case, the Ninth Circuit examined three factors to determine the Constitution's extraterritorial application: (1) the citizenship and status of the claimant, (2) the nature of the location where the constitutional violation occurred, and (3) the practical obstacles inherent in enforcing the claimed right. *Rodriguez v. Swartz*, 899 F.3d 719, 729 (9th Cir. 2018) (Fourth Amendment analysis); *see also Ibrahim*, 669 F.3d at 994–97 (Fifth Amendment).

Regarding the first factor, each new Individual Plaintiff is a noncitizen. On these facts, foreign citizenship cuts sharply in Plaintiffs' favor, of course, because asylum is conferred exclusively on non-citizens. So too does status. Each Plaintiff alleges that she fled persecution, traveling hundreds of miles, and approached the United States border with the intent of seeking asylum—that is, that she is precisely within the group contemplated by the statutory scheme.

As to the second factor, Plaintiffs were not apprehended far from American

territory in international waters. *Cf. Sale*, 509 U.S. 155. Even under Defendants' non-record-based assertions, Plaintiffs were certainly at the border, at most within steps of the cartographer's line, so close they could speak to CBP agents whom the government says were on American soil, and so close that it was only U.S. government influence or control that prevented their further advance. *See Boumediene*, 553 U.S. at 749 (applying constitutional habeas privilege in non-U.S. territory subject to U.S. control); *Rodriguez*, 899 F.3d at 731 ("American law controls what people do here.") (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402–03, at 237–54 (AM. LAW INST. 1987)).

Defendants' suggestion that the border constitutes a bright line between the United States' *de jure* and *de facto* control over U.S. territory and genuinely foreign territory ignores the realities of the U.S.-Mexico border. CBP officials regularly operate in Northern Mexico, and the United States exercises significant control over the entire border region, Mexico's *de jure* sovereignty notwithstanding. *See, e.g.*, *Securing Our Borders—Operational Control and the Path Forward: Hearing Before the Subcomm. on Border & Mar. Sec. of the H. Comm. on Homeland Sec.*, 112th Cong. 8 (2011) (prepared statement of Michael J. Fisher, Chief of U.S. Border Patrol) (U.S. border security policy "extends [the nation's] zone of security outward, ensuring that our physical border is not the first or last line of defense, but one of many."); Eva Bitran, Note, *Boumediene at the Border? The Constitution and Foreign Nationals on the U.S.-Mexico Border*, 49 HARV. C.R.-C.L. L. REV. 229, 244–47 (2014) (collecting historical examples showing the U.S. "exerts and has exerted powerful influence over northern Mexico"). If U.S. power projects beyond the map line, then so too does the Constitution's demand that the government not deprive a statutorily-recognized class of would-be asylees of due process.

Under the applicable treaties, the United States and Mexico have agreed to jointly maintain the Rio Grande and related limitrophe areas. *See* Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as

the International Boundary, art. IV, Nov. 23, 1970, 23 U.S.T. 390, T.I.A.S. No. 7313 (Rio Grande and Colorado River Treaty); *see also* Treaty on the Utilization of Waters of Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, art. 2, 59 Stat. 1219, T.S. No. 904 (a U.S.-Mexico joint International Boundary and Water Commission, exercises its "jurisdiction" over limitrophe parts of the Rio Grande). As Justice Breyer recently observed:

> [I]nternational law recognizes special duties and obligations that nations may have in respect to limitrophe areas. Traditionally, boundaries consisted of rivers, mountain ranges, and other areas that themselves had depth as well as length. It was not until the late 19th century that effective national boundaries came to consist of an engineer's imaginary line, perhaps thousands of miles long, but having no width. Modern precision may help avoid conflicts among nations, but it has also produced boundary areas—of the sort we have described—which are subject to a special legal, political and economic regime of internal and international law.

Hernandez v. Mesa, 137 S. Ct. 2003, 2010 (2017) (Breyer, J., dissenting) (internal quotations and citations omitted); *see also* Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 58–72 (2014). The constant presence of U.S. officials on both sides of the cartographer's line, and the U.S.'s significant control over the area of northern Mexico adjacent to the border weighs strongly in favor of a finding that, in the circumstances of this case, the new Individual Plaintiffs may not be denied access to the asylum system when interdicted by the extension of that power.

As to the third factor, there are no practical obstacles inherent in requiring that the new Individual Plaintiffs' asylum claims be evaluated on the merits. The new Individual Plaintiffs were standing at the border, and had a face-to-face conversation with CBP officers who Defendants assert were on U.S. soil. It is no burden to require American officials in the United States to provide due process when inspecting and referring Plaintiffs' asylum claims for appropriate evaluation, and to stop selectively turning back would-be asylees at the border.

Amici do not suggest that the statutory rights to seek asylum and have one's

asylum claim evaluated in accordance with Due Process extend to anyone, anywhere who intends to seek asylum. But those rights do extend to those who are on the threshold of entering the United States, close enough to have a face-to-face conversation with CBP officers standing on U.S soil, and who are prevented from advancing further only by the extension of the government's active force. *Cf. Rodriguez*, 899 F.3d at 731 ("The practical concerns . . . about regulating conduct on Mexican soil also do not apply here. There are many reasons not to extend the Fourth Amendment willy-nilly to actions abroad. . . . But those reasons do not apply to [the CBP agent in *Rodriguez*]. He acted on American soil subject to American law."). Under the particular circumstances as pled, the Plaintiffs had a right to apply for asylum under the INA, and a right to due process in the evaluation of those claims, even if they technically were standing in Mexico when they requested asylum or expressed their intent to do so. To hold otherwise, particularly without a full factual record, would give Defendants *carte blanche* to ignore their duties under the INA, and, as alleged in the Complaint, to use all manner of lies, threats, coercion, and physical force to turn back refugees fleeing violence and persecution. *See, e.g.*, Compl. at ¶¶ 2, 33, 62, 84, 87–97, 107–18, 121–23, 128–31, 134–36, 141–44, 150–51, 155–56, 167, 174, 181, 185–88, 192–93, 197, 199.

The Supreme Court has previously rejected similar claims that the Executive's conduct is without constraint:

> Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." *Murphy v. Ramsey*, 114 U.S. 15, 44, 5 S. Ct. 747, 29 L.Ed. 47 (1885). Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is." *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803).

Boumediene, 553 U.S. at 765.

3. The United States' *Non-Refoulement* Obligations Prohibit It from Denying Noncitizens at The Border from Access to The Asylum Process.

Defendants assert that "the United States does not have a *non-refoulement* obligation to aliens outside its borders." Mot. at 23. This is a misreading of the United States' responsibilities, and Defendants' categorical claim is not supported by *Sale*, the only case they cite. The *Sale* court determined that the United States' *non-refoulement* obligations did not "appl[y] to action taken by the Coast Guard on the high seas." 509 U.S. at 159. In particular, the U.S.'s treaty obligations did not require the government to transport Haitians intercepted on the high seas to either the U.S. or a third country, rather than returning the migrants to their home country. *Id*. at 181–83. Here, both Article 33 and the *Sale* Court's analysis support a finding that the United States does in fact have a *non-refoulement* obligation to refugees who are at the border and in the process of attempting to enter this country in search of asylum:

> 1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Sale, 509 U.S. at 179 (quoting United Nations Protocol Relating to the Status of Refugees, art. 33.1, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577). In evaluating this prohibition, the *Sale* Court noted that the English word "return" and the French term "*refouler*" are not exact synonyms, and that English-French dictionaries did not translate "*refouler*" as "return," or vice versa. *Id*. at 180–81.

> [Dictionary definitions] do, however, include words like "repulse," "repel," "drive back," and even "expel." To the extent that they are relevant, ***these translations imply that "return" means a defensive act of resistance or exclusion at a border*** rather than an act of transporting someone to a particular destination. ***In the context of the Convention, to "return" means to "repulse"*** rather than to "reinstate."

Id. at 181–82 (emphasis added); *see also* THE COMPACT OXFORD ENGLISH DICTIONARY 1564 (2d ed. 1989) ("repulse … *trans*. 1. To drive or beat back (an

assailant); to repel by force of arms. . . . 2. To repel with denial; to reject, refuse, rebuff. . . . 3. To shut out, exclude *from* something.") (emphasis in original)).

In *Sale*, individuals intercepted outside the territorial waters of the U.S. were not being "repulse[d]" from, or "exclu[ded] at a border." The Court viewed the issue as whether the United States was obligated to transport migrants at large on the high seas to a country that they had neither come from, nor approached. The Supreme Court held that it was not. *Sale*, 509 U.S. at 159 ("We hold that neither [INA] § 243(h) nor Article 33 of the United Nations Protocol Relating to the Status of Refugees applies to action taken by the Coast Guard *on the high seas*." (emphasis added)). The Court repeatedly emphasized that the Coast Guard had intercepted the migrants in remote international waters. *See id.* at 160, 166–67, 173, 179–80, 187 (all emphasizing aliens' presence on the high seas). Lower courts have also noted the importance of *Sale*'s unique facts to its analysis and holding. *See, e.g.*, *Blazevska v. Raytheon Aircraft Co.*, 522 F.3d 948, 954 (9th Cir. 2008) (describing *Sale* as involving the "deportation of aliens from international waters"); *In re French*, 320 B.R. 78, 82 n.8 (D. Md. 2004) (similarly noting that *Sale* concerned "refugees apprehended in international waters."), *aff'd*, 440 F.3d 145 (4th Cir. 2006). With respect to the scope of Article 33, *Sale* is properly understood as limited to its unique facts, and the holding that it does not apply to the high seas.

Statements that go beyond the Court's holding and related reasoning are properly understood as dicta. In particular, Justice Stevens' statement that "[b]ecause the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions . . ." was not the holding of the case. *Compare Sale*, 509 U.S. at 183 *with id.* at 159 ("We hold . . . ."). This statement is, at most, dicta that goes beyond the facts of the case, or the analysis necessary to the Court's specific holding. *See, e.g.*, *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 35 (2012) ("We resist reading a single sentence unnecessary to the decision as having done so much work. In this regard,

we recall Chief Justice Marshall's sage observation that 'general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.'" (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)).

The *Sale* majority opinion has been broadly criticized, not least by Justice Blackmun in dissent:

> When, in 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, it pledged not to "return ('*refouler*') a refugee in any manner whatsoever" to a place where he would face political persecution. In 1980, Congress amended our immigration law to reflect the Protocol's directives. Today's majority nevertheless decides that the forced repatriation of the Haitian refugees is perfectly legal, because the word "return" does not mean return, because the opposite of "within the United States" is not outside the United States, and because the official charged with controlling immigration has no role in enforcing an order to control immigration.

Sale, 509 U.S. at 188–89 (Blackmun, J., dissenting) (internal citations omitted). UNHCR, the European Court for Human Rights, and the Inter-American Commission on Human Rights have been similarly critical. *See*, *e.g.*, U.N. High Comm'r for Refugees, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol 12 (Jan. 26, 2007) ("[T]he purpose, intent and meaning of Article 33(1) of the 1951 Convention are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State."), https://www.unhcr.org/4d9486929.pdf; *id.* at 12 n.54 ("*Sale* does not accurately reflect the scope of Article 33(1)"); *Jamaa v. Italy* (No. 27765/09), 2012-II Eur. Ct. H.R. 97, 173, 175 (2012) (De Albuquerque, J., concurring), https://www.echr.coe.int/Documents/Reports_Recueil_2012-II.pdf ("The

prohibition of *refoulement* is not limited to the territory of a State, but also applies to extraterritorial State action, including action occurring on the high seas. . . . With all due respect, the United States Supreme Court's interpretation contradicts the literal and ordinary meaning of the language of Article 33 of the United Nations Convention relating to the Status of Refugees and departs from the common rules of treaty interpretation."); *The Haitian Ctr. for Human Rights v. United States*, Case 10.675, Inter-Am. Comm'n H.R., Report No. 51/96, OEA/Ser. L/V/II.95, Doc. 7 rev. ¶ 157 (1997), http://hrlibrary.umn.edu/cases/1996/unitedstates51-96.htm ("Article 33 had no geographical limitations"). These criticisms do not, of course, effect *Sale*'s status as precedent, but they do counsel against over-reading *Sale* to go beyond the Court's holding and reasoning.

The facts here are very different from *Sale*, and compel a different conclusion. It is undisputed that Plaintiffs were at least "at a border" of the United States. *See, e.g.*, Compl. at ¶¶ 30, 86, 96, 97, 105, 150–51, 154, 162, 197; Mot. at 2. The Complaint specifically alleges that Defendants' agents resisted Plaintiffs' efforts to enter the country and excluded them at the border. Compl. at ¶¶ 33, 62, 84, 87–97, 107–18, 121–23, 128–31, 134–36, 141–44, 150–51, 155–56, 167, 174, 181, 185–88, 192–93, 197, 199. The Complaint also specifically alleges that U.S. officials did so because Plaintiffs indicated a desire to seek asylum in the United States. *Id.* at ¶¶ 32, 34, 86, 94, 100, 105, 114, 116, 121, 144, 158, 181, 192. Defendants do not claim otherwise. Consistent with the Supreme Court's view that Article 33 prohibits the "repuls[ion]" or "exclu[sion]" of refugees "at the border," turning Plaintiffs back at the border and denying them access to the asylum process is a core example of the type of activity that Article 33 prohibits.

III. CONCLUSION

For these reasons, *Amici Curiae* respectfully suggest that Defendants' Motion to Partially Dismiss the Second Amended Complaint be denied as to the new Individual Plaintiffs.

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Respectfully submitted,

By 

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