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18 UNITED STATES DISTRICT COURT
19 SOUTHERN DISTRICT OF CALIFORNIA

20 Al Otro Lado, Inc., et al.,
21 Plaintiffs,
22 v.
23 Kirstjen M. Nielsen, et al.,
24 Defendants.

Case No.: 3:17-cv-02366-BAS-KSC
Hon. Cynthia A. Bashant
Courtroom 4B

**AMICUS BRIEF OF MEMBERS OF
CONGRESS IN SUPPORT OF
PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS THE SECOND AMENDED
COMPLAINT**

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4 *City & County of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018)..... 10

5 *East Bay Sanctuary Covenant v. Trump* (“*East Bay Sanctuary I*”), No. 18-

6 CV-06810-JST, 2018 WL 6053140 (N.D. Cal. Nov. 19, 2018) 8, 10

7 *East Bay Sanctuary Covenant v. Trump* (“*East Bay Sanctuary II*”), 909 F.3d

8 1219 (9th Cir. 2018) 6, 8, 10

9 *INS v. Chadha*, 462 U.S. 919 (1983) 10

10 *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) 8

11 *Trump v. Hawaii*, 138 S. Ct. 2392 (2018)..... 10

12 *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014)..... 10

13 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)..... 10

14

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16 8 C.F.R. § 235.3 9

17 8 U.S.C. § 1158..... 1, 6, 8, 9

18 8 U.S.C. § 1225..... 1, 8, 9

19 8 U.S.C. § 1229a..... 9

20 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div.

21 C of Pub. L. No. 104-208, 110 Stat. 3009-546..... 6

22 Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*..... 1

23 Refugee Act of 1980, Pub. L. No. 96–212, § 101(a), 94 Stat. 102..... 1, 5, 6, 10, 11

24

LEGISLATIVE MATERIALS

25

26 125 Cong. Rec. 23,231-32 (1979)..... 5, 6

27 126 Cong. Rec. 3,757 (1980)..... 5

28 126 Cong. Rec. 4,500 (1980)..... 5

1 126 Cong. Rec. 4,507 (1980) 10

2 164 Cong. Rec. H5430-31 (daily ed. June 21, 2018) 7

3 Asylum Reform and Border Protection Act of 2017, H.R. 391, 115th Cong.

4 § 4 (2017)..... 7

5 Border Security and Immigration Reform Act of 2018, H.R. 6136, 115th

6 Cong., title IV, §§ 4101, 4108 (2018) 7

7 H. Rep. No. 104-469, pt. 1 (1996) 7

8 Hearing on S. 269 Before the S. Comm. on the Judiciary, 104th Cong. 23

9 (1995)..... 6

10 S. 3372, 115th Cong. § 2 (2018)..... 7

11 Securing America’s Future Act of 2018, H.R. 4760, 115th Cong., title

12 IV, §§ 4402, 4408 (2018) 7

13 Senate Amendment 5 to H.R. 268, 116th Cong., Div. L § 102(2), 165 Cong.

14 Rec. S472 (daily ed. Jan. 22, 2019)..... 8

15 **OTHER AUTHORITIES**

16 1951 Convention Relating to the Status of Refugees, July 28, 1951, 189

17 U.N.T.S. 150 6

18 CBP, *Claims of Fear: CBP Southwest Border and Claims of Credible Fear*

19 *Total Apprehensions/Inadmissibles (FY2017 - FY2018)* 3, 9

20 CBP, *Southwest Border Migration FY2017* 3

21 CBP, *Southwest Border Migration FY2018* 3

22 CBP, *U.S. Border Patrol Monthly Apprehensions (FY 2000 – FY 2017)* 2

23 David Shepardson, *Trump Says Family Separations Deter Illegal*

24 *Immigration*, Reuters (Oct. 13, 2018) 5

25 Dep’t of Homeland Sec., CBP, *Budget Overview Fiscal Year 2019*..... 4

26 Human Rights First, *Refugee Blockade: The Trump Administration’s*

27 *Obstruction of Asylum Claims at the Border* (December 2018) 3

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1 Letter from Ranking Members of House Committees on Judiciary,
2 Homeland Sec., and Subcommittee on Immigration and Border Sec. to
3 Commissioner, CBP (Dec. 17, 2018) 4
4 Manny Fernandez, Caitlin Dickerson & Paulina Villegas, *The Price of*
5 *Trump’s Migrant Deterrence Strategy: New Chaos on the Border*,
6 N.Y. Times (Jan. 4, 2019) 4
7 Press Release, DHS, Secretary Kirstjen M. Nielsen Announces Historic
8 Action to Confront Illegal Immigration (Dec. 20, 2018) 2
9 Ryan Miller, *Inhofe to Introduce New Asylum Bill to Senate*, Enid News &
10 Eagle (Aug. 8, 2018)..... 7
11 *Transcript: White House Chief of Staff John Kelly’s Interview With NPR*,
12 NPR (May 11, 2018)..... 5
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1 **INTEREST OF AMICI CURIAE**

2 Amici are members of Congress who are familiar with the Immigration and
3 Nationality Act (“INA”), 8 U.S.C. § 1101 *et seq.* Amici have a strong interest in
4 ensuring that the Executive Branch respects the role of Congress and faithfully
5 implements the INA. Amici are well suited to provide the Court with insights concerning
6 Congress’s intent in enacting the INA, the INA’s strict requirements in relation to asylum
7 seekers, and the conflict between the intent and requirements of the INA and the
8 Executive Branch practices challenged in this litigation. A complete list of amici is set
9 forth in the appendix to this brief.

10 **SUMMARY OF ARGUMENT**

11 There is reason to believe that the U.S. Department of Homeland Security (“DHS”)
12 is violating the INA by attempting to deter asylum seekers through artificial limitations
13 on arriving noncitizens’ access to ports of entry and to the asylum process. The asylum
14 provisions of the INA reflect the intent of Congress to “respond to the urgent needs of
15 persons subject to persecution in their homelands.” Refugee Act of 1980, Pub. L. No.
16 96–212, § 101(a), 94 Stat. 102, 102. To that end, the INA requires that arriving
17 noncitizens be afforded specific procedural protections including, in virtually every
18 instance, an opportunity to apply for asylum. 8 U.S.C. §§ 1158, 1225. Nothing in the
19 INA permits DHS to deny arriving noncitizens those protections, even temporarily, based
20 on the policy preferences of the Executive Branch.

21 **BACKGROUND**

22 As plaintiffs allege and DHS has acknowledged, DHS is limiting access by
23 arriving noncitizens to ports of entry and to the asylum process. As explained in
24 plaintiffs’ Second Amended Complaint (“SAC”) and in a September 2018 report of
25 DHS’s Office of Inspector General (“OIG Report”), U.S. Customs and Border Protection
26 (“CBP”) is “regulating the flow of asylum-seekers at ports of entry through ‘metering,’ a
27 practice CBP has utilized at least as far back as 2016.” SAC ¶ 70, ECF No. 189; *see also*
28 *id.* ¶¶ 51-57 (citing internal CBP documents that discuss controlling the flow of migrants

1 at ports of entry). Specifically, “‘CBP officers stand at the international line out in the
2 middle of the footbridges,’ checking pedestrians’ travel documents, and preventing
3 asylum-seekers from crossing the international line until space is ‘available ... to hold the
4 individual while being processed.’” *Id.* ¶ 70 n.61 (quoting OIG Report).

5 The Executive Branch has argued that it lacks the capacity to deal with the “illegal
6 immigration crisis facing the United States.”¹ DHS Secretary Kirstjen M. Nielsen has
7 acknowledged that the government is “metering,” explaining that “if we don’t have the
8 resources to let [asylum-seekers] in on a particular day, they are going to have to come
9 back.” SAC ¶ 65 (quoting May 2018 Fox News interview). CBP Commissioner Kevin
10 K. McAleenan, similarly, has said that individuals arriving at the San Ysidro port of entry
11 “may need to wait in Mexico as CBP officers work to process those already within our
12 facilities.” *Id.* ¶ 68 n.56. Defendants offer the same rationale in this case, arguing that
13 “metering” is an “operational decision to control the flow of travel across the U.S.-
14 Mexico border based on operational constraints at the ports of entry.” Defs.’ Mem. Supp.
15 Mot. Dismiss 2-3 (“Defs. Mem.”), ECF No. 192-1.

16 However, CBP’s own statistics undermine the claim that it lacks sufficient capacity
17 to process arriving noncitizens. Apprehensions at the southern border dropped from
18 approximately 1.6 million in FY 2000 to approximately 300,000 in FY 2017.² The
19 number increased in FY 2018 to just under 400,000, but remains significantly below
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23 ¹ Press Release, DHS, Secretary Kirstjen M. Nielsen Announces Historic Action to
24 Confront Illegal Immigration (Dec. 20, 2018),
[https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-
25 confront-illegal-immigration](https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration).

26 ² CBP, *U.S. Border Patrol Monthly Apprehensions (FY 2000 – FY 2017)*,
[https://www.cbp.gov/sites/default/files/assets/documents/2017-
27 Dec/BP%20Total%20Monthly%20Apps%20by%20Sector%20and%20Area%2C%20FY
28 2000-FY2017.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2017-
27 Dec/BP%20Total%20Monthly%20Apps%20by%20Sector%20and%20Area%2C%20FY
28 2000-FY2017.pdf) (last visited Feb. 15, 2019).

1 historical levels.³ To be sure, the number of individuals arriving at ports of entry along
2 the southern border who assert a credible fear of returning to their home countries, the
3 foundation of an asylum claim, has increased over the past year from 17,284 to 38,269,
4 potentially as a result of public statements by DHS urging asylum seekers to go to ports
5 of entry.⁴ But the total number of noncitizens arriving at ports of entry who were deemed
6 inadmissible increased by a much smaller margin. In 2018, that number was 124,511,
7 compared to 111,601 in 2017, 150,825 in 2016, and 114,486 in 2015.⁵ Moreover, the
8 rate at which DHS is processing asylum seekers is below CBP's own stated processing
9 capacity. In FY 2018, DHS processed an average of only 34 asylum seekers per day in
10 the San Diego field office area, even though CBP has claimed that the San Ysidro port of
11 entry has the ability to process 90 to 100 asylum seekers daily.⁶

12 Any contention that DHS lacks sufficient capacity to process the current volume of
13 noncitizens arriving at ports of entry is further belied by the administration's failure to
14 prioritize increasing that capacity. The operations and support budget for CBP's Office
15 of Field Operations ("OFO"), which manages ports of entry, was \$3,942,479,000 in FY
16 2017. In FY 2018, the President's budget called for a *smaller* amount (\$3,900,330,000).

18 ³ CBP, *Southwest Border Migration FY2018*, [https://www.cbp.gov/newsroom/stats/sw-](https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018)
19 [border-migration/fy-2018](https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018) (last visited Feb. 15, 2019).

20 ⁴ CBP, *Claims of Fear: CBP Southwest Border and Claims of Credible Fear Total*
21 *Apprehensions/Inadmissibles (FY2017 - FY2018)*,
22 <https://www.cbp.gov/newsroom/stats/sw-border-migration/claims-fear> (last visited Feb.
15, 2019).

23 ⁵ CBP, *Southwest Border Migration FY2018*, *supra* note 3; CBP, *Southwest Border*
24 *Migration FY2017*, <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2017>
(last visited Feb. 15, 2019).

25 ⁶ Human Rights First, *Refugee Blockade: The Trump Administration's Obstruction of*
26 *Asylum Claims at the Border*, at 13 (December 2018),
27 https://www.humanrightsfirst.org/sites/default/files/December_Border_Report.pdf.

1 And the FY 2019 request calls for a relatively modest 4.3 percent increase
2 (\$4,067,985,000).⁷ Additionally, the amount requested in the President’s budget for
3 construction and facility improvements at OFO facilities in FY 2019 is identical to the
4 amount requested in FY 2018.⁸ And, of the five facilities at which the President’s budget
5 contemplates expenditures to expand capacity and improve operations, only two are
6 located at the southern border.⁹

7 Finally, recent statements of DHS personnel suggest that DHS is limiting arriving
8 noncitizens’ access to ports of entry not because it lacks capacity but as a means of
9 deterring asylum seekers. During a joint DHS and Department of Defense staff briefing
10 on December 6, 2018, a CBP official stated that DHS had limited processing at the San
11 Ysidro port of entry because “[t]he more we process, the more will come.”¹⁰ Other DHS
12 officials have similarly indicated that the administration’s focus at the border “has just
13 been on how can we deter, rather than how can we handle.”¹¹

14 Any attempted deterrence would be consistent with the approach taken by the
15 Executive Branch to immigration policy generally. For example, in defending the
16 administration’s now-rescinded family separation policy, former White House Chief of
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18 ⁷ Dep’t of Homeland Sec., CBP, *Budget Overview Fiscal Year 2019*, at CBP – OS – 118,
19 [https://www.dhs.gov/sites/default/files/publications/U.S.%20Customs%20and%20Border](https://www.dhs.gov/sites/default/files/publications/U.S.%20Customs%20and%20Border%20Protection.pdf)
20 [%20Protection.pdf](https://www.dhs.gov/sites/default/files/publications/U.S.%20Customs%20and%20Border%20Protection.pdf).

21 ⁸ *Id.* at CBP – PC&I – 108.

22 ⁹ *Id.*

23 ¹⁰ Letter from Ranking Members of House Committees on Judiciary, Homeland Sec., and
24 Subcommittee on Immigration and Border Sec. to Commissioner, CBP (Dec. 17, 2018),
25 [https://democrats-](https://democrats-judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/Nadler-Lofgren-Thompson%2012.17%20Letter%20to%20CBP%20Commissioner.pdf)
[judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/Nadler-Lofgren-](https://democrats-judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/Nadler-Lofgren-Thompson%2012.17%20Letter%20to%20CBP%20Commissioner.pdf)
[Thompson%2012.17%20Letter%20to%20CBP%20Commissioner.pdf](https://democrats-judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/Nadler-Lofgren-Thompson%2012.17%20Letter%20to%20CBP%20Commissioner.pdf).

26 ¹¹ Manny Fernandez, Caitlin Dickerson & Paulina Villegas, *The Price of Trump’s*
27 *Migrant Deterrence Strategy: New Chaos on the Border*, N.Y. Times (Jan. 4, 2019),
28 <https://www.nytimes.com/2019/01/04/us/mexico-wall-policy-trump.html>.

1 Staff John Kelly noted that it “would be a tough deterrent. A much faster turnaround on
2 asylum seekers.”¹² Along the same lines, President Trump defended the family
3 separation policy by noting that if migrants “feel there will be separation, they don’t
4 come.”¹³ The limitations DHS has imposed on asylum seekers arriving at ports of entry
5 appear to reflect a similar deterrence-based strategy.

6 ARGUMENT

7 I. The INA Reflects the Intent of Congress to Facilitate Grants of Asylum

8 The asylum provisions of the INA reflect Congress’s intent to “give statutory
9 meaning to our national commitment to human rights and humanitarian concerns,” bring
10 federal law into conformity with the United States’s commitments under international
11 law, and address needs that “touch at the heart of America’s foreign policy.” 125 Cong.
12 Rec. 23,231-32 (1979) (statement of Sen. Kennedy).

13 Congress enacted the Refugee Act of 1980 in recognition that “[t]he refugees of
14 tomorrow, like the refugees of today, will continue to look to the United States for safe
15 haven and resettlement opportunities—and our Government will continue to be called
16 upon to help.” 126 Cong. Rec. 3,757 (1980) (statement of Sen. Kennedy). The Act set
17 out for the first time an “asylum procedure ... mandated in our immigration law.” 126
18 Cong. Rec. 4,500 (1980) (statement of Rep. Holtzman). It replaced what had been an “ad
19 hoc,” “inadequate,” and “discriminatory” administrative process, 125 Cong. Rec. 23,232
20 (1979) (statement of Sen. Kennedy), with a formal asylum application process for any
21 noncitizen “physically present in the United States or at a land border or port of entry,
22 irrespective of such alien’s status,” Refugee Act § 208(a) (current version, with similar
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24 ¹² *Transcript: White House Chief of Staff John Kelly’s Interview With NPR*, NPR (May
25 11, 2018), [https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-](https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr)
26 [staff-john-kellys-interview-with-npr](https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr).

27 ¹³ David Shepardson, *Trump Says Family Separations Deter Illegal Immigration*, Reuters
28 (Oct. 13, 2018), [https://www.reuters.com/article/us-usa-immigration-trump/trump-says-](https://www.reuters.com/article/us-usa-immigration-trump/trump-says-family-separations-deter-illegal-immigration-idUSKCN1MO00C)
[family-separations-deter-illegal-immigration-idUSKCN1MO00C](https://www.reuters.com/article/us-usa-immigration-trump/trump-says-family-separations-deter-illegal-immigration-idUSKCN1MO00C).

1 language, at 8 U.S.C. § 1158). Consistent with the statutory goal of providing refuge
2 where needed, the Act invested the Executive Branch with discretion in deciding whether
3 to grant asylum, but made access to the application process mandatory. *Id.*

4 The Refugee Act also intended to bring U.S. law “into conformity with the United
5 States’s obligations” under the 1951 Convention Relating to the Status of Refugees
6 (“1951 Convention”) and the 1967 Protocol Relating to the Status of Refugees (“1967
7 Protocol”). *East Bay Sanctuary Covenant v. Trump* (“*East Bay Sanctuary II*”), 909 F.3d
8 1219, 1233 (9th Cir. 2018); *see also* 125 Cong. Rec. 23,232 (1979) (statement of Sen.
9 Kennedy that the Act will “make our law conform to the United Nations Convention and
10 protocol relating to the status of refugees, which we signed in 1969”). The 1951
11 Convention precludes parties, including the United States, from “impos[ing] penalties, on
12 account of their illegal entry or presence, on refugees who, coming directly from a
13 territory where their life or freedom was threatened . . . , enter or are present in their
14 territory without authorization, provided they present themselves without delay to the
15 authorities and show good cause for their illegal entry or presence.” 1951 Convention,
16 art. 31, § 1, July 28, 1951, 189 U.N.T.S. 150, 174.

17 In 1996, Congress further amended the INA through the Illegal Immigration
18 Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Div. C of Pub. L. No.
19 104-208, 110 Stat. 3009-546. That law, which required stricter asylum procedures,
20 continued to reflect the legislative conviction that asylum was “a cherished thing.”
21 Proposals to Reduce Illegal Immigration and Control Costs to Taxpayers: Hearing on S.
22 269 Before the S. Comm. on the Judiciary, 104th Cong. 23 (1995) (statement of Sen.
23 Simpson). While IIRIRA tightened asylum procedures, it also preserved the requirement
24 to permit otherwise inadmissible noncitizens to apply for asylum if they feared
25 persecution abroad. This continued protection for asylum seekers reflects Congress’s
26 long-held belief that the United States, “[a]s a nation of immigrants” and an “island of
27 freedom” to which “the world has looked as both protector and exemplar,” has a
28 “singular interest that its immigration laws encourage the admission of persons who will

1 enrich our society.” H. Rep. No. 104-469, pt. 1, at 110 (1996) (quoting in part President
2 Reagan).

3 Confirming its intent to facilitate grants of asylum where warranted, Congress has
4 repeatedly rejected efforts to limit the number of asylum applicants. In 2018, for
5 example, Senator James Inhofe introduced the Asylum Abuse Reduction Act, which
6 would have prohibited migrants from applying for asylum at the border, requiring
7 prospective applicants to instead travel to a U.S. embassy or consulate for an interview
8 with an asylum officer. S. 3372, 115th Cong. § 2 (2018). Sen. Inhofe told an Oklahoma
9 newspaper that “[t]o resolve the large numbers [of asylum-seekers at the border,] the only
10 thing you have to do is not allow them to come into the United States.”¹⁴ The bill died in
11 committee. Another set of similar bills—including one that a co-sponsor acknowledged
12 was intended to deter asylum seekers—was equally unsuccessful in the House of
13 Representatives. *See* 164 Cong. Rec. H5430-31 (daily ed. June 21, 2018) (statement of
14 Rep. McCaul) (“[H.R. 4760] protects [children seeking asylum and separated from their
15 parents] because it provides a deterrent for them not to come here in the first place.”).
16 These bills would have raised the burden of proof in credible fear interviews and
17 introduced harsh criminal penalties for making any false statements in the asylum
18 interview process. Each failed to pass. *See* Securing America’s Future Act of 2018, H.R.
19 4760, 115th Cong., title IV, §§ 4402, 4408 (2018) (defeated on the floor 193-231);
20 Border Security and Immigration Reform Act of 2018, H.R. 6136, 115th Cong., title IV,
21 §§ 4101, 4108 (2018) (failed twice on the floor 121-301 and 190-230); Asylum Reform
22 and Border Protection Act of 2017, H.R. 391, 115th Cong. § 4 (2017) (died in
23 committee). And as recently as this year, the Senate rejected a bill aimed at “reduc[ing]

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26 ¹⁴ Ryan Miller, *Inhofe to Introduce New Asylum Bill to Senate*, Enid News & Eagle (Aug.
27 8, 2018) (“It’s an obvious solution to a problem Now if we don’t do anything, that’s
28 going to go right back up to the large numbers that we had under the Obama
administration.”), [https://www.enidnews.com/oklahoma/news/inhofe-to-introduce-new-
asylum-bill-to-senate/article_1d30f74d-1595-5ba5-9946-4082b68b4cc2.html](https://www.enidnews.com/oklahoma/news/inhofe-to-introduce-new-asylum-bill-to-senate/article_1d30f74d-1595-5ba5-9946-4082b68b4cc2.html).

1 the incentive ... to make the dangerous journey to the United States southern border to
 2 request asylum” by, among other things, placing numerical limits on asylum processing
 3 and grants. Senate Amendment 5 to H.R. 268, 116th Cong., Div. L § 102(2), 165 Cong.
 4 Rec. S472 (daily ed. Jan. 22, 2019) (failed 50-47).

5 II. The INA Imposes Strict Procedural Requirements Concerning Access to the
 6 Asylum Process

7 In fulfillment of the legislative purposes just described, the INA requires that an
 8 opportunity to apply for asylum be afforded to nearly all arriving noncitizens, and it
 9 charges immigration officers with facilitating the asylum application process.

10 With three narrow exceptions not relevant here,¹⁵ the INA states that “any alien ...
 11 who arrives in the United States” may apply for asylum whether or not she arrives at a
 12 designated port of entry and irrespective of her immigration status. 8 U.S.C. § 1158(a)(1)
 13 (emphasis added). Courts have recognized this legislative command “that any alien who
 14 arrives in the United States, irrespective of that alien’s status, may apply for asylum.”
 15 *East Bay Sanctuary Covenant v. Trump* (“*East Bay Sanctuary I*”), No. 18-CV-06810-
 16 JST, 2018 WL 6053140, at *1 (N.D. Cal. Nov. 19, 2018); *see also Orantes-Hernandez v.*
 17 *Thornburgh*, 919 F.2d 549, 553 (9th Cir. 1990) (stating that “all aliens possess such a
 18 right” to apply for asylum).

19 The INA also describes specific procedural protections that must be afforded to
 20 asylum seekers. First, any noncitizen who is “seeking admission” to the United States
 21 “shall be inspected by immigration officers.” 8 U.S.C. § 1225(a)(3) (emphasis added).
 22 Second, virtually all arriving noncitizens are entitled to an opportunity to request asylum.
 23

24
 25 ¹⁵ “Section 1158(a) makes three classes of aliens categorically ineligible to apply for
 26 asylum: those who may be removed to a ‘safe third country’ in which their ‘life or
 27 freedom would not be threatened’ and where they would have access to equivalent
 28 asylum proceedings; those who fail to file an application within one year of arriving in
 the United States; and those who have previously applied for asylum and been denied.”
East Bay Sanctuary II, 909 F.3d at 1234.

1 Specifically, under the expedited removal process that applies to most noncitizens
2 arriving at ports of entry along the U.S.-Mexico border without valid entry documents,
3 *see id.* § 1225(b)(1)(A), if an immigration officer determines that a noncitizen is
4 inadmissible, “the officer shall order the alien removed from the United States without
5 further hearing or review *unless* the alien indicates either an intention to apply for asylum
6 ... or a fear of persecution.” *Id.* § 1225(b)(1)(A)(i) (emphasis added). And if such a
7 noncitizen “indicates either an intention to apply for asylum ... or a fear of persecution,
8 the officer *shall* refer the alien for an interview by an asylum officer.” *Id.*
9 § 1225(b)(1)(A)(ii) (emphasis added). A person placed directly into ordinary removal
10 proceedings under § 240 of the INA need not be granted an interview with an asylum
11 officer, but (with limited exceptions) must still be permitted to seek asylum. *See id.*
12 §§ 1158, 1225(b)(2)(A), 1229a(c)(4).

13 DHS has repeatedly acknowledged the mandatory nature of the asylum process.
14 DHS regulations state, for example, that if a noncitizen “subject to the expedited removal
15 provisions indicates an intention to apply for asylum, or expresses a fear of persecution or
16 torture, or a fear of return to his or her country, the inspecting officer *shall not proceed*
17 *further* with removal of the alien until the alien has been referred for an interview by an
18 asylum officer.” 8 C.F.R. § 235.3(b)(4) (emphasis added). And public statements of
19 CBP recognize that its agents implementing the expedited removal process have “no
20 discretion as to whether or not to refer an alien for a credible fear interview.”¹⁶

21 III. DHS’s Practice of Deterring Asylum Seekers by Limiting Access to Ports of
22 Entry and the Asylum Process Violates the INA

23 The Executive Branch is bound to implement duly enacted laws, including the
24 asylum provisions articulated by Congress in the INA. “In the framework of our
25

26
27 ¹⁶ *Claims of Fear, supra* note 4 (“CBP Agents and Officers do not make any
28 determination on the validity of such claims and refer the person for an interview with
[an] Asylum Officer.”).

1 Constitution, the President’s power to see that the laws are faithfully executed refutes the
2 idea that he is to be a lawmaker.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S.
3 579, 587 (1952). The Framers left it to Congress, not the Executive Branch, to exercise
4 “the legislative power of the Federal government” using the “single, finely wrought and
5 exhaustively considered, procedure” they prescribed. *INS v. Chadha*, 462 U.S. 919, 951
6 (1983). It follows that “[t]he power of executing the laws ... does not include a power to
7 revise clear statutory terms that turn out not to work in practice.” *Util. Air Regulatory*
8 *Grp. v. EPA*, 573 U.S. 302, 327 (2014). Much less may the executive “decline to follow
9 a statutory mandate or prohibition simply because of policy objections.” *City & Cnty. of*
10 *San Francisco v. Trump*, 897 F.3d 1225, 1232 (9th Cir. 2018) (quoting *In re Aiken Cnty.*,
11 725 F.3d 255, 259 (D.C. Cir. 2013)).

12 The Refugee Act “mandates a procedure for the consideration of asylum claims by
13 people who are here on our shores”—a procedure DHS is bound to follow. 126 Cong.
14 Rec. 4,507 (1980) (statement of Rep. Holtzman). Nothing in the INA permits the
15 Executive Branch to refuse to implement any aspect of the statutory scheme described
16 above based upon its own policy judgments. As recognized by the Ninth Circuit in a
17 recent case addressing one of the statutory provisions at issue here, “[w]here ‘Congress
18 itself has significantly limited executive discretion by establishing a detailed scheme that
19 the Executive must follow in [dealing with] aliens,’ the Attorney General may not
20 abandon that scheme because he thinks it is not working well.” *East Bay Sanctuary II*,
21 909 F.3d at 1250 (citation omitted). Noting that Congress “codified our obligation to
22 receive” asylum-seekers in the INA, *id.* at 1230, the court held that allowing the
23 Executive Branch to modify the asylum application process would do “indirectly what
24 the Executive cannot do directly: amend the INA,” *id.* at 1250; *see also Trump v.*
25 *Hawaii*, 138 S. Ct. 2392, 2411 (2018) (noting that the President may not “override
26 particular provisions of the INA”). The Ninth Circuit affirmed the district court’s
27 decision that the administration’s denial of asylum to migrants arriving between ports of
28 entry “irreconcilably conflicts with the INA and the expressed intent of Congress.” *East*

1 *Bay Sanctuary I*, 2018 WL 6053140, at *1. The same conclusion applies with at least
2 equal force where DHS is refusing—even temporarily—to process asylum applications
3 from noncitizens who are following DHS’s directive to go to ports of entry and seek
4 asylum there.

5 For DHS to violate the INA’s provisions concerning asylum, not based on any
6 genuine lack of capacity to comply, but as a means of *detering asylum seekers*, is
7 especially problematic. That is because doing so directly contravenes the intent of
8 Congress in enacting the INA: to make the asylum process, including specific procedural
9 protections, accessible to virtually all arriving noncitizens. The Refugee Act aimed to
10 “respond to the urgent needs of persons subject to persecution in their homelands.”
11 Refugee Act § 101(a). DHS may not flout that purpose by artificially limiting arriving
12 noncitizens’ access to ports of entry and to the asylum process in order to deter such
13 noncitizens from seeking asylum at all. To the extent DHS is doing so, it is violating the
14 letter and spirit of the INA.

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16 DATED: February 21, 2019

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18 By: /s/ Matthew D. Benedetto
19 Matthew D. Benedetto

20 *Attorney for Amici Curiae Members of*
21 *Congress*

APPENDIX: LIST OF AMICI

- 1
- 2 Jerrold Nadler, Representative of New York
- 3 Zoe Lofgren, Representative of California
- 4 Bennie G. Thompson, Representative of Mississippi
- 5 Nanette Diaz Barragán, Representative of California
- 6 Suzanne Bonamici, Representative of Oregon
- 7 Julia Brownley, Representative of California
- 8 Tony Cárdenas, Representative of California
- 9 André Carson, Representative of Indiana
- 10 Joaquin Castro, Representative of Texas
- 11 Judy Chu, Representative of California
- 12 David N. Cicilline, Representative of Rhode Island
- 13 Gilbert R. Cisneros, Jr., Representative of California
- 14 Yvette D. Clarke, Representative of New York
- 15 Steve Cohen, Representative of Tennessee
- 16 Bonnie Watson Coleman, Representative of New Jersey
- 17 Lou Correa, Representative of California
- 18 Elijah E. Cummings, Representative of Maryland
- 19 Susan A. Davis, Representative of California
- 20 Madeleine Dean, Representative of Pennsylvania
- 21 Diana DeGette, Representative of Colorado
- 22 Val B. Demings, Representative of Florida
- 23 Mark DeSaulnier, Representative of California
- 24 Theodore E. Deutch, Representative of Florida
- 25 Eliot Engel, Representative of New York
- 26 Veronica Escobar, Representative of Texas
- 27 Adriano Espaillat, Representative of New York
- 28 Bill Foster, Representative of Illinois

- 1 Marcia L. Fudge, Representative of Ohio
- 2 Jesús G. “Chuy” García, Representative of Illinois
- 3 Sylvia Garcia, Representative of Texas
- 4 Jimmy Gomez, Representative of California
- 5 Vicente Gonzalez, Representative of Texas
- 6 Al Green, Representative of Texas
- 7 Raúl Grijalva, Representative of Arizona
- 8 Deb Haaland, Representative of New Mexico
- 9 Denny Heck, Representative of Washington
- 10 Sheila Jackson Lee, Representative of Texas
- 11 Pramila Jayapal, Representative of Washington
- 12 Henry C. “Hank” Johnson, Jr., Representative of Georgia
- 13 Joseph P. Kennedy, III, Representative of Massachusetts
- 14 Dan Kildee, Representative of Michigan
- 15 Raja Krishnamoorthi, Representative of Illinois
- 16 Brenda L. Lawrence, Representative of Michigan
- 17 Andy Levin, Representative of Michigan
- 18 John Lewis, Representative of Georgia
- 19 Ted W. Lieu, Representative of California
- 20 Alan Lowenthal, Representative of California
- 21 James P. McGovern, Representative of Massachusetts
- 22 Jerry McNerney, Representative of California
- 23 Gwen Moore, Representative of Wisconsin
- 24 Debbie Mucarsel-Powell, Representative of Florida
- 25 Grace F. Napolitano, Representative of California
- 26 Joe Neguse, Representative of Colorado
- 27 Eleanor Holmes Norton, Representative of the District of Columbia
- 28 Ilhan Omar, Representative of Minnesota

- 1 Chellie Pingree, Representative of Maine
- 2 David E. Price, Representative of North Carolina
- 3 Jamie Raskin, Representative of Maryland
- 4 Kathleen M. Rice, Representative of New York
- 5 Cedric L. Richmond, Representative of Louisiana
- 6 Harley Rouda, Representative of California
- 7 Linda Sánchez, Representative of California
- 8 Mary Gay Scanlon, Representative of Pennsylvania
- 9 Jan Schakowsky, Representative of Illinois
- 10 Albio Sires, Representative of New Jersey
- 11 Darren Soto, Representative of Florida
- 12 Jackie Speier, Representative of California
- 13 Eric Swalwell, Representative of California
- 14 Dina C. Titus, Representative of Nevada
- 15 Rashida Tlaib, Representative of Michigan
- 16 Norma Torres, Representative of California
- 17 Lauren Underwood, Representative of Illinois
- 18 Juan Vargas, Representative of California
- 19 Filemon Vela, Representative of Texas
- 20 Nydia M. Velázquez, Representative of New York
- 21 Peter Welch, Representative of Vermont
- 22 John A. Yarmuth, Representative of Kentucky

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