

1 Susan Baker Manning, Bar No. 197350
MORGAN, LEWIS & BOCKIUS LLP
2 1111 Pennsylvania Avenue, NW
Washington, DC 20004
3 Tel: +1.202.739.3000
Fax: +1.202.739.3001
4 susan.manning@morganlewis.com

5 Sabin Willett
MORGAN, LEWIS & BOCKIUS LLP
6 One Federal Street
Boston, Massachusetts 02110
7 Tel: +1.617.341.7700
Fax: +1.617.341.7701
8 sabin.willett@morganlewis.com

9 (Additional Attorneys Listed
on Signature Page)

10 Attorneys for *Amici Curiae*

11
12 UNITED STATES DISTRICT COURT
13 SOUTHERN DISTRICT OF CALIFORNIA
14 SAN DIEGO DIVISION

15
16 AL OTRO LADO, INC., *et al.*,
17 Plaintiffs,
18 vs.
19 KIRSTJEN M. NIELSEN, *et al.*,
20 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**

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

I. INTEREST OF AMICI CURIAE 1

II. INTRODUCTION 2

 A. Governing Law Requires that the Extraterritoriality Arguments Be Reviewed Only Upon a Full Factual Record. 4

 B. Even If the New Individual Plaintiffs Were Turned Back Steps from the Border, They State Cognizable Claims. 5

 1. **Under the INA, CBP Officials May Not Deny the New Individual Plaintiffs Access to the Asylum Process.** 6

 a. **Extraterritorial Application of U.S. Statutes**..... 6

 b. **The Statutory Text Makes Asylum Available to Noncitizens Who Are at, But May Not Have Yet Crossed, the Border.** 7

 c. **Agency Interpretation of the INA Confirms That Asylum Is Available to Noncitizens Who Are at, But May Not Have Yet Crossed, the Border.** 10

 d. ***Salé* Does Not Support Defendants’ Statutory Interpretation.**12

 2. **CBP Officials May Not Deny Plaintiffs Access to the Asylum Process Without Due Process.**..... 12

 3. **The United States’ *Non-Refoulement* Obligations Prohibit It from Denying Noncitizens at The Border from Access to The Asylum Process.**..... 17

III. CONCLUSION 20

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

Cases

Ark. Game & Fish Com’n v. United States,
568 U.S. 23 (2012) 18–19

Blazevska v. Raytheon Aircraft Co.,
522 F.3d 948 (9th Cir. 2008) 18

Boumediene v. Bush,
553 U.S. 723 (2008) 12–13, 14, 16–17

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,
467 U.S. 837 (1984) 11

Cohens v. Virginia,
19 U.S. (6 Wheat.) 264, 399 (1821) 19

Duncan v. Walker,
533 U.S. 167 (2001) 9

In re French,
320 B.R. 78 (D. Md. 2004)..... 18

In re French,
440 F.3d 145 (4th Cir. 2006) 18

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. (1997) 20

Hernandez v. Mesa,
137 S. Ct. 2003 (2017) 15

Jamaa v. Italy (No. 27765/09), 2012-II Eur. Ct. H.R. 97 (2012)..... 19–20

Kiobel v. Royal Dutch Petrol. Co.,
569 U.S. 108 (2013) 7

Ibrahim v. Dep’t of Homeland Sec.,
669 F.3d 983 (9th Cir. 2012) 13

1 *Johnson v. Eisentrager*,
 2 339 U.S. 763 (1950) 13

3 *Loughrin v. United States*,
 4 573 U.S. 351 (2014) 9

5 *Morrison v. Nat’l Austl. Bank Ltd.*,
 6 561 U.S. 247 (2010) 7

7 *Reid v. Covert*,
 8 354 U.S. 1 (1957) 13

9 *RJR Nabisco, Inc. v. European Cmty.*,
 10 136 S. Ct. 2090 (2016) 6–7

11 *Rodriguez v. Swartz*,
 12 899 F.3d 719 (9th Cir. 2018) 7, 13, 14, 15

13 *Ruiz-Diaz v. United States*,
 14 618 F.3d 1055 (9th Cir. 2010) 11

15 *Sale v. Haitian Ctrs. Council, Inc.*,
 16 509 U.S. 155 (1993) 3, 11–12, 13, 17–20

17 *Thompson v. Davis*,
 18 295 F.3d 890 (2002) 5

19 *United States v. Balint*,
 20 201 F.3d 928 (7th Cir. 2000) 9

21 *United States v. Delgado-Garcia*,
 22 374 F.3d 1337 (D.C. Cir. 2004) 12

23 *United States v. Verdugo-Urquidez*,
 24 494 U.S. 259 (1990) 13

25 *W. Geco LLC v. ION Geophysical Corp.*,
 26 138 S. Ct. 2129 (2018) 6

27 **Statutes**

28 8 U.S.C. § 1158(a)(1) 2, 8, 10, 11, 12

8 U.S.C. § 1225(a)(1) 8

1 8 U.S.C. § 1225(a)(3) 8, 9, 10, 11, 12

2 8 U.S.C. § 1225(b)(1) 8, 10, 12

3 8 U.S.C. § 1253(h) (1988) 12

4 Immigration and Nationality Act (“INA”),

5 8 U.S.C. §§ 1101–1537 1, 2, 3, 4, 5, 6, 10, 12, 16, 18

6 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE

7 UNITED STATES §§ 402–03, at 237–54 (AM. LAW INST. 1987)..... 14

8 Refugee Act of 1980

9 Pub. L. No. 96-212, § 101(a), (b), 94 Stat. 102, 102..... 5

10 Treaty to Resolve Pending Boundary Differences and Maintain the Rio

11 Grande and Colorado River as the International Boundary, art. IV,

12 Nov. 23, 1970, 23 U.S.T. 390, T.I.A.S. No. 7313..... 14–15

13 Treaty on the Utilization of Waters of Colorado and Tijuana Rivers

14 and of the Rio Grande,

15 Feb. 3, 1944, art. 2, 59 Stat. 1219, T.S. No. 904 15

16 United Nations Protocol Relating to the Status of Refugees,

17 art. 33.1, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 17, 18, 19, 20

18 **Other Authorities**

19 8 C.F.R. § 1.2..... 2, 10

20 8 C.F.R. § 235.3(b)(1)(i), (b)(4) 2, 10

21 Eva Bitran, Note, *Boumediene at the Border? The Constitution and*

22 *Foreign Nationals on the U.S.-Mexico Border*,

23 49 HARV. C.R.-C.L. L. REV. 229, 244–47 (2014) 14

24 THE COMPACT OXFORD ENGLISH DICTIONARY 1564 (2d ed. 1989) 17–18

25 Anil Kalhan, *Immigration Surveillance*,

26 74 MD. L. REV. 1, 65–68 (2014) 15

27 *Implementation of Title III of the Illegal Immigration Reform and*

28 *Immigrant Responsibility Act of 1996*,

105th Cong. 17–18 (1997)..... 11–12

1 S. Rep. No. 96-256, at 1 (1979)..... 5–6

2 *Securing Our Borders—Operational Control and the Path Forward,*

3 112th Cong. 8 (2011)..... 14

4 U.N. High Comm’r for Refugees, Advisory Opinion on the

5 Extraterritorial Application of *Non-Refoulement* Obligations under

6 the 1951 Convention relating to the Status of Refugees and its 1967

7 Protocol 12 (Jan. 26, 2007) 19

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 **I. INTEREST OF AMICI CURIAE**

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

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

28 _____
¹ All academic affiliations are listed for identification purposes only.

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

4 **II. INTRODUCTION**

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

10 *Amici* submit that asylum is no game. The border is not a football field, and
11 neither the U.S. Code nor the Constitution halts abruptly at a pinpoint in the desert
12 or an eddy in a river. The “border” is more than a cartographical concept. It is built
13 of ports of entry, of mountains, rivers, tidal areas that are land one hour and water six
14 hours later, and of many places where, as the Complaint alleges, U.S. power regularly
15 crosses the cartographer’s line. Congress chose prepositions and gerundives to match
16 the border’s complexity, conferring rights on the asylum seeker when she is “at” the
17 border, granting rights to an “arriving” class. 8 U.S.C. § 1158(a)(1); *see also* 8 C.F.R.
18 § 1.2; 8 C.F.R. § 235.3(b)(1)(i), (b)(4). And as Constitutional jurisprudence teaches,
19 if all that held an asylum seeker from the engineer’s line was the force or suasion of
20 a burly lineman cloaked with federal authority, then perforce that plaintiff had
21 already reached a place where the applicant’s rights are found.

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

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

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

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

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

24 _____
25 ² *Amici* do not address Defendants’ arguments that the Second Amended Complaint
26 should be dismissed as to organizational Plaintiff Al Otro Lado or any of the
27 Individual Plaintiffs who were part of the original complaint in this action, and who
28 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).

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

4 *Amici* therefore respectfully suggest that Defendants’ Motion to Dismiss
5 should be denied as to the eight new Individual Plaintiffs.

6 **III. DEFENDANTS CANNOT EVADE THEIR LEGAL DUTIES BY** 7 **INTERCEPTING ASYLUM SEEKERS STEPS FROM U.S. SOIL.**

8 **A. Governing Law Requires that the Extraterritoriality Arguments** 9 **Be Reviewed Only Upon a Full Factual Record.**

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

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

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

28 *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.* ¶¶

1 33, 185, & 187–88 (Bianca); *id.* ¶¶ 34 & 193 (Emiliana); and *id.* ¶¶ 35 & 199 (César).
 2 It is undisputed that all U.S. ports of entry “are located within the territorial United
 3 States.” Mot. at 11. Thus, the allegation that each new Individual Plaintiff presented
 4 himself or herself “at” a port of entry where he or she spoke to CBP officials is a
 5 plain assertion that each new Individual Plaintiff had sufficient “presence” in the
 6 United States to seek asylum. *See, e.g., Thompson v. Davis*, 295 F.3d 890, 895 (9th
 7 Cir. 2002) (“All allegations of material fact are taken as true and construed in the
 8 light most favorable to the nonmoving party.”). Whatever the significance of
 9 cartography to the ultimate question whether a plaintiff was “at” the border, the
 10 question depends on a factual record that does not yet exist. Given the importance of
 11 the legal questions presented, *Amici* suggest that the Court should resolve them only
 12 upon development of that factual record.

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

15 It has been nearly forty years since Congress amended the INA to replace the
 16 *ad hoc* refugee and asylum system that grew up over the preceding century to
 17 establish “for the first time a comprehensive United States refugee resettlement and
 18 assistance policy.” S. Rep. No. 96-256, at 1 (1979). The Refugee Act of 1980
 19 amended the INA to “a permanent and systematic procedure for the admission to this
 20 country of refugees of special humanitarian concern to the United States.” Refugee
 21 Act of 1980, Pub. L. No. 96-212, § 101(b), 94 Stat. 102, 102. Explaining the purpose
 22 of the law, Congress declared:

23 [I]t is the historic policy of the United States to respond to
 24 the urgent needs of persons subject to persecution in their
 25 homelands, including, where appropriate, humanitarian
 26 assistance for their care and maintenance in asylum areas,
 27 efforts to promote opportunities for resettlement or
 28 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

1 America’s history—welcoming homeless refugees to our shores” and “gives
2 statutory meaning to our national commitment to human rights and humanitarian
3 concerns.” S. Rep. No. 96-256, at 1.

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

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

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

25 **a. Extraterritorial Application of U.S. Statutes**

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

1 been rebutted—that is, whether the statute gives a clear, affirmative indication that it
 2 applies extraterritorially.” *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090,
 3 2101 (2016). “While the presumption can be overcome only by a clear indication of
 4 extraterritorial effect, an express statement of extraterritoriality is not essential.
 5 ‘Assuredly context can be consulted as well.’” *Id.* at 2102 (quoting *Morrison v. Nat’l*
 6 *Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010)).

7 If the statute clearly indicates that it applies extraterritorially, the analysis is
 8 complete because “[t]he scope of an extraterritorial statute [] turns on the limits
 9 Congress has (or has not) imposed on the statute’s foreign application[.]” *Id.*; *see also*
 10 *Rodriguez v. Swartz*, 899 F.3d 719, 747 (9th Cir. 2018) (the presumption against the
 11 extraterritorial application of a statute “can be overcome when actions ‘touch and
 12 concern the territory of the United States . . . with sufficient force to displace the
 13 presumption’”) (quoting *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 124–25,
 14 (2013)). If the statute does not clearly indicate that it applies extraterritorially, the
 15 court will consider “whether the case involves a domestic application of the
 16 statute . . . by looking to the statute’s ‘focus.’” *RJR Nabisco*, 136 S. Ct. at 2101. “If
 17 the conduct relevant to the statute’s focus occurred in the United States, then the case
 18 involves a permissible domestic application even if other conduct occurred abroad;
 19 but if the conduct relevant to the focus occurred in a foreign country, then the case
 20 involves an impermissible extraterritorial application regardless of any other conduct
 21 that occurred in U.S. territory.” *Id.*

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

25 Congress did not require that the applicant for asylum have fully crossed the
 26 map-maker’s line. The statutory text sets out three different categories of noncitizens
 27 who may seek asylum: (1) aliens “physically present in the United States”; (2) those
 28 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.

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

4 Section 1158(a)(1) describes two categories of persons who may seek asylum:

5 Any alien who is [1] physically present in the United
6 States or [2] *who arrives in the United States* (whether or
7 not at a designated port of arrival and including an alien
8 who is brought to the United States after having been
9 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.

10 8 U.S.C. § 1158(a)(1) (emphasis added). Just as Section 1158(a)(1) makes “[a]ny
11 alien ... who *arrives* in the United States” eligible to apply for asylum, Section
12 1225(b)(1) also requires that an immigration officer to refer the asylum request of
13 “an alien ... who *is arriving* in the United States” for proper evaluation.

14 If an immigration officer determines that an alien ... *who*
15 *is arriving in the United States* ... is inadmissible ... and
16 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[.]”

17 8 U.S.C. § 1225(b)(1)(A)(ii) (emphasis added).

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

20 An alien [1] present in the United States who has not been
21 admitted or [2] *who arrives in the United States* (whether
22 or not at a designated port of arrival . . .) shall be deemed
for purposes of this chapter an applicant for admission.

23 8 U.S.C. § 1225(a)(1) (emphasis added). The duty of immigration officers to inspect
24 noncitizens—which will, in appropriate circumstances, trigger the duty to refer the
25 noncitizen for an asylum interview—builds on the Section 1225(a)(1) definition of
26 “applicant for admission,” but is framed even more broadly:

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

1 8 U.S.C. § 1225(a)(3).

2 In each of the cited statutes, Congress carefully distinguished the categories
3 from each other. First, each of the provisions uses the disjunctive “or.” This makes
4 clear that a person in any one of the categories must be appropriately inspected and
5 have his asylum claim addressed. *See, e.g., Loughrin v. United States*, 573 U.S. 351,
6 357 (2014) (the “ordinary use” of the word “or” “is almost always disjunctive, that
7 is, the words it connects are to be given separate meanings”) (internal quotation
8 omitted). Second, by setting out distinct categories of eligibility, Congress intended
9 the terms “[physically] present in the United States” and “who arrives in the United
10 States” (or “who is arriving in the United States”) to mean different things, under the
11 familiar canon against surplusage. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174
12 (2001). Third, the use of the present tense (“arrives”) and present progressive tense
13 (“is arriving”) of the verb “to arrive” indicates an ongoing or continuing action. *See,*
14 *e.g., United States v. Balint*, 201 F.3d 928, 933 (7th Cir. 2000) (“[U]se of the present
15 progressive tense, formed by pairing a form of the verb ‘to be’ and the present
16 participle, or ‘-ing’ form of an action verb, generally indicates continuing action.”).
17 A guest may not have entered the house, and still we refer to him as an “arriving
18 guest.”

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

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

1 the meaning of Section 1225(a)(3). The Complaint describes how each new
 2 Individual Plaintiff specifically sought admission to the United States—in some
 3 cases repeatedly—and was turned back by CBP officials. *See* Compl. ¶¶ 29 & 154–
 4 56 (Roberto); *id.* ¶¶ 30, 162, & 165–167 (Maria and her two children); *id.* ¶¶ 31 &
 5 174–75 (Juan and Úrsula); *id.* ¶¶ 32 & 181 (Victoria); *id.* ¶¶ 33, 185, & 187–88
 6 (Bianca); *id.* ¶¶ 34 & 193 (Emiliana); and *id.* ¶¶ 35 & 199 (César). Although
 7 Defendants assert that Plaintiffs were not “‘seeking admission’ in the manner
 8 prescribed by statute and regulation,” Mot. at 8, the Complaint is clear that the new
 9 Individual Plaintiffs were in fact seeking admission. As to the claim that they were
 10 not seeking admission “in the manner prescribed by statute and regulation,” this is
 11 incorrect for all the reasons discussed above. And, of course, the new Individual
 12 Plaintiffs were not able to *formally* apply for asylum only because of Defendants’
 13 Turnback Policy and the unlawful actions of CBP officers.

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

18 Although “arriving alien” is not a term expressly defined by statute, long-
 19 standing agency interpretation of the INA confirms that Sections 1158(a)(1),
 20 1225(b)(1), and 1225(a)(3) apply to noncitizens who are at the border and seeking
 21 entry, but who may not yet have crossed the border.

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

25 8 C.F.R. § 1.2; *see also* 8 C.F.R. § 235.3(b)(1)(i), (b)(4) (describing the procedure
 26 for an “arriving alien” to apply for asylum and the duties of immigration officers
 27 under the INA). The present progressive tense phrase “coming . . . into the United
 28 States” refers to ongoing or continuing action, not the act of having already come

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

16 During the rulemaking process, Rep. Lamar Smith, Chairman of the House
 17 Judiciary Committee’s Subcommittee on Immigration and Claims, commented on
 18 Congress’s intent in adopting the term “arriving alien”:

19 ***The term “arriving alien” was selected specifically by***
 20 ***Congress in order to provide a flexible concept that would***
 21 ***include all aliens who are in the process of physical entry***
 22 ***past our borders, regardless of whether they are at a***
 23 ***designated port of entry, on a seacoast, or at a land***
 24 ***border.... “Arrival” in this context should not be***
 25 ***considered ephemeral or instantaneous but, consistent with***
 26 ***common usage, as a process. An alien apprehended at any***
 27 ***stage of this process, whether attempting to enter, at the***
 28 ***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.

26 *Implementation of Title III of the Illegal Immigration Reform and Immigrant*
 27 *Responsibility Act of 1996: Hearing Before the Subcomm. on Immigration and*
 28 *Claims of the H. Comm. on the Judiciary*, 105th Cong. 17–18 (1997) (correspondence

1 dated Feb. 3, 1997 to Immigration and Naturalization Service from Chairman Smith)
 2 (emphasis added). An alien “attempting to enter” the United States necessarily has
 3 not yet entered. Chairman Smith’s comments confirm that the statutory text was
 4 intentional: Congress meant to reach aliens who are in the active process of entering
 5 the United States, even if they have not yet taken the last steps to cross the border.

6 **d. *Sale* Does Not Support Defendants’ Statutory**
 7 **Interpretation.**

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

14 A narrow decision, *Sale* was driven by the unique facts of the 1990s Haitian
 15 migration crisis. The Supreme Court analyzed whether INA § 243(h), 8 U.S.C.
 16 § 1253(h) (1988) (“Withholding of deportation or return”) (since abrogated), and
 17 U.S. treaty obligations controlled the interdiction of Haitian migrants outside the
 18 territorial waters of the United States and their subsequent return to Haiti. The Court
 19 held that neither set of obligations “applies to action taken by the Coast Guard *on the*
 20 *high seas.*” *Sale*, 509 U.S. at 159 (emphasis added). *Sale*’s review of the interdiction
 21 and summary repatriation of Haitian migrants on the high seas has no bearing on
 22 whether or how Sections 1158(a)(1), 1225(b)(1), and 1225(a)(3) apply to the current
 23 policy of turning back refugees at the U.S.-Mexico border. *Cf. United States v.*
 24 *Delgado-Garcia*, 374 F.3d 1337, 1348 (D.C. Cir. 2004) (finding that immigration-
 25 related statute applies extraterritorially, and distinguishing *Sale* because the statute at
 26 issue in *Sale* referenced a domestic official, the Attorney General, and deportation
 27 proceedings the Attorney General was not authorized to conduct outside the country).

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

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

5 The reach of the Constitution is not determined with simple reference to a line
6 on the map. In *Boumediene v. Bush*, 553 U.S. 723, 759 (2008), the Supreme Court
7 reviewed more than a hundred years of precedent regarding the Constitution’s
8 geographic scope, including the *Johnson v. Eisentrager*, 339 U.S. 763 (1950), *Reid*
9 *v. Covert*, 354 U.S. 1 (1957), and *United States v. Verdugo-Urquidez*, 494 U.S. 259
10 (1990), cases Defendants rely upon. The Court found “a common thread uniting all
11 [the] cases: the idea that extraterritoriality questions turn on objective factors and
12 practical concerns, not formalism.” *Boumediene*, 553 U.S. at 764; *see also Ibrahim*
13 *v. Dep’t of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir. 2012) (“The Supreme Court
14 has held in a series of cases that the border of the United States is not a clear line that
15 separates aliens who may bring constitutional challenges from those who may not.”).

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

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

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

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

10 Defendants’ suggestion that the border constitutes a bright line between the
11 United States’ *de jure* and *de facto* control over U.S. territory and genuinely foreign
12 territory ignores the realities of the U.S.-Mexico border. CBP officials regularly
13 operate in Northern Mexico, and the United States exercises significant control over
14 the entire border region, Mexico’s *de jure* sovereignty notwithstanding. *See, e.g.,*
15 *Securing Our Borders—Operational Control and the Path Forward: Hearing Before*
16 *the Subcomm. on Border & Mar. Sec. of the H. Comm. on Homeland Sec.*, 112th
17 Cong. 8 (2011) (prepared statement of Michael J. Fisher, Chief of U.S. Border Patrol)
18 (U.S. border security policy “extends [the nation’s] zone of security outward,
19 ensuring that our physical border is not the first or last line of defense, but one of
20 many.”); Eva Bitran, Note, *Boumediene at the Border? The Constitution and Foreign*
21 *Nationals on the U.S.-Mexico Border*, 49 HARV. C.R.-C.L. L. REV. 229, 244–47
22 (2014) (collecting historical examples showing the U.S. “exerts and has exerted
23 powerful influence over northern Mexico”). If U.S. power projects beyond the map
24 line, then so too does the Constitution’s demand that the government not deprive a
25 statutorily-recognized class of would-be asylees of due process.

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

1 the International Boundary, art. IV, Nov. 23, 1970, 23 U.S.T. 390, T.I.A.S. No. 7313
 2 (Rio Grande and Colorado River Treaty); *see also* Treaty on the Utilization of Waters
 3 of Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, art. 2, 59 Stat.
 4 1219, T.S. No. 904 (a U.S.-Mexico joint International Boundary and Water
 5 Commission, exercises its “jurisdiction” over limitrophe parts of the Rio Grande). As
 6 Justice Breyer recently observed:

7 [I]nternational law recognizes special duties and
 8 obligations that nations may have in respect to limitrophe
 9 areas. Traditionally, boundaries consisted of rivers,
 10 mountain ranges, and other areas that themselves had depth
 11 as well as length. It was not until the late 19th century that
 12 effective national boundaries came to consist of an
 13 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.

14 *Hernandez v. Mesa*, 137 S. Ct. 2003, 2010 (2017) (Breyer, J., dissenting) (internal
 15 quotations and citations omitted); *see also* Anil Kalhan, *Immigration Surveillance*,
 16 74 MD. L. REV. 1, 58–72 (2014). The constant presence of U.S. officials on both sides
 17 of the cartographer’s line, and the U.S.’s significant control over the area of northern
 18 Mexico adjacent to the border weighs strongly in favor of a finding that, in the
 19 circumstances of this case, the new Individual Plaintiffs may not be denied access to
 20 the asylum system when interdicted by the extension of that power.

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

28 *Amici* do not suggest that the statutory rights to seek asylum and have one’s

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

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

21 Even when the United States acts outside its borders, its
 22 powers are not “absolute and unlimited” but are subject “to
 23 such restrictions as are expressed in the Constitution.”
 24 *Murphy v. Ramsey*, 114 U.S. 15, 44, 5 S. Ct. 747, 29 L.Ed.
 25 47 (1885). Abstaining from questions involving formal
 26 sovereignty and territorial governance is one thing. To hold
 27 the political branches have the power to switch the
 28 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).

1 *Boumediene*, 553 U.S. at 765.

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

5 Defendants assert that “the United States does not have a *non-refoulement*

6 obligation to aliens outside its borders.” Mot. at 23. This is a misreading of the United

7 States’ responsibilities, and Defendants’ categorical claim is not supported by *Sale*,

8 the only case they cite. The *Sale* court determined that the United States’ *non-*

9 *refoulement* obligations did not “appl[y] to action taken by the Coast Guard on the

10 high seas.” 509 U.S. at 159. In particular, the U.S.’s treaty obligations did not require

11 the government to transport Haitians intercepted on the high seas to either the U.S.

12 or a third country, rather than returning the migrants to their home country. *Id.* at

13 181–83. Here, both Article 33 and the *Sale* Court’s analysis support a finding that the

14 United States does in fact have a *non-refoulement* obligation to refugees who are at

15 the border and in the process of attempting to enter this country in search of asylum:

16 1. No Contracting State shall expel or return (“*refouler*”) a

17 refugee in any manner whatsoever to the frontiers of

18 territories where his life or freedom would be threatened

19 on account of his race, religion, nationality, membership of

20 a particular social group or political opinion.

21 *Sale*, 509 U.S. at 179 (quoting United Nations Protocol Relating to the Status of

22 Refugees, art. 33.1, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577). In evaluating

23 this prohibition, the *Sale* Court noted that the English word “return” and the French

24 term “*refouler*” are not exact synonyms, and that English-French dictionaries did not

25 translate “*refouler*” as “return,” or vice versa. *Id.* at 180–81.

26 [Dictionary definitions] do, however, include words like

27 “repulse,” “repel,” “drive back,” and even “expel.” To the

28 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

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

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

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

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

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

8 When, in 1968, the United States acceded to the United
 9 Nations Protocol Relating to the Status of Refugees, it
 10 pledged not to “return (*‘refouler’*) a refugee in any manner
 11 whatsoever” to a place where he would face political
 12 persecution. In 1980, Congress amended our immigration
 13 law to reflect the Protocol’s directives. Today’s majority
 14 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.

15 *Sale*, 509 U.S. at 188–89 (Blackmun, J., dissenting) (internal citations omitted).
 16 UNHCR, the European Court for Human Rights, and the Inter-American
 17 Commission on Human Rights have been similarly critical. *See, e.g.*, U.N. High
 18 Comm’r for Refugees, Advisory Opinion on the Extraterritorial Application of *Non-*
 19 *Refoulement* Obligations under the 1951 Convention relating to the Status of
 20 Refugees and its 1967 Protocol 12 (Jan. 26, 2007) (“[T]he purpose, intent and
 21 meaning of Article 33(1) of the 1951 Convention are unambiguous and establish an
 22 obligation not to return a refugee or asylum-seeker to a country where he or she
 23 would be risk of persecution or other serious harm, which applies wherever a State
 24 exercises jurisdiction, including at the frontier, on the high seas or on the territory of
 25 another State.”), <https://www.unhcr.org/4d9486929.pdf>; *id.* at 12 n.54 (“*Sale* does
 26 not accurately reflect the scope of Article 33(1)”); *Jamaa v. Italy* (No. 27765/09),
 27 2012-II Eur. Ct. H.R. 97, 173, 175 (2012) (De Albuquerque, J., concurring),
 28 https://www.echr.coe.int/Documents/Reports_Recueil_2012-II.pdf (“The

1 prohibition of *refoulement* is not limited to the territory of a State, but also applies to
2 extraterritorial State action, including action occurring on the high seas. . . . With all
3 due respect, the United States Supreme Court’s interpretation contradicts the literal
4 and ordinary meaning of the language of Article 33 of the United Nations Convention
5 relating to the Status of Refugees and departs from the common rules of treaty
6 interpretation.”); *The Haitian Ctr. for Human Rights v. United States*, Case 10.675,
7 Inter-Am. Comm’n H.R., Report No. 51/96, OEA/Ser. L/V/II.95, Doc. 7 rev. ¶ 157
8 (1997), <http://hrlibrary.umn.edu/cases/1996/unitedstates51-96.htm> (“Article 33 had
9 no geographical limitations”). These criticisms do not, of course, effect *Sale*’s status
10 as precedent, but they do counsel against over-reading *Sale* to go beyond the Court’s
11 holding and reasoning.

12 The facts here are very different from *Sale*, and compel a different conclusion.
13 It is undisputed that Plaintiffs were at least “at a border” of the United States. *See*,
14 *e.g.*, Compl. at ¶¶ 30, 86, 96, 97, 105, 150–51, 154, 162, 197; Mot. at 2. The
15 Complaint specifically alleges that Defendants’ agents resisted Plaintiffs’ efforts to
16 enter the country and excluded them at the border. Compl. at ¶¶ 33, 62, 84, 87–97,
17 107–18, 121–23, 128–31, 134–36, 141–44, 150–51, 155–56, 167, 174, 181, 185–88,
18 192–93, 197, 199. The Complaint also specifically alleges that U.S. officials did so
19 because Plaintiffs indicated a desire to seek asylum in the United States. *Id.* at ¶¶ 32,
20 34, 86, 94, 100, 105, 114, 116, 121, 144, 158, 181, 192. Defendants do not claim
21 otherwise. Consistent with the Supreme Court’s view that Article 33 prohibits the
22 “repuls[ion]” or “exclu[sion]” of refugees “at the border,” turning Plaintiffs back at
23 the border and denying them access to the asylum process is a core example of the
24 type of activity that Article 33 prohibits.

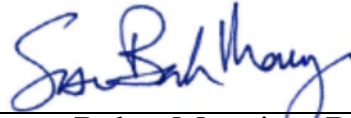
25 III. CONCLUSION

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: February 21, 2019

Respectfully submitted,

By 
Susan Baker Manning, Bar No. 197350
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: +1.202.739.3000
Fax: +1.202.739.3001
susan.manning@morganlewis.com

Sabin Willett
MORGAN, LEWIS & BOCKIUS LLP
One Federal Street
Boston, Massachusetts 02110
Tel: +1.617.341.7700
Fax: +1.617.341.7701
sabin.willett@morganlewis.com

Julie S. Goldemberg
Shannon N. Doherty
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, Philadelphia 19103
Tel: +1.215.963.5000
Fax: +1.215.963.5001
julie.goldemberg@morganlewis.com
shannon.doherty@morganlewis.com

Anthony P. Ferrara
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, NY 10178
Tel: +1.212.309.6706
Fax: +1.212.309.6001
anthony.ferrara@morganlewis.com

Attorneys for Amici Curiae