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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.

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

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

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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:

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 n 26(e)-247t3/O2duB

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

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

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.

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

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

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*

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,

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Respectfully submitted,

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