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20 UNITED STATES DISTRICT COURT
21 SOUTHERN DISTRICT OF CALIFORNIA

22 Al Otro Lado, Inc., et al.,

Case No.: 3:17-cv-02366-BAS-KSC

23 Plaintiffs,

24 v.

25 Kirstjen M. Nielsen, et al.,

26 Defendants.

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6 CV-06810-JST, 2018 WL 6053140 (N.D. Cal. Nov. 19, 2018) 8, 10

7 *East Bay Sanctuary Covenant v. Trump* (“*East Bay Sanctuary II*”), 909 F.3d

8 1219 (9th Cir. 2018)

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1 **INTEREST OF AMICI CURIAE**

2 Amici are members of Congress who are familiar with the Immigration and
3 Nationality Act (“INA”), 8 U.S.C. § 1101 *et seq.* Amici have a strong interest in
4 ensuring that the Executive Branch respects the role of Congress and faithfully
5 implements the INA. Amici are well suited to provide the Court with insights concerning
6 Congress’s intent in enacting the INA, the INA’s strict requirements in relation to asylum
7 seekers, and the conflict between the intent and requirements of the INA and the
8 Executive Branch practices challenged in this litigation. A complete list of amici is set
9 forth in the appendix to this brief.

10 **SUMMARY OF ARGUMENT**

11 There is reason to believe that the U.S. Department of Homeland Security (“DHS”)
12 is violating the INA by attempting to deter asylum seekers

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1 at ports of entry). Specifically, “‘CBP officers stand at the international line out in the
2 middle of the footbridges,’ checking pedestrians’ travel documents, and preventing
3 asylum-seekers from crossing the international line until space is ‘available ... to hold the
4 individual while being processed.’” *Id.* ¶ 70 n.61 (quoting OIG Report).

5 The Executive Branch has argued that it lacks the capacity to deal with the “illegal
6 immigration crisis facing the United States.”¹ DHS Secretary Kirstjen M. Nielsen has
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1 historical levels.³ To be sure, the number of individuals arriving at ports of entry along
2 the southern border who assert a credible fear of returning to their home countries, the
3 foundation of an asylum claim, has increased over the past year from 17,284 to 38,269,
4 potentially as a result of public statements by DHS urging asylum seekers to go to ports
5 of entry.⁴ But the total number of noncitizens arriving at ports of entry who were deemed
6 inadmissible increased by a much smaller margin. In 2018, that number was 124,511,
7 compared to 111,601 in 2017, 150,825 in 2016, and 114,486 in 2015.⁵ Moreover, the
8 rate at which DHS is processing asylum seekers is below CBP's own stated processing
9 capacity. In FY 2018, DHS processed an average of only 34 asylum seekers per day in
10 the San Diego field office area, even though CBP has claimed that the San Ysidro port of
11 entry has the ability to process 90 to 100 asylum seekers daily.⁶

12 Any contention that DHS lacks sufficient capacity to process the current volume of
13 noncitizens arriving at ports of entry is further belied by the administration's failure to
14 prioritize increasing that capacity. The operations and support budget for CBP's Office
15 of Field Operations ("OFO"), which manages ports of entry, was \$3,942,479,000 in FY
16 2017. In FY 2018, the President's budget called for a *smaller* amount (\$3,900,330,000).

18 ³ CBP, *Southwest Border Migration FY2018*, [https://www.cbp.gov/newsroom/stats/sw-](https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018)
19 [border-migration/fy-2018](https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018) (last visited Feb. 15, 2019).

20 ⁴ CBP, *Claims of Fear: CBP Southwest Border and Claims of Credible Fear Total*
21 *Apprehensions/Inadmissibles (FY2017 - FY2018)*,
22 <https://www.cbp.gov/newsroom/stats/sw-border-migration/claims-fear> (last visited Feb.
15, 2019).

23 ⁵ CBP, *Southwest Border Migration FY2018*, *supra* note 3; CBP, *Southwest Border*
24 *Migration FY2017*, <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2017>
(last visited Feb. 15, 2019).

25 ⁶ Human Rights First, *Refugee Blockade: The Trump Administration's Obstruction of*
26 *Asylum Claims at the Border*, at 13 (December 2018),
27 https://www.humanrightsfirst.org/sites/default/files/December_Border_Report.pdf.

1 And the FY 2019 request calls for a relatively modest 4.3 percent increase
2 (\$4,067,985,000).⁷ Additionally, the amount requested in the President’s budget for
3 construction and facility improvements at OFO facilities in FY 2019 is identical to the
4 amount requested in FY 2018.⁸ And, of the five facilities at which the President’s budget
5 contemplates expenditures to expand capacity and improve operations, only two are
6 located at the southern border.⁹

7 Finally, recent statements of DHS personnel suggest that DHS is limiting arriving
8 noncitizens’ access to ports of entry not because it lacks capacity but as a means of
9 deterring asylum seekers. During a joint DHS and Department of Defense staff briefing
10 on December 6, 2018, a CBP official stated that DHS had limited processing at the San
11 Ysidro port of entry because “[t]he more we process, the more will come.”¹⁰ Other DHS
12 officials have similarly indicated that the administration’s focus at the border “has just
13 been on how can we deter, rather than how can we handle.”¹¹

14 Any attempted deterrence would be consistent with the approach taken by the
15 Executive Branch to immigration policy generally. For example, in defending the
16 administration’s now-rescinded family separation policy, former White House Chief of
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18 ⁷ Dep’t of Homeland Sec., CBP, *Budget Overview Fiscal Year 2019*, at CBP – OS – 118,
19 [https://www.dhs.gov/sites/default/files/publications/U.S.%20Customs%20and%20Border
20 %20Protection.pdf](https://www.dhs.gov/sites/default/files/publications/U.S.%20Customs%20and%20Border%20Protection.pdf).

21 ⁸ *Id.* at CBP – ~~HC~~&IPC&IP20 PB1111Id. 0

1 Staff John Kelly noted that it “would be a tough deterrent. A much faster turnaround on
2 asylum seekers.”¹² Along the same lines, President Trump defended the family
3 separation policy by noting that if migrants “feel there will be separation, they don’t
4 come.”¹³ The limitations DHS has imposed on asylum seekers arriving at ports of entry
5 appear to reflect a similar deterrence-based strategy.

6 ARGUMENT

7 I. The INA Reflects the Intent of Congress to Facilitate Grants of Asylum

8 The asylum provisions of the INA reflect Congress’s intent to “give statutory
9 meaning to our national commitment to human rights and humanitarian concerns,” bring
10 federal law into conformity with the United States’s commitments under international
11 law, and address needs that “touch at the heart of America’s foreign policy.” 125 Cong.
12 Rec. 23,231-32 (1979) (statement of Sen. Kennedy).

13 Congress enacted the Refugee Act of 1980 in recognition that “[t]he refugees of
14 tomorrow, like the refugees of today, will continue to look to the United States for safe
15 haven and resettlement opportunities—and our Government will continue to be called
16 upon to help.” 126 Cong. Rec. 3,757 (1980) (statement of Sen. Kennedy). The Act set
17 out for the first time an “asylum procedure ... mandated in our immigration law.” 126
18 Cong. Rec. 4,500 (1980) (statement of Rep. Holtzman). It replaced what had been an “ad
19 hoc,” “inadequate,” and “discriminatory” administrative process, 125 Cong. Rec. 23,232
20 (1979) (statement of Sen. Kennedy), with a formal asylum application process for any
21 noncitizen “physically present in the United States or at a land border or port of entry,
22 irrespective of such alien’s status,” Refugee Act § 208(a) (current version, with similar
23

24 ¹²

1 language, at 8 U.S.C. § 1158). Consistent with the statutory goal of providing refuge
2 where needed, the Act invested the Executive Branch with discretion in deciding whether
3 to grant asylum, but made access to the application process mandatory. *Id.*

4 The Refugee Act also intended to bring U.S. law “into conformity with the United
5 States’s obligations” under the 1951 Convention Relating to the Status of Refugees
6 (“1951 Convention”) and the 1967 Protocol Relating to the Status of Refugees (“1967
7 Protocol”). *East Bay Sanctuary Covenant v. Trump* (“*East Bay Sanctuary II*”), 909 F.3d
8 1219, 1233 (9th Cir. 2018); *see also* 125 Cong. Rec. 23,232 (1979) (statement of Sen.
9 Kennedy that the Act will “make our law conform to the United Nations Convention and
10 protocol relating to the status of refugees, which we signed in 1969”). The 1951
11 Convention precludes parties, including the United States, from “impos[ing] penalties, on
12 account of their illegal entry or presence, on refugees who, coming directly fro -0.006 T2impos[

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1 enrich our society.” H. Rep. No. 104-469, pt. 1, at 110 (1996) (quoting in part President
2 Reagan).

3 Confirming its intent to facilitate grants of asylum where warranted, Congress has
4 repeatedly rejected efforts to limit the number of asylum applicants. 2.1 (te)3.6 ()] k 01 Te -0.0

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1 Constitution, the President’s power to see that the laws are faithfully executed refutes the
2 idea that he is to be a lawmaker.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S.
3 579, 587 (1952). The Framers left it to Congress, not the Executive Branch, to exercise
4 “the legislative power of the Federal government” using the “single, finely wrought and
5 exhaustively considered, procedure” they prescribed. *INS v. Chadha*, 462 U.S. 919, 951
6 (1983). It follows that “[t]he power of executing the laws ... does not include a power to
7 revise clear statutory terms that

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1 *Bay Sanctuary I*, 2018 WL 6053140, at *1. The same conclusion applies

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APPENDIX: LIST OF AMICI

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- 2 Jerrold Nadler, Representative of New York
- 3 Zoe Lofgren, Representative of California
- 4 Bennie G. Thompson, Representative of Mississippi
- 5 Nanette Diaz Barragán, Representative of California
- 6 Suzanne Bonamici, Representative of Oregon
- 7 Julia Brownley, Representative of California
- 8 Tony Cárdenas, Representative of California
- 9 André Carson, Representative of Indiana
- 10 Joaquin Castro, Representative of Texas
- 11 Judy Chu, Representative of California
- 12 David N. Cicilline, Representative of Rhode Island
- 13 Gilbert R. Cisneros, Jr., Representative of California
- 14 Yvette D. Clarke, Representative of New York
- 15 Steve Cohen, Representative of Tennessee
- 16 Bonnie Watson Coleman, Representative of New Jersey
- 17 Lou Correa, Representative of California
- 18 Elijah E. Cummings, Representative of Maryland
- 19 Susan A. Davis, Representative of California
- 20 Madeleine Dean, Representative of Pennsylvania
- 21 Diana DeGette, Representative of Colorado
- 22 Val B. Demings, Representative of Florida
- 23 Mark DeSaulnier, Representative of California
- 24 Theodore E. Deutch, Representative of Florida

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1 Marcia L. Fudge, Representative of Ohio

2 Jesús G. “Chuy” García, Representative of Illinois

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Jimmy Gomez, Representative of California

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Al Green, Representative of Texas

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Denny Heck, Representative of Washington

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Henry C.12Hank” Johnson, Jr., Representative of Georgia

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Dan Kildee, Representative of Michigan

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Breda L.16awrec, ersistentative of Michigan

Andy Le17Representative of Michigan

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