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17 **IN THE UNITED STATES DISTRICT COURT**
18 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

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

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

21 Plaintiffs,

22 v.

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

25 Defendants.

26 **CONSENT MOTION OF**
27 **CONSTITUTIONAL**
28 **ACCOUNTABILITY CENTER FOR**
LEAVE TO FILE *AMICUS CURIAE*
BRIEF IN SUPPORT OF PLAINTIFFS’
OPPOSITION TO THE MOTION TO
DISMISS

Honorable Ruth Bermudez Montenegro

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT Constitutional Accountability Center (CAC) hereby
3 respectfully moves the Court for leave to file a brief *amicus curiae* in the above-captioned case
4 in support of Plaintiffs’ Opposition to Defendants’ Motion to Dismiss. Counsel for all parties
5 have consented to the filing of this brief. A copy of the proposed *amicus curiae* brief is attached
6 to this motion. In support of this motion, *amicus* states:

7 1. CAC is a think tank and public interest law firm dedicated to fulfilling the
8 progressive promise of the Constitution’s text and history. CAC works to improve
9 understanding of the Constitution and accordingly has an interest in this case.

10 2. CAC has filed *amicus* briefs in courts across the country addressing issues related
11 to federal immigration law. *See, e.g.*, Brief of Constitutional Accountability Center as *Amicus*
12 *Curiae* in Support of Appellees and Affirmance, *Refugee and Immigr. Center Educ. and Legal*
13 *Servs, et al. v. Noem, et al.*, No. 25-5243 (D.C. Cir. filed Sept. 19, 2025); Brief of Constitutional
14 Accountability Center as *Amicus Curiae* in Opposition to Defendants-Appellants’ Petition for En
15 Banc Rehearing, *Community Legal Services in East Palo Alto, et al. v. HHS*, No. 25-2808 (9th
16 Cir. filed June 20, 2025); Brief of Scholars of Constitutional Law and Immigration Law as *Amici*
17 *Curiae* in Support of Plaintiffs-Appellees and Affirmance, *State of Washington, et al. v. Trump,*
18 *et al.*, No. 25-807 (9th Cir. filed April 11, 2025); Brief of Current Members of Congress and
19 Bipartisan Former Members of Congress as *Amici Curiae* in Support of Plaintiffs-Appellees,
20 *Grace, et al. v. Barr, et al.*, No. 19-5013 (D.C. Cir. filed Aug. 1, 2019). Accordingly, CAC has
21 developed expertise relevant to the issues at the heart of this case.

22 3. District courts “frequently welcome *amicus* briefs from non-parties concerning
23 legal issues that have potential ramifications beyond the parties directly involved or if the *amicus*
24 has unique information or perspective that can help the court beyond the help that the lawyers for
25 the parties are able to provide.” *Trunk v. City of San Diego*, No. 06CV1597-LAB (WMC), 2007
26 WL 9776582, at *1 (S.D. Cal. Dec. 10, 2007); *see also Padre v. MVM, Inc.*, 768 F. Supp. 3d
27 1111, 1117 n. 1 (S.D. Cal. 2025). “[T]here are no strict prerequisites that must be established

1 prior to qualifying for amicus status.” *Angga v. Bumble Bee Foods, LLC*, No. 25-CV-0583-
2 MMA-DEB, 2025 WL 2345080, at *1 (S.D. Cal. Aug. 13, 2025). Instead, “an individual
3 seeking to appear as amicus must merely make a showing that his participation is useful to or
4 otherwise desirable to the court.” *WildEarth Guardians v. Haaland*, 561 F. Supp. 3d 890, 905
5 (C.D. Cal. 2021). Furthermore, while the court is not bound by the parties’ agreements involving
6 amicus filings, the fact that the parties have consented to the filing weighs in favor of granting
7 leave. *See Angga*, 2025 WL 2345080, at *2.

8 4. The proposed, attached *amicus curiae* brief satisfies these standards. The
9 attached brief explains that the text and history of 8 U.S.C. § 1182(f) and § 1185(a), the primary
10 provisions on which Defendants rely in their Motion to Dismiss, only authorize the President to
11 add to the existing grounds of admissibility under § 1182. They do not authorize the executive
12 branch to limit access to the U.S. asylum system. Indeed, the ability to apply for or receive
13 asylum has never hinged on an individual’s admissibility, as statutory text, history, and executive
14 branch materials all make clear. By explaining these issues in detail, the proposed brief provides
15 a unique historic perspective and develops this perspective in more detail than the parties may
16 provide.

1 For the foregoing reasons, *amicus curiae* respectfully requests leave to file the attached
2 brief. A proposed order is attached to this motion.

3 Dated: December 1, 2025

Respectfully submitted,
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15 forthcoming*

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2025, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Dated: December 1, 2025

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INTEREST OF *AMICUS CURIAE*

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 ue 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. Cardo a 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.

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

6 Congress also addressed the nation’s asylum procedures in the Illegal Immigration
7 Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”). That law established an
8 expedited removal process and simultaneously required the executive branch to exempt from that
9 process anyone who expressed a fear of persecution or an intention to apply for asylum. Those
10 individuals had to be referred for interviews with specially trained asylum officers to determine
11 whether they possessed a “credible fear of persecution.” IIRIRA, Pub. L. No. 104-208, § 302,
12 110 Stat. 3009-546, 3009-582 (1996). The goal of these provisions was to ensure that the
13 government would not force people who might be eligible for asylum or other forms of
14 protection back to countries in which they faced persecution without first considering their
15 claims.

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

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

1 those provisions make clear, they only authorize restrictions on “entry” that is, restrictions on
2 eligibility for “admission” to the country. *Trump v. Hawaii*, 585 U.S. 667, 695 n.4 (2018) (“The
3 concepts of entry and admission . . . are used interchangeably in the Immigration and Nationality
4 Act.”); *see id.* (noting that 8 U.S.C. § 1182(f) and § 1185(a) operate within the “sphere[]” of
5 immigration law that “defines the universe of aliens who are admissible into the United States
6 (and therefore eligible to receive a visa)”). And the right to apply for asylum exists regardless of
7 whether an individual is eligible for “admission” to the country, *Sanchez v. Mayorkas*, 593 U.S.
8 409, 416 (2021) (asylum status does not “require admission”), as Congress made clear when
9 passing the Refugee Act and IIRIRA. *See generally* Dan Kesselbrenner & Lory D. Rosenberg,
10 *Immigr. L. & Crimes* §§ 5:1-5:2 (Nov. 2025 update) (noting that a “labyrinthine set of rules and
11 laws govern the[] apparently simple concepts” of admission and entry, and that a grant of asylum
12 is not considered an “admission”); *see infra* at 9-11. Nothing in these laws requires that
13 individuals be admitted before they can apply for asylum, or conditions their ability to apply for
14 asylum on being admissible. Both enactments, in other words, cemented the presumption that
15 “asylum is a concept distinct from admission.” *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d
16 742, 757 (9th Cir. 2018).

17 Because a person’s ability to “enter” the country has nothing to do with their ability to
18 seek asylum, the executive branch has never understood § 1182(f) to “permit the President to
19 eliminate the asylum rights of noncitizens.” *Securing the Border*, 89 Fed. Reg. 81156, 81163
20 n.53 (2024) (describing 1984 conclusion of the Department of Justice’s Office of Legal
21 Counsel). Thus, even if the President could “override particular provisions of the INA through
22 the power granted him in § 1182(f)” a prospect that the Ninth Circuit has rejected, *see E. Bay*,
23 932 F.3d at 760 (internal quotation marks omitted) he could not use that power to limit access
24 to asylum.

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

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

3 **AR GUMENT**

4 **I S d Pr d P r Add r d**
5 **I d N L A A**

6 **A** Section 1182(f) provides that the President can, “by proclamation,” “suspend the
7 entry” of anyone whose entry “would be detrimental to the interests of the United States.”

8 8 U.S.C. § 1182(f). Although this provision “grants the President broad discretion,” it
9 “operate[s]” only within its “sphere[.]” *Ha aii*, 585 U.S. at 683-84, 695. As the provision’s text
10 and history make clear, it addresses the criteria for “admission” into the country. In other words,
11 it allows the president to “define[] the universe of aliens who are admissible” into the country, *id.*
12 at 695, that is, to “supplement the other grounds of inadmissibility in the INA,” *id.* at 684 (citing
13 *Aboure k v. Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986)). But, as described below,
14 admissibility is not and has never been a prerequisite to applying for asylum. Thus, the
15 President’s § 1182(f) power gives him no discretion to prevent people from applying for asylum.

16 By the time § 1182(f) was enacted, the concept of “entry” was a well-defined term of art
17 within immigration law, and it was a legal concept rather than a physical one. *Matter of Pierre*
18 *et al.*, 14 I. & N. Dec. 467, 468 (B.I.A. 1973) (noting that a noncitizen physically present in the
19 country could still be understood not to have made an “entry” and citing “the many cases which
20 have treated this sub ect over the years”). Individuals who had not legally “entered” the United
21 States, regardless of their physical location, were sub ect to “exclusion proceedings,” in which
22 the government determined whether they would “be allowed to enter or [should] be excluded and
23 deported.” *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958); *see also id.* (noting that those
24 who had “entered” were instead sub ect to deportation or “expulsion” proceedings). In exclusion
25 proceedings, immigration ad udicators assessed whether noncitizens seeking entry fell within
26 § 1182’s “classes of aliens . . . excluded from admission,” INA, Pub. L. No. 414, § 212(a), 66
27 Stat. 163, 182 a part of the INA that only applied to those who had not effected “an entry.”

1 *Leng May Ma*, 357 U.S. at 187. “Entry,” in other words, was a legal status that freed a
2 noncitizen from the burden of proving her eligibility for admission. *Landon v. Plasencia*, 459
3 U.S. 21, 28-32 (1982) (“only entering’ aliens are sub ect to exclusion” proceedings, in which
4 “admissibility shall be determined”); *cf.* Dan Kesselbrenner, Lory D. Rosenberg, *Immigr. L. &*
5 *Crimes* § 5:7 (Nov. 2025 update) (“[t]he [INA] requires applicants for entry to establish that they
6 are admissible to the United States”); *Ha aii*, 585 U.S. at 695 n.4 (“the concepts of entry and
7 admission . . . are used interchangeably in the INA”). By permitting suspensions of “entry,”
8 § 1182(f) allowed the President to demarcate “the boundaries of admissibility,” *id.* at 695, rather
9 than endowing him with any special power over the nation’s physical borders.

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

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

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

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

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

18 **II F r D d C r H R r d E C d r A**
19 **A R rd A ’Ad**

20 Years after Congress delegated to the President the power to impose restrictions on entry
21 and travel in § 1182(f) and § 1185(a), it enacted the Refugee Act, creating the first statutory
22 protections for asylum-seekers. The Refugee Act, as amended by IIRIRA, requires the executive
23 to consider requests for asylum protection from asylum-seekers at ports of entry, and makes clear
24 that this obligation exists regardless of the President’s entry-related powers in § 1182(f) and
25 § 1185(a).

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

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

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

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

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

1 the U.N. Protocol’s nondiscriminatory definition of “refugee,” *see* H.R. Rep. No. 96-781, at 19
2 (1980) (Conf. Rep.), an endeavor that had become intimately intertwined with its “demand for
3 more congressional control” over refugee programs, Anker & Posner, *supra*, at 30. It also
4 created statutory protections for asylum-seekers by requiring the Attorney General to establish a
5 “procedure for an alien physically present in the United States or at a land border or port of
6 entry, irrespective of such alien’s status, to apply for asylum.” Refugee Act § 208(a), 94 Stat. at
7 105. Although executive agencies had previously promulgated regulations that provided for the
8 granting of asylum and withholding of deportation regulations that required the consideration
9 of asylum claims at “land border port[s],” “seaports,” “airports,” or “ports of entry,” and “within
10 the United States,” *Report on Haitian Emigration, supra*, at 20-22 (quoting 8 C.F.R. § 108(a),
11 INS Operations Instructions 108.1(a)); *cf. Public Notice* , *supra*, at 3447 (providing
12 procedures applicable to requests for asylum “from a foreign national . . . within territory under
13 the jurisdiction of the United States, or . . . on or over the high seas”) legislators sought a
14 “specific statutory basis” for these policies to “insure the rights of those it [sought] to protect,”
15 H.R. Rep. No. 96-608, at 17-18; *see also* 126 Cong. Rec. 3757 (Feb. 26, 1980) (Sen. Kennedy)
16 (“[p]resent regulations and procedures now used by the Immigration Service simply do not
17 conform to . . . the spirit [of the Refugee Act]”).

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

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

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

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

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

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

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

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

1 for asylum . . . or a fear of persecution” for an interview by an “asylum officer” defined as an
2 officer with similar professional training and supervision to those in the existing Asylum Officer
3 Corps, 8 U.S.C. § 1225(b)(1)(E) to assess whether they have a “credible fear of persecution”
4 and must be exempt from the expedited removal process, *see id.* § 1225(b)(1); *Dept of*
5 *Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 109-10 (2020).

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

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

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

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

15 Historical practice accords with this reading. The “recognition that [§ 1182(f)] does not
16 affect the right to pursue a claim for asylum has been the Executive Branch’s consistent position
17 for four decades.” *Securing the Border*, 89 Fed. Reg. 81156, 81163 (2024); *id.* at n.53
18 (describing the Office of Legal Counsel’s 1984 conclusion that § 1182(f) “did not permit the
19 President to eliminate the asylum rights of noncitizens who had . . . been flown to the United
20 States”). For this reason, no President has attempted to use the entry-ban power to prohibit
21 access to the U.S. asylum process. *Id.* And some past proclamations including the one at issue
22 in *Trump v. Hawaii* have been explicit that individuals subject to an entry ban may still apply
23 for asylum. *See, e.g.*, Proc. 9645, § 6(e) (Sept. 24, 2017) (“Nothing in this proclamation shall be
24 construed to limit the ability of an individual to seek asylum . . . consistent with the laws of the
25
26
27

1 United States.”); *Ha aii*, 585 U.S. at 725 (Breyer, J., dissenting) (emphasizing that “[t]he
2 Proclamation does not apply to asylum seekers”).

3 This history matters. In *Ha aii*, the Court relied upon past executive practice to ascertain
4 the relationship between an INA provision preventing discrimination in visa issuance and
5 § 1182(f). *See Ha aii*, 585 U.S. at 696 (considering 8 U.S.C. § 1152(a)(1)(A)). The Court
6 reviewed previous proclamations citing § 1182(f) and found that none of those proclamations
7 complied with the anti-discrimination provision. *See id.* (emphasizing that “[o]n plaintiffs’
8 reading, those orders were beyond the President’s authority”). For the Court, the fact that the
9 anti-discrimination provision had “never been treated as a constraint on the criteria for
10 admissibility in § 1182(f)” suggested that the provision did not “limit the President’s delegated
11 authority under § 1182(f).” *Id.* at 669. Here, by contrast, the executive branch has *al ays*
12 treated the right of an individual to seek asylum as a substantive constraint on the president’s
13 power under § 1182(f), perhaps because of the longstanding understanding that this right exists
14 regardless of most grounds of admissibility.

15 Defendants’ argument is also at odds with the INA’s provision that “[a]ny alien who is
16 physically present in the United States or who arrives in the United States . . . *irrespective of*
17 *such alien s status*, may apply for asylum.” 8 U.S.C. § 1158(a)(1) (emphasis added).
18 Defendants’ argument, if accepted, would allow the executive branch to prevent people from
19 applying for asylum based solely on the fact that they are presenting at a port of entry in
20 violation of certain provisions of immigration law, *see Compl.* 8 (noting that the Proclamation
21 suspends entry to noncitizens who fail to provide certain information necessary “to enable
22 fulfillment of the requirements of 8 U.S.C. § 1182(a)(1)-(3)” (quoting 90 Fed. Reg. 8333, 8335
23 (Jan. 20, 2025)) the exact type of penalty the Refugee Act prohibits. *Cf. E. Bay*, 932 F.3d at
24 773 (“there may be reasons, fully consistent with the claim of asylum, that will cause a person to
25 possess false documents . . . to escape persecution by facilitating travel”).

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

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

17 * * *

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

1 **CONCLUSION**

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

3 Dated: December 1, 2025

4 Respectfully submitted,
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