No. 25-5

IN THE
Supreme Court of the United States

KRISTI NOEM, SECRETARY OF HOMELAND SECURITY, *ET AL.*, *Petitioners*,

v.

AL OTRO LADO, *ET AL.*, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief *Amicus Curiae* of America's Future in Support of Petitioners

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MISCELLANEOUS

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus America's Future is a nonprofit organization, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code. America's Future participates in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Recently, America's Future has filed *amicus* briefs supporting Trump Administration applications for stay of district court injunctions, including three involving immigration issues, where stays were issued by this Court.

- *Noem v. National TPS Alliance* (May 8, 2025), supporting the Trump Administration's revocation of Temporary Protected Status for Venezuela;
- *Noem v. Doe* (May 15, 2025), supporting the Trump Administration's termination of parole processes for Cubans, Haitians, Nicaraguans, and Venezuelans; and
- *Department of Homeland Security v. D.V.D.* (June 5, 2025), supporting the Trump Administration's ability to deport illegal aliens to third countries

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[1] It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than this *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

when needed and Executive Power to conduct immigration and foreign relations.

This *amicus* also filed an *amicus* brief supporting a stay of a district court injunction in one recent immigration case in the D.C. Circuit, after which an administrative stay was issued which is now in effect.

- *Refugee and Immigrant Center for Educational and Legal Services v. Noem* (July 9, 2025), supporting the Trump Administration's Implementation of Executive Order 14159 of January 20, 2025, "Protecting the American People Against Invasion."

STATEMENT OF THE CASE

In July 2017, six individual plaintiffs and organizational plaintiff Al Otro Lado, Inc. filed suit against the Secretary of the Department of Homeland Security ("DHS") and two officials of Customs and Border Protection ("CBP"). The suit alleged that CBP officers were failing to follow both international law and the Immigration and Nationality Act ("INA") by failing to review asylum requests of aliens who were stopped at the southern border and prevented from entering the United States.

On August 23, 2022, the district court entered final judgment in the case. The court entered judgment for Defendants on Plaintiffs' claims of violations of the INA and the Non-Refoulement Doctrine. It entered judgment for Plaintiffs on their claims of violation of Section 706(1) of the Administrative Procedure Act

("APA") and violation of procedural due process. The claim for violation of Section 706(2) of the Administrative Procedure Act — agency action in excess of statutory authority and without observance of procedures required by law — was dismissed as moot. *Al Otro Lado, Inc. v. Mayorkas*, 2022 U.S. Dist. LEXIS 159511 at *7 (S.D. Cal. 2022).

The district court issued a permanent injunction, preventing Plaintiffs from "applying ... the 'Interim Final Transit Rule' ... or the ... 'Final Transit Rule' ... to [any] 'non-Mexican asylum seekers who were unable to make a direct asylum claim at a U.S. [Port of Entry] before July 16, 2019 because of the U.S. Government's metering policy, and who continue to seek access to the U.S. asylum process.'" *Id.* at *8.

On October 23, 2024, the Ninth Circuit affirmed most of the district court's decision. *Al Otro Lado v. Exec. Off. for Immigr. Review,* 120 F.4th 606 (9th Cir. 2024). The Government argued that 8 U.S.C. § 1158(a)(1) states that "[a]ny alien who is physically present in the United States or who arrives in the United States ... may apply for asylum," (*id.* at 615) and that the law thus would not apply to an alien stopped at the border who had not yet entered the United States. A split panel of the Ninth Circuit disagreed, over a strong dissent from Judge Nelson. *Id.* at 618-19. The court then concluded that the metering policy violated Section 706(1) of the APA.

The court of appeals addressed the district court's compliance with *Garland v. Aleman Gonzalez*, 596 U.S. 543 (2022), but found it unnecessary. The court

ruled that "asylum eligibility under § 1158 ... is not covered by § 1252(f)(1)," and that "[e]ven though asylum eligibility may change the outcome of a removal proceeding under a covered provision, such an effect is collateral" to the removal proceeding, and therefore § 1252(f)(1)'s jurisdictional bar does not apply. *Al Otro Lado v. Exec. Off.* at 628.

On May 14, 2025, the Ninth Circuit denied *en banc* review. *Al Otro Lado v. Exec. Off. for Immigr. Rev.*, 138 F.4th 1102 (9th Cir. 2025). On the same day, the panel issued an amended opinion in substantially similar language to its October 2024 opinion. *Al Otro Lado v. Exec. Off. for Immigr. Review*, 2025 U.S. App. LEXIS 11683 (9th Cir. 2025).

Judge Nelson, joined by Judges Bress and Bea, dissented from the denial of rehearing *en banc*. Judge Nelson argued that an alien standing on Mexican soil has not "arrived in the United States," and so cannot demand review for asylum under the statute. *Al Otro Lado*, 2025 U.S. App. LEXIS 11683 at *90-91 (Nelson, J., dissenting from denial of rehearing *en banc*). Judge Nelson also challenged the district court's ruling that the metering policy "withheld" rather than was merely "delaying" agency action on asylum petitions. *Id.* at *116.

Judge Nelson likewise rejected Plaintiffs' due process argument, contending that the rights are granted to aliens by Congress via statute, and that the Fifth Amendment requires no more. *Id.* at *109. Judge Nelson argued that the district court's

injunction against metering should be vacated as moot since the government had terminated the policy.

Judge Bress also dissented, joined by several other judges. Like Judge Nelson, he concluded that the phrase "arrived in the United States" does not include aliens in Mexico. *Id.* at *119-120 (Bress, J., dissenting from denial of rehearing *en banc*). Judge Bea, joined by two other judges, also dissented on the same grounds. *Id.* at *140 (Bea, J., dissenting from denial of rehearing *en banc*).

STATEMENT

This litigation began in July 2017, early in the first Trump Administration, and the Ninth Circuit decision now being challenged was issued shortly before the 2024 election. Only the highly contentious denial of rehearing *en banc* in the Ninth Circuit occurred during the current Trump Administration. But regardless of who occupies the presidency, this Ninth Circuit has a long record of issuing decisions impairing the executive's protection of our border and other matters involving immigration.

This year, since inauguration day, the Ninth Circuit declined to stay a nationwide injunction from the Northern District of California against President Trump's enforcement of certain immigration laws, only to be stayed by this Court. *See Nat'l TPS All. v. Noem*, 2025 U.S. App. LEXIS 9436 (9th Cir. 2025). This injunction was later stayed by this Court in *Noem v. Nat'l TPS All.*, 2025 U.S. LEXIS 1978 (2025). The Ninth Circuit also declined to stay the nationwide

injunction involving President Trump's Birthright Citizenship Executive Order issued by the Western District of Washington (*Washington v. Trump*, 2025 U.S. App. LEXIS 3983 (9th Cir. 2025)). This injunction was later stayed by this Court in *Trump v. CASA*, 2025 U.S. LEXIS 2501 (2025).

As of today, according to an informal list maintained by this *amicus,* already 104 injunctions have been issued during the first six months of President Trump's current term, impeding the policy changes that he was elected by the People to effect. *See* Federal Court Injunctions against the Trump Administration. Of those 104 injunctions, 15 were issued by five different district courts in the Ninth Circuit.

SUMMARY OF ARGUMENT

The Ninth Circuit has approved yet another restriction on the authority of the Executive Branch to protect the nation's border through a novel and curious re-imagining of clear statutory language. The Circuit Court found a redundancy in two statutes where there was none and sought to cure it by re-writing the statute to give additional rights to seek asylum to persons who had not entered the United States, crushing a clear distinction made by Congress. This is not the first time that this Court has been required to act to protect the authority of the Executive Branch to control our nation's borders. On four recent occasions, this Court has been required to reverse efforts by lower court judges to impede that authority.

Although the crisis at our nation's southern border has abated under President Trump, correcting the decision of the Ninth Circuit is still of great importance. The nation has had nearly 12,000 people seek to cross the border on a single day. Those aliens somewhere near the border, but on the other side of the border, do not have the same right to claim asylum under the statutory plan. Judicially imagining that they have "arrived in" the United States while still in Mexico undermines both that statutory plan and border security generally.

ARGUMENT

I. THE NINTH CIRCUIT'S INTERPRETATION OF 8 U.S.C. § 1101 IS ERRONEOUS AND CANNOT BE ALLOWED TO STAND.

The area of immigration law is complex, and the course of proceedings in this case has been long and tortured, but Secretary Noem's Petition is focused on a narrow issue of statutory interpretation. The Ninth Circuit has interpreted two near-identical Immigration and Nationality Act provisions to have a meaning not previously ascribed to them. The Ninth Circuit deemed an alien who is somewhere near to, but still physically outside of the United States, as having arrived "in" the United States. The policy consequences of this interpretation are clear — that aliens who are not "in" the United States will be provided rights that they would not have under federal law while in another country, here Mexico. With that erroneous interpretation, the policy preferences of the majority of the Ninth Circuit judges are achieved, but

at great cost. That cost includes: the crushing of the distinction made by Congress between aliens outside and inside the country; the impairment of the ability of the Executive Branch of government to enforce our nation's immigration laws; and the judiciary's usurpation of authority by the manipulation of language. There are two primary statutes. First, 8 U.S.C. § 1158(a)(1) governing "asylum" provides:

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

The second statute, 8 U.S.C. § 1225(a)(1), addressing "inspection by immigration officers," states:

> An alien present in the United States who has not been admitted or **who arrives in the United States** (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) **shall be deemed** for purposes of this chapter **an applicant** for admission. [Emphasis added.]

Employing the same language in both statutes, Congress distinguished between an alien "who arrives in the United States" and one who has not arrived, giving the right to apply for asylum only to those "in the United States." Under the Ninth Circuit's entirely novel interpretation, those aliens who are to be found in some proximity to our border (a specific distance being a point on which the Ninth Circuit is not clear), would all have the right to apply for asylum — not at the moment they entered the United States, but at the moment they came somewhere near. The Court described this point only as when the alien "presents herself to an official at the border." *Al Otro Lado*, 2025 U.S. App. LEXIS 11683 at *23.

The Ninth Circuit sought to justify its decision as a simple act of statutory interpretation of § 1158(a)(1), which states that an "alien who is physically present in the United States or who arrives in the United States ... may apply for asylum." The court asserted that since the second phrase — "arrives in the United States" — involves physical entry into the United States, it thus would be redundant to the first phrase "physically present in the United States." App. 13a-14a. For that reason, the court imagined that the term "arrives in the United States" actually includes aliens not in the United States, but rather "at the border, whichever side of the border they are standing." *Al Otro Lado*, 2025 U.S. App. LEXIS 11683 at *22.

However, there is another, more logical and more natural interpretation of the two phrases, which eliminates any inconsistency. The phrase "arrives in the United States" uses the intransitive, singular,

present tense verb "arrives" followed by a phrase specifying "where" the person must arrive — "in the United States," not "at the border." Put simply, that phrase indicates a person who has just crossed the border into the United States, while the phrase "physically present in the United States" indicates a person whose entry had not just occurred and was not found at the border. Thus, the right to seek asylum is not limited to a person setting foot on U.S. territory for the first time, but extends to those who did not just cross the border. The statute does not need to be re-written by the Ninth Circuit to avoid redundancy. There is no redundancy.

Consider how the Ninth Circuit's crushing of this clear distinction would alter the protection of our border when there is a surge of illegal aliens still in Mexico, all demanding entry into the United States — a demand that border officials may be physically incapable of accommodating. Allowing such a surge of migrants into the country can also cause danger for both border officials and aliens. Such surges can be used as a tactical device by those seeking to penetrate our border with massive numbers of immigrants arriving at the same time, and the Ninth Circuit decision facilitates such a strategy. While it may be that no such crush of migrants is occurring at the Mexican border at the moment, this does not make the need for this Court to rule correctly any less significant. The litigation below began in 2017, at the outset of the first Trump Administration, continued through President Trump's first term as well as all of President Biden's term, and now comes to this Court during President Trump's second term. The

interpretation adopted by this Court will last well beyond the current Administration.

II. IN RECENT MONTHS, THIS COURT REPEATEDLY HAS BEEN REQUIRED TO CORRECT LOWER COURT DECISIONS INTRUDING ON EXECUTIVE BRANCH AUTHORITY UNDER THE IMMIGRATION AND NATIONALITY ACT.

The Ninth Circuit's decision should be reviewed in the context of other efforts by the lower federal courts to intrude into the Executive Branch's INA authority, even where jurisdiction was removed by Congress.

A. *Bouarfa v. Mayorkas*.

Late last year, this Court decided *Bouarfa v. Mayorkas*, 604 U.S. 6 (2024), which involved a visa petition filed by the wife of a Palestinian national. The government denied the visa petition after determining that a previous marriage had been entered into to evade immigration laws. The courts below disregarded jurisdiction-stripping code sections and assumed jurisdiction to review the petition denial. This Court determined that the controlling statute — which vests discretion in the Secretary of Homeland Security to "revoke the approval of any petition" "for good and sufficient cause" — barred judicial review. *Bouarfa* at 12. This Court explained:

> Through §1252(a)(2)(B), Congress stripped federal courts of jurisdiction to review two categories of discretionary agency decisions....

> [I]n the provision at issue here, Congress barred review of "any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary." §1252(a)(2)(B)(ii). [*Bouarfa* at 11.]

B. *Noem v. National TPS Alliance.*[2]

Under 8 U.S.C. § 1254a, the DHS Secretary is authorized to designate a foreign country for Temporary Protected Status ("TPS") when individuals from that country cannot safely return due to war, natural disaster, or other extraordinary and temporary circumstances. TPS status allows aliens from designated nations an expedited process to apply for legal status. After DHS Secretary Kristi Noem vacated a TPS designation for Venezuela granted by her predecessor, Alejandro Mayorkas, the Northern District of California enjoined the revocation, despite a provision in the INA making TPS designations completely discretionary and barring judicial review of TPS designations or terminations. *Nat'l TPS All. v. Noem*, 2025 U.S. Dist. LEXIS 61630 (N.D. Cal. 2025). The Ninth Circuit refused to stay the injunction (*Nat'l TPS All. v. Noem*, 2025 U.S. App. LEXIS 9436 (9th Cir. 2025)), requiring this Court to do so on May 19, 2025. *Noem v. Nat'l TPS All.*, 2025 U.S. LEXIS 1978 (2025).

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[2] This *amicus* filed an *amicus* brief supporting the Government's application for stay. Brief *Amicus Curiae* of America's Future, *et al.* (May 8, 2025).

C. *Noem v. Doe*.[3]

The Biden Administration had adopted a wholesale (non-individualized) policy allowing aliens from four countries — Cuba, Haiti, Nicaragua, and Venezuela ("CHNV") — to have categorical parole status, despite the INA requiring that parole be granted only on a case-by-case basis. On January 20, 2025, President Trump issued Executive Order 14165, "Securing Our Borders." Section 7 of that Order directs the Secretary of Homeland Security to, consistent with applicable law, take all appropriate action to "[t]erminate all categorical parole programs that are contrary to the policies of the United States established in [the President's] Executive Orders, including the program known as the 'Processes for Cubans, Haitians, Nicaraguans, and Venezuelans.'"

The district court enjoined the Trump Administration's termination of the CHNV parole program, again despite jurisdiction-stripping statutes. *Doe v. Noem,* 2025 U.S. Dist. LEXIS 70398 (D. Mass. 2025). The applicable statute provided, "Notwithstanding **any other provision of law ...**, **no court shall have jurisdiction to review** ... **any other decision or action** of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this title...." 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added). Upon application,

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[3] This *amicus* filed an *amicus* brief supporting the Government's application for stay. Brief *Amicus Curiae* of America's Future, *et al.* (May 15, 2025).

the Supreme Court stayed the Massachusetts court's injunction. *See Noem v. Doe*, 145 S. Ct. 1524 (2025).

D. *Department of Homeland Security v. D.V.D.*[4]

The District of Massachusetts issued an injunction preventing the Trump Administration from removing illegal aliens to "third countries" when they made a showing of fear to return to their home countries, under the "Convention Against Torture."

The government challenged the injunction on the basis of three jurisdiction-stripping statutes. 8 U.S.C. § 1252(g) states: "Except as provided in this section ... **no court shall have jurisdiction** to hear any cause or claim by or on behalf of any alien...." (Emphasis added.) 8 U.S.C. § 1252(a)(5) states: "a petition for review filed with an appropriate **court of appeals** in accordance with this section shall be the **sole and exclusive** means for judicial review of an order of removal entered or issued under any provision of this Act." (Emphasis added.) Finally, 8 U.S.C. § 1252(b)(9) states: "Except as otherwise provided in this section, **no court shall have jurisdiction**, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), **to review such an order**...." (Emphasis added). These three statutes divest the

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[4] This *amicus* filed an *amicus* brief supporting the Government's application for stay. Brief *Amicus Curiae* of America's Future, *et al.* (June 5, 2025).

district court of jurisdiction to review the Administration's decisions. On June 23, 2025, the Supreme Court granted the stay, allowing the third-country removals to resume. *Dep't of Homeland Sec. v. D.V.D.*, 2025 U.S. LEXIS 2487 (2025). Due to the district court's resistance to this Court's stay, this Court issued a "clarification" on July 3, 2025. *Dep't of Homeland Sec. v. D.V.D.*, 2025 U.S. LEXIS 2666 (2025).

III. THE JUDICIARY SHOULD BE MINDFUL OF THE SOLEMN DUTY OF THE EXECUTIVE BRANCH TO PROTECT THE BORDERS OF THE UNITED STATES.

Decisions such as that issued by the Ninth Circuit now under review impede the ability of the Executive Branch to defend the nation's borders. The litigation commenced during the first year of President Trump's first term, continued throughout the entire Biden Administration, and now continues into 2025 in the first year of President Trump's second term. During much of this time, the country has suffered an unprecedented number of illegal border crossings.

President Biden took office promising to reverse all of Trump's actions taken to protect the border in his first Administration.[5] And in the first days of his

[5] J. Burnett, "Biden Pledges to Dismantle Trump's Sweeping Immigration Changes — But Can He Do That?" *NPR* (Sept. 14, 2020).

Administration, Biden did so.[6] This resulted in some of the worst influx of illegal immigration in our Nation's history. Data on immigration is available for a five-year period during which this litigation has been pending:

> Between October 2019 and June 2024, US Customs and Border Protection (CBP) reported just under 11 million border encounters nationwide. That's roughly equivalent to the current population of North Carolina, the ninth most populous state.
>
> Monthly encounters peaked with over 370,000 people in December 2023. ["Statistics on unauthorized US immigration and US border crossings by year," *USA Facts* (Aug. 1, 2024).]

That same source reports that, in December 2023, "CBP encountered nearly 12,000 people at the border every day." *Id*. Imagine how the Ninth Circuit rule would work in the face of such numbers of aliens massing at the border on a daily basis. As a result of both apparent deliberate neglect and many impediments to enforcement of our immigration laws, approximately 18.6 million illegal aliens currently reside in the United States.[7]

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[6] "Joe Biden reverses anti-immigrant Trump policies hours after swearing-in," *The Guardian* (Jan. 20, 2021).

[7] "How Many Illegal Aliens Are in the United States?," *FAIR* (Mar. 7, 2025).

In contrast to the prior Administration, in 2024, President Trump promised to restore the rule of law to immigration enforcement, and in response to a clear mandate from the American people in electing him to do that, he took swift action on his first day in office. For example, on January 20, 2025, he issued both a proclamation entitled "Guaranteeing the States Protection Against Invasion" and Executive Order 14165, "Securing Our Borders."

Federal courts were able to do little to reverse the policies of a President determined not to enforce the nation's border, but they can avoid placing impediments in the way of a President who seeks to enforce our borders. The Ninth Circuit has badly misread the federal statutes regarding asylum claims, and this Court should grant certiorari to reconsider and reverse that decision.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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