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**Application for admission pro hac vice forthcoming*

Counsel for Amicus Curiae

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*,

Defendants.

Case No. 3:25-cv-1501-RBM-BLM

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' OPPOSITION TO THE MOTION TO DISMISS

Honorable Ruth Bermudez Montenegro

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights, freedoms, and structural safeguards that it guarantees. CAC also has an interest in ensuring that important federal statutes are interpreted in a manner consistent with their text and history and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

As the Supreme Court has long recognized, Congress has "plenary" authority over the "terms and conditions" upon which noncitizens "come into or remain in the country." *Lapina v. Williams*, 232 U.S. 78, 88 (1914); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) ("[Immigration] being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by *treaty or by act of Congress*." (emphasis added)). At times, Congress delegates this power to the executive, entrusting executive-branch officials to make the "hard individualized decisions," *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 444-45 (1987), about which noncitizens satisfy the standards Congress creates for who can come into or remain in the country, Adam B. Cox, *The Invention of Immigration Exceptionalism*, 134 Yale L.J. 329, 346 (2024).

In the Refugee Act of 1980, for example, Congress provided that asylum-seekers—persons who are unable or unwilling to return to their home country because of persecution—could seek asylum from within the country or at its borders. *See* Refugee Act of 1980, Pub. L. No. 96-212, §§ 201, 208(a), 94 Stat. 102, 102, 105. It specified a precise standard to be applied to asylum claims, requiring that applicants show a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," *id*.

[1] No person or entity other than *amicus* and its counsel assisted in or made a monetary contribution to the preparation or submission of this brief. All parties consent to the filing of this brief.

§ 201, 94 Stat. at 105, and required the executive branch to establish a procedure by which people fleeing persecution could seek asylum, *see id.* § 208(a), 94 Stat. at 105. In doing so, it endeavored to replace the practice of *ad hoc*, executive-led admission of refugees and asylum-seekers with a uniform, nondiscriminatory, and systematic procedure that aligned with the nation's obligations under international law. *See generally* S. Rep. No. 96-256, at 1-34 (1979).

Congress also addressed the nation's asylum procedures in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). That law established an expedited removal process and simultaneously required the executive branch to exempt from that process anyone who expressed a fear of persecution or an intention to apply for asylum. Those individuals had to be referred for interviews with specially trained asylum officers to determine whether they possessed a "credible fear of persecution." IIRIRA, Pub. L. No. 104-208, § 302, 110 Stat. 3009-546, 3009-582 (1996). The goal of these provisions was to ensure that the government would not force people who might be eligible for asylum or other forms of protection back to countries in which they faced persecution without first considering their claims.

Plaintiffs allege that Defendants have violated these laws, instituting an "Asylum Shutdown Policy" that "turn[s] away" asylum-seekers who are trying to present themselves at ports of entry to seek asylum, Compl. ¶¶ 93, 103, leaving them stranded in places in which they are subject to grave danger, *id.* at ¶¶ 107-48. Defendants have moved to dismiss the Complaint, arguing that, notwithstanding the requirements Congress established in the Refugee Act, as amended by IIRIRA, the executive can prevent asylum-seekers from seeking humanitarian protections because Congress—in separate provisions of immigration law—delegated to the President the authority to "suspend the entry" of certain noncitizens and prescribe rules and regulations, and make "limitations and exceptions" to those rules, surrounding the entry and departure of others. MTD 17-18 (citing 8 U.S.C. §§ 1182(f), 1185(a)).

According to Defendants, these provisions empower the executive to prevent migrants at ports of entry from seeking asylum. *See id.* at 17. This is wrong. As the text and history of

those provisions make clear, they only authorize restrictions on "entry"—that is, restrictions on eligibility for "admission" to the country. *Trump v. Hawaii*, 585 U.S. 667, 695 n.4 (2018) ("The concepts of entry and admission . . . are used interchangeably in the Immigration and Nationality Act."); *see id.* (noting that 8 U.S.C. § 1182(f) and § 1185(a) operate within the "sphere[]" of immigration law that "defines the universe of aliens who are admissible into the United States (and therefore eligible to receive a visa)"). And the right to apply for asylum exists regardless of whether an individual is eligible for "admission" to the country, *Sanchez v. Mayorkas*, 593 U.S. 409, 416 (2021) (asylum status does not "require admission"), as Congress made clear when passing the Refugee Act and IIRIRA. *See generally* Dan Kesselbrenner & Lory D. Rosenberg, Immigr. L. & Crimes §§ 5:1-5:2 (Nov. 2025 update) (noting that a "labyrinthine set of rules and laws govern the[] apparently simple concepts" of admission and entry, and that a grant of asylum is not considered an "admission"); *see infra* at 9-11. Nothing in these laws requires that individuals be admitted before they can apply for asylum, or conditions their ability to apply for asylum on being admissible. Both enactments, in other words, cemented the presumption that "asylum is a concept distinct from admission." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 757 (9th Cir. 2018).

Because a person's ability to "enter" the country has nothing to do with their ability to seek asylum, the executive branch has never understood § 1182(f) to "permit the President to eliminate the asylum rights of noncitizens." *Securing the Border*, 89 Fed. Reg. 81156, 81163 n.53 (2024) (describing 1984 conclusion of the Department of Justice's Office of Legal Counsel). Thus, even if the President could "override particular provisions of the INA through the power granted him in § 1182(f)"—a prospect that the Ninth Circuit has rejected, *see E. Bay*, 932 F.3d at 760 (internal quotation marks omitted)—he could not use that power to limit access to asylum.

In short, Congress has established a "detailed scheme that the Executive must follow" when dealing with asylum-seekers at the border. *E. Bay*, 932 F.3d at 774. The President "may not abandon that scheme because he thinks it is not working well." *Id*. Because Defendants

ignore core tenets of the nation's asylum statutes and overread the President's power to ban entry, this Court should deny their motion to dismiss.

ARGUMENT

I. Sections 1182(f) and 1185(a) Give the President the Power to Add to the Grounds of Inadmissibility, Not Limit Access to Asylum.

A. Section 1182(f) provides that the President can, "by proclamation," "suspend the entry" of anyone whose entry "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). Although this provision "grants the President broad discretion," it "operate[s]" only within its "sphere[]." *Hawaii*, 585 U.S. at 683-84, 695. As the provision's text and history make clear, it addresses the criteria for "admission" into the country. In other words, it allows the president to "define[] the universe of aliens who are admissible" into the country, *id.* at 695, that is, to "supplement the other grounds of inadmissibility in the INA," *id.* at 684 (citing *Abourezk v. Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986)). But, as described below, admissibility is not—and has never been—a prerequisite to applying for asylum. Thus, the President's § 1182(f) power gives him no discretion to prevent people from applying for asylum.

By the time § 1182(f) was enacted, the concept of "entry" was a well-defined term of art within immigration law, and it was a legal concept rather than a physical one. *Matter of Pierre et al.*, 14 I. & N. Dec. 467, 468 (B.I.A. 1973) (noting that a noncitizen physically present in the country could still be understood not to have made an "entry" and citing "the many cases which have treated this subject over the years"). Individuals who had not legally "entered" the United States, regardless of their physical location, were subject to "exclusion proceedings," in which the government determined whether they would "be allowed to enter or [should] be excluded and deported." *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958); *see also id.* (noting that those who had "entered" were instead subject to deportation or "expulsion" proceedings). In exclusion proceedings, immigration adjudicators assessed whether noncitizens seeking entry fell within § 1182's "classes of aliens . . . excluded from admission," INA, Pub. L. No. 414, § 212(a), 66 Stat. 163, 182—a part of the INA that only applied to those who had not effected "an entry."

Leng May Ma, 357 U.S. at 187. "Entry," in other words, was a legal status that freed a noncitizen from the burden of proving her eligibility for admission. *Landon v. Plasencia*, 459 U.S. 21, 28-32 (1982) ("only 'entering' aliens are subject to exclusion" proceedings, in which "admissibility shall be determined"); *cf.* Dan Kesselbrenner, Lory D. Rosenberg, Immigr. L. & Crimes § 5:7 (Nov. 2025 update) ("[t]he [INA] requires applicants for entry to establish that they are admissible to the United States"); *Hawaii*, 585 U.S. at 695 n.4 ("the concepts of entry and admission . . . are used interchangeably in the INA"). By permitting suspensions of "entry," § 1182(f) allowed the President to demarcate "the boundaries of admissibility," *id*. at 695, rather than endowing him with any special power over the nation's physical borders.

The provision's history bears this out. When lawmakers debated § 1182(f), they described it as a power to add to the "classes of aliens" who "may be denied admission," *see, e.g.*, S. Rep. No. 81-1515 at 375, 381 (1951)—a component of Congress's "plenary" power over "the admission of aliens," *id.* at 798 (citing *Lapina*, 232 U.S. at 88); *see id.* at 806 ("[t]he President is given the power to suspend or restrict entry of any alien or class of aliens *whose admission* he finds to be detrimental to the interests of the United States" (emphasis added)); S. Rep. No. 82-1137 at 8, 11-14, 21-23 (1952) (describing the President's entry-ban power within a list of "excludable classes of aliens"); H.R. Rep. No. 82-1365, at 45 (1952) (including the entry-ban power in a list of "classes of aliens [who] . . . shall be excluded from admission"). That is why the provision sits in § 1182, which is entitled "inadmissible aliens," 8 U.S.C. § 1182, and sets forth "numerous grounds" on which noncitizens "may be inadmissible to the United States." *Hawaii*, 585 U.S. at 683; *see generally Dubin v. United States*, 599 U.S. 110, 121 (2023) (noting that subsection's "title and place in the statutory scheme" can "shed light on its text," especially when the title reinforces what the subsection's "'nouns and verbs independently suggest'" (quoting *Yates v. United States*, 574 U.S. 528, 552 (2015) (Alito, J., concurring in judgment)).

B. Defendants also invoke § 1185(a)(1), which makes it "unlawful . . . for any alien to depart from or enter . . . the United States except under . . . reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." As the

Supreme Court has acknowledged, this provision "substantially overlap[s]" with § 1182(f). *Hawaii*, 585 U.S. at 683 n.1. And like § 1182(f), it operates in a distinct sphere, authorizing restrictions on admission and exit from the country.

Notably, Congress consistently described the provision as a component of the law of admissibility. In 1952, it listed § 1185(a)'s predecessor as a "provision[] relating to excludable classes." *See, e.g.*, H.R. Rep. No. 82-1365, at 45; S. Rep. No. 82-1137, at 14. When Congress enacted the current provision in 1979, it sought to "make permanent" the "authority of the president to regulate the entry of aliens into the United States and to require American citizens to bear valid passports when entering or leaving." H.R. Rep. No. 95-1535, at 44 (1978) (Conf. Rep.); 124 Cong. Rec. 15770 (1978) (Rep. Eilburg) (explaining that the bill authorized documentary requirements to "enter into or depart from the United States").

Thus, while the provision extends beyond the realm of admissions, its title—"Travel Documentation of Aliens and Citizens"—"shed[s] light" on the meaning of this text, *Dubin*, 599 U.S. at 121, indicating that it authorizes regulations pertaining to how individuals come into or exit the country and does not allow the President to subvert other statutory protections that are guaranteed regardless of entry. *See* 124 Cong. Rec. 15770 (1978) (Rep. Eilburg) ("[t]he thrust of my amendment is to facilitate travel").

II. For Decades, Congress Has Required the Executive to Consider Asylum Applications Without Regard to Applicants' Admissibility.

Years after Congress delegated to the President the power to impose restrictions on entry and travel in § 1182(f) and § 1185(a), it enacted the Refugee Act, creating the first statutory protections for asylum-seekers. The Refugee Act, as amended by IIRIRA, requires the executive to consider requests for asylum protection from asylum-seekers at ports of entry, and makes clear that this obligation exists regardless of the President's entry-related powers in § 1182(f) and § 1185(a).

A. Congress first addressed the government's obligations toward asylum-seekers in the Refugee Act of 1980. That Act represented the culmination of a decades-long congressional

effort to "reassert" the role of Congress in refugee policy and ensure that the executive adhered to "international obligations," rather than foreign policy imperatives, when making decisions about refugees and asylum-seekers. *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1060 (9th Cir. 2017).

Before the Refugee Act's passage, decisions regarding refugees and asylum-seekers were often made on an *ad hoc*, categorical basis by the executive. Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 41 (1981) (describing Congress's concern with the "politicized nature of executive practice in the asylum area"); *see generally* S. Rep. No. 96-256, at 4 (describing a pattern in which "the Attorney General's discretionary authority to parole aliens into the country temporarily became the initial vehicle for admission [of refugees], and special legislation was then generally required").

Congress viewed this system as insufficiently protective of its role in asylum decision-making and inconsistent with the 1967 United Nations Protocol Relating to the Status of Refugees, which the United States ratified in 1968. *Id*. at 11-12; *see* S. Exec. Journal, 90th Cong., 2d Sess. 448, 449 (1968). After the Protocol's ratification, executive agencies promulgated regulations allowing for noncitizens to seek some form of asylum protection. S*ee e.g.*, Staff of H. Subcomm. Immig., Citizenship, & Int'l L., 94th Cong., Report on Haitian Emigration 20-22 (Comm. Print 1976) (quoting 8 C.F.R. § 108(a), INS Operations Instructions 108.1(a)); Department of State Public Notice 351, 37 Fed. Reg. 3447 (Feb. 16, 1972) (describing "procedures for handling asylum requests," and citing the Protocol as a "primary consideration in U.S. asylum policy"). Nevertheless, many lawmakers were concerned that these regulations were being implemented inequitably, to the detriment of asylum-seekers fleeing persecution from non-Communist countries. Anker & Posner, *supra,* at 41.

In passing the Refugee Act, Congress sought to rein in the use of asylum policy as a tool of foreign affairs and advance a "comprehensive and long term policy" for the treatment of refugees and asylum-seekers. S. Rep. No. 96-256, at 35. In the Act, Congress "incorporated"

the U.N. Protocol's nondiscriminatory definition of "refugee," *see* H.R. Rep. No. 96-781, at 19 (1980) (Conf. Rep.), an endeavor that had become intimately intertwined with its "demand for more congressional control" over refugee programs, Anker & Posner, *supra*, at 30. It also created statutory protections for asylum-seekers by requiring the Attorney General to establish a "procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum." Refugee Act § 208(a), 94 Stat. at 105. Although executive agencies had previously promulgated regulations that provided for the granting of asylum and withholding of deportation—regulations that required the consideration of asylum claims at "land border port[s]," "seaports," "airports," or "ports of entry," and "within the United States," *Report on Haitian Emigration*, *supra*, at 20-22 (quoting 8 C.F.R. § 108(a), INS Operations Instructions 108.1(a)); *cf. Public Notice 351*, *supra*, at 3447 (providing procedures applicable to requests for asylum "from a foreign national . . . within territory under the jurisdiction of the United States, or . . . on or over the high seas")—legislators sought a "specific statutory basis" for these policies to "insure the rights of those it [sought] to protect," H.R. Rep. No. 96-608, at 17-18; *see also* 126 Cong. Rec. 3757 (Feb. 26, 1980) (Sen. Kennedy) ("[p]resent regulations and procedures now used by the Immigration Service simply do not conform to . . . the spirit [of the Refugee Act]").

Lawmakers made clear that the right to seek asylum existed regardless of whether an applicant had legally "entered" the country. Notably, the decision to provide a legislative basis for asylum procedures was a response to specific concerns about the Immigration & Naturalization Service ("INS")'s treatment of claims from Haitian asylum-seekers, who had arrived in the United States with increasing frequency throughout the 1970s. *See* Anker & Posner, *supra*, at 41; *see also* Maria Luisa Sepulveda, *Barring Extraterritorial Protection for Haitian Refugees Interdicted on the High Seas: Sale v. Haitian Centers Council, Inc.*, 44 Cath. U. L. Rev. 321, 327 (1995) (same); *see also id.* at 357 ("Congressional hearings and reports, which disclosed the mistreatment of Haitian asylum seekers, encouraged Congress to introduce the statutory asylum provision into the Refugee Act"). As Congress well knew, most of these

asylum-seekers were "apprehended *at the time* of their arrival in the United States" and had "not 'entered' the United States in the legal sense of the term" when they applied for asylum. *Haitian Emigration*, *supra*, at 3; *id.* at 28 (noting that "exclusion proceedings always begin at the time a Haitian arrives in the United States," when "an Immigration Inspector meets the boat bringing the Haitians" at "the point of arrival"). Yet Congress clearly planned for the Refugee Act's asylum provisions to protect this population. *See* S. Rep. No. 96-256, at 17 (1979).

Relatedly, Congress clarified that people could seek asylum regardless of whether they satisfied the criteria for admissibility under § 1182. The Refugee Act included only one limitation on who could be granted asylum—namely, it excluded those who engaged in the persecution of others, a provision that Congress viewed as consistent with the Protocol. Anker & Posner, *supra*, at 52; *see also* Refugee Act § 201(a)-(b), 94 Stat. at 103-105. And unlike the section on "refugee admissions," the Act's section on "asylum procedure" did not suggest that the inadmissibility grounds in § 1182 would apply to asylum seekers or even reference § 1182 at all. *See id*. § 201(b).

B. Only weeks after the passage of the Refugee Act, the arrival of additional asylum-seekers from Haiti, as well as an "influx of over 120,000 Cubans to Florida," posed an immediate challenge to Congress's vision for a fair and workable asylum system. Anker & Posner, *supra*, at 64. Amidst the "mass influx" of asylum-seekers, the government's screening program for admitting asylum-seekers was criticized from a wide variety of perspectives. *Id.* at 65. Officials in and out of government began to consider how to balance asylum-seekers' rights to individualized review with the need for expeditious processing of asylum claims.

The resulting proposals for reform of the asylum system introduced the concept of an asylum officer—a government official trained in the "procedures and techniques of eligibility determinations" with access to "information on conditions in the source country," who could make "expeditious, equitable and uniform decisions on asylum petitions." Select Comm'n Immigr. & Refugee Pol'y, U.S. Immigration Policy in the National Interest 173-74 (1981); Gregg A. Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, 4 Int'l J.

of Refugee L. 455, 459-63 (1992). In the early 1990s, after "[t]he decade of the 1980s produced many ideas for change but no final decision," *id.* at 456, the INS passed a set of final regulations employing asylum officers to process applications filed by asylum-seekers "at a port of entry," as well as those "physically present in the United States." Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30674, 30680 (July 27, 1990); Beyer, *supra*, at 467. Within the first few years of its existence, the INS's Asylum Officer Corps had, according to many observers, made "positive first steps" toward "timely and consistently high quality asylum adjudications." *Id.* at 485.

Congress integrated the INS's experiments with Asylum Officers in IIRIRA, which it passed in 1996. In response to their perceived need for "prompt exclusion" of noncitizens who arrived by sea, or who traveled to the United States using fraudulent passports and visas, *see* H.R. Rep. No. 104-469, at 110-14 (1996), IIRIRA aimed to "expedite the removal from the United States of aliens who indisputably have no authorization to be admitted" by providing that certain noncitizens who had not been admitted could be removed without further hearing or review, *see* H.R. Rep. No. 104-828, at 209 (1996) (Conf. Rep.). The law integrated expedited removal into the procedures for "inspection" of "applicants for admission"—that is, noncitizens "present in the United States . . . or who arrive[] in the United States[,] whether or not at a designated port of arrival." *See* IIRIRA § 302(a), 110 Stat. 3009-579-81. It permitted the application of expedited removal to applicants for admission who were "arriving in the United States" and fell within certain grounds of inadmissibility, and allowed the executive to apply it to certain other "applicants for admission" on a discretionary basis. *Id.*

Lawmakers ensured that anyone subject to expedited removal would still have a chance to apply for asylum, and incorporated the executive's asylum officer program into IIRIRA for that purpose. The Act's credible fear screening process would "provid[e] an opportunity for . . . an alien who claims asylum to have the merits of his or her claim promptly assessed by officers with full professional training in adjudicating asylum claims." H.R. Rep. No. 104-828, at 209. The law required examining officers to refer anyone who "indicates either an intention to apply

for asylum . . . or a fear of persecution" for an interview by an "asylum officer"—defined as an officer with similar professional training and supervision to those in the existing Asylum Officer Corps, 8 U.S.C. § 1225(b)(1)(E)—to assess whether they have a "credible fear of persecution" and must be exempt from the expedited removal process, *see id.* § 1225(b)(1); *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 109-10 (2020).

Lawmakers framed these provisions as guarantees that individuals with potentially-valid asylum claims would not be summarily removed to countries where they could be persecuted. One of the "purpose[s]" of the credible-fear screening process was to provide "an opportunity for . . . an alien who claims asylum to have the merits of his or her claim promptly assessed." H.R. Rep. No. 104-828, at 209; H.R. Rep. No. 104-469, at 13 ("[These] procedures protect those aliens who present credible claims for asylum by giving them an opportunity for a full hearing on their claims."); 142 Cong. Rec. H11067 (daily ed. Sept. 25, 1996) (describing the hope "that the process . . . not result in sending genuine refugees back to persecution" (Rep. Smith)); *id.* at H11081 (describing "safeguards against returning persons who meet the refugee definition to conditions of persecution" (Rep. Hyde)).

Furthermore, lawmakers again made clear that the right to apply for asylum existed regardless of most grounds of inadmissibility. IIRIRA added additional exceptions to the right to apply for asylum, including a requirement that applicants must apply within one year of the date of their arrival, and provided that certain specified grounds of inadmissibility listed in § 1182, specifically those "relating to terrorist activity," would make the right to asylum inapplicable. IIRIRA § 604, 110 Stat. at 3009-691; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 421, 110 Stat. 1214. That Congress explicitly stated that some subsections of § 1182 would bar individuals from applying for asylum underscores that § 1182's grounds of inadmissibility generally do not preclude eligibility for asylum. And when implementing IIRIRA, the INS explained that an inspection for admissibility would occur only "[i]f the asylum officer does not grant asylum," suggesting that "a grant of asylum does not require a threshold inspection for admissibility." *See Matter of V-X-*, 26 I. & N. Dec. 147, 154

(B.I.A. 2013); Asylum Procedures, 65 Fed. Reg. 76121, 76134-35 (Dec. 6, 2000) ("[i]f the asylum officer does not grant asylum," an asylum-seeker can "be charged as inadmissible to the United States"); *see also* 8 C.F.R. § 1208.14(c) (same); 8 U.S.C. § 1158(c)(3) (providing for removal based on any "applicable grounds of inadmissibility" "*when asylum is terminated*" (emphasis added)); *see generally Matter of V-X-*, 26 I. & N. Dec. at 155 (distinguishing between people with asylum status and "aliens admitted at the border with . . . visas").

C. This history makes clear why Defendants cannot invoke 8 U.S.C. § 1182(f) and § 1185(a) to legitimize their efforts to restrict access to the U.S. asylum process for noncitizens at ports of entry. Those provisions operate in the sphere of admission and travel control, *see supra* Part I, and the right to apply for asylum does not depend on an individual's admissibility—indeed, it never has. *See supra* 9-11; *see generally Thuraissigiam*, 591 U.S. at 140 (confirming that an asylum-seeker was entitled to apply for asylum, as well as other "rights . . . that Congress has provided by statute," after a credible-fear screening, even if he could not "be said to have 'effected an entry'" (quoting *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)).

Historical practice accords with this reading. The "recognition that [§ 1182(f)] does not affect the right to pursue a claim for asylum has been the Executive Branch's consistent position for four decades." *Securing the Border*, 89 Fed. Reg. 81156, 81163 (2024); *id.* at n.53 (describing the Office of Legal Counsel's 1984 conclusion that § 1182(f) "did not permit the President to eliminate the asylum rights of noncitizens who had . . . been flown to the United States"). For this reason, no President has attempted to use the entry-ban power to prohibit access to the U.S. asylum process. *Id.* And some past proclamations—including the one at issue in *Trump v. Hawaii*—have been explicit that individuals subject to an entry ban may still apply for asylum. *See, e.g.*, Proc. 9645, § 6(e) (Sept. 24, 2017) ("Nothing in this proclamation shall be construed to limit the ability of an individual to seek asylum . . . consistent with the laws of the

United States."); *Hawaii*, 585 U.S. at 725 (Breyer, J., dissenting) (emphasizing that "[t]he Proclamation does not apply to asylum seekers").

This history matters. In *Hawaii*, the Court relied upon past executive practice to ascertain the relationship between an INA provision preventing discrimination in visa issuance and § 1182(f). *See Hawaii*, 585 U.S. at 696 (considering 8 U.S.C. § 1152(a)(1)(A)). The Court reviewed previous proclamations citing § 1182(f) and found that none of those proclamations complied with the anti-discrimination provision. *See id.* (emphasizing that "[o]n plaintiffs' reading, those orders were beyond the President's authority"). For the Court, the fact that the anti-discrimination provision had "never been treated as a constraint on the criteria for admissibility in § 1182(f)" suggested that the provision did not "limit the President's delegated authority under § 1182(f)." *Id.* at 669. Here, by contrast, the executive branch has *always* treated the right of an individual to seek asylum as a substantive constraint on the president's power under § 1182(f), perhaps because of the longstanding understanding that this right exists regardless of most grounds of admissibility.

Defendants' argument is also at odds with the INA's provision that "[a]ny alien who is physically present in the United States or who arrives in the United States . . . *irrespective of such alien's status*, may apply for asylum." 8 U.S.C. § 1158(a)(1) (emphasis added). Defendants' argument, if accepted, would allow the executive branch to prevent people from applying for asylum based solely on the fact that they are presenting at a port of entry in violation of certain provisions of immigration law, *see* Compl. ¶ 8 (noting that the Proclamation suspends entry to noncitizens who fail to provide certain information necessary "to enable fulfillment of the requirements of 8 U.S.C. § 1182(a)(1)-(3)" (quoting 90 Fed. Reg. 8333, 8335 (Jan. 20, 2025))—the exact type of penalty the Refugee Act prohibits. *Cf. E. Bay*, 932 F.3d at 773 ("there may be reasons, fully consistent with the claim of asylum, that will cause a person to possess false documents . . . to escape persecution by facilitating travel").

Finally, *Sale v. Haitian Centers Council* cannot rescue Defendants' argument. Defendants invoke that case to argue that § 1182(f) allows the government to "prevent the

physical entry of migrants into United States territory," even if it means disregarding the Refugee Act's clear commands. MTD 17-18 (referencing *Sale*, 509 U.S. at 155). This is wrong. In *Sale*, the Court considered whether the Coast Guard, operating "beyond the territorial seas of the United States," could interdict Haitian migrants whose entry had been suspended without regard to the INA's provision for "withholding of deportation" of noncitizens fearing persecution. 509 U.S. at 158 (referencing 8 U.S.C. § 1253(h) (1988 ed.)). Its opinion addressed only that provision—not § 1158—and only considered whether it applied "beyond the territorial sea of the United States." *See id.* (describing the "question presented in this case"). Indeed, both the Court and the parties assumed that the "statutory protections" in § 1158 would apply "to aliens who reside in or have *arrived at the border of the United States*," *id.* at 160; Pet'r Br., *Sale*, 509 U.S. at 155 (No. 92-344), 1992 WL 541276, at *31 (1992) (contrasting "refugees outside the United States" from those "in the United States *or at our borders*," who could take advantage of the INA's "asylum regime (emphasis added)); *id.* at *40 (emphasizing that "the Haitian migrants interdicted off the coast of Haiti are *not at the borders* of the United States" (emphasis added)); *Proposed Interdiction of Haitian Flag Vessels*, 5 Op. O.L.C. 242, 243 (1981) (reasoning § 1158(a) would not apply "on the high seas").

* * *

When it passed the Refugee Act and created the credible-fear screening process in IIRIRA, Congress balanced the nation's obligations toward refugees with the need for expeditious processing at ports of entry. Defendants suggest that §§ 1182(f) and 1185(a) allow it to ignore these carefully-made decisions, but they "ignore the basic distinction" between inadmissibility determinations and asylum and contradict decades of "historical practice," *Hawaii*, 585 U.S. at 696. This Court should reject their arguments.

CONCLUSION

For the foregoing reasons, this Court should deny the motion to dismiss.

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Respectfully submitted,

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**Application for admission pro hac vice forthcoming*

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