No. 19-56417

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AL OTRO LADO, INC., *et al.*,
Appellees,

v.

CHAD WOLF, Acting Secretary of Homeland Security, *et al.*,
Appellants.

On Appeal from a Preliminary Injunction Issued by the
U.S. District Court for the Southern District of California,
Civil Action No. 17-cv-02366-BAS-KSC

APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR ADMINISTRATIVE STAY AND MOTION FOR STAY PENDING APPEAL

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CIRCUIT RULE 27-3 CERTIFICATE

Undersigned counsel certifies the following information under Circuit Rule 27-3(a)(3):

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(2) Facts Showing the Existence and Nature of the Emergency

On November 19, 2019, the U.S. District Court for the Southern District of California entered a nationwide preliminary injunction barring the government from applying an important Executive Branch rule—one that the Supreme Court has already, on the government's emergency stay request, permitted to go into full effect—to an estimated 26,000+ aliens in Mexico and the United States. The rule is designed to address the dramatically escalating burdens of unauthorized migration by generally rendering ineligible for asylum aliens who cross the United States' southern

border after failing to apply for protection from persecution or torture in a third country through which the alien transited en route to the United States.

The injunction irreparably harms the government and the public. The injunction contravenes the constitutional separation of powers by preventing the Executive from using its delegated statutory authorities; harms the public by thwarting enforcement of a rule implementing the Attorney General's and Secretary of Homeland Security's statutory authority to grant or deny the discretionary benefit of asylum in this country; and is in serious tension with the Supreme Court's order—staying a prior nationwide injunction of the rule—that permitted the rule to go into nationwide effect without limitation.

(3) Manner of Notification

Undersigned counsel notified Plaintiffs-Appellees' counsel by email on December 12, 2019, of the government's intent to file this Emergency Motion. Plaintiffs' counsel stated that Plaintiffs oppose this Motion. Service will be effected by electronic service through the CM/ECF system.

(4) Submissions to the District Court

On December 4, 2019, Defendants filed a motion for a stay from the district court, and asked that the district court order expedited briefing on the motion and that the district court rule on the motion by December 11, 2019. On December 9, the district court denied the government's request for expedited briefing, and ordered

the Plaintiffs to file an opposition to the stay motion by December 20, 2019, thereby indicating that the district court did not intend to rule on Defendants' stay request before that date.

(5) Decision Requested By

The government respectfully requests that an administrative stay be issued immediately. The government also requests that a decision on the motion for a stay pending appeal be issued as soon as possible, but no later than December 27, 2019.

DATED: December 12, 2019

Respectfully submitted,

/s/Alexander J. Halaska
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Counsel for Defendants-Appellants

INTRODUCTION

This Court should expedite this appeal and, pending resolution of the appeal, stay the district court's erroneous nationwide injunction of a critical Rule designed to prioritize urgent and meritorious asylum claims, deter non-urgent or baseless ones, and aid ongoing international negotiations to address the flow of migrants to our southern border. *See* Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019) (Rule). The district court's order rests on serious errors of law, enjoins a Rule that is not even challenged in this case, and does so after the Supreme Court stayed an injunction of that very Rule. Letting the injunction stand during this appeal will irreparably harm the government and the public. The government respectfully requests an immediate administrative stay and a decision on this stay motion by December 27, 2019.

Faced with an unprecedented and unsustainable surge in migration, the Attorney General and Acting Secretary of Homeland Security exercised their express statutory authority to issue an interim final rule denying asylum to certain aliens who seek asylum in the United States without having sought protection in a third country through which they traveled and where such protection was available. By screening out asylum claims by those who declined to request protection at the first opportunity, the Rule alleviates a crushing burden on the U.S. asylum system by prioritizing asylum seekers who most need asylum in the United States, screens out asylum

claims that are less urgent or less likely to be meritorious, and combats human smuggling by discouraging aliens without a genuine need for asylum from making the arduous and potentially dangerous journey from Central America to the United States. 84 Fed. Reg. at 33,839. The Rule preserves the ability to seek withholding of removal and protection under the Convention Against Torture, so aliens will not be returned to countries where they face persecution or torture. When a district court in this Circuit enjoined the Rule nationwide, the Supreme Court stayed that injunction pending appeal and through the disposition of any petition for certiorari filed by the government. *Barr v. East Bay Sanctuary Covenant*, No. 19A230, 2019 WL 4292781 (U.S. Sept. 11, 2019).

After the Supreme Court issued that stay, Al Otro Lado—one of the plaintiffs that secured the nationwide injunction of the Rule and then unsuccessfully opposed a stay of that injunction in the Supreme Court—turned to the district court in this case. This case, which has been pending since 2017, challenges Customs and Border Protection's (CBP) "metering" practices—its policy of regulating the flow of aliens who cross or seek to cross the border into U.S. ports of entry, based on a port's capacity, under which CBP at times tells aliens to return to the port to seek entry later, when the port has capacity to process them. Plaintiffs here claim that metering unlawfully "denies" them "access to the U.S. asylum process." Second Am. Compl.

¶ 2 (SAC) (App099–100).[1] This case has never challenged—or even concerned—the Rule. Yet after the Supreme Court issued its stay in *East Bay*, Al Otro Lado and its co-plaintiffs in this case moved the district court here to enjoin the government from applying the Rule to aliens who purportedly would have entered the United States before the Rule's effective date (July 16, 2019) but did not enter because they were metered.

The district court granted that nationwide injunction, barring application of the Rule to a provisional class of an estimated 26,000+ aliens who purportedly would have entered before July 16 if not for metering. The district court did not hold that either metering or the Rule is unlawful. Rather, the court ruled that the Rule by its terms does not apply to class members because they "attempted to enter or arrived at the southern border *before* July 16, 2019 to seek asylum but were prevented from making a direct claim at a [port of entry] pursuant to the metering policy," and the Rule "clearly states that it applies only to aliens who entered, attempted to enter, or arrived *on or after* July 16, 2019." Order 31, 32 (App031, 032) (second emphasis added).

The district court's injunction rests on manifest errors of law and irreparably harms the government and the public. It should be stayed pending appeal.

[1] "App" refers to this Motion's appendix.

The district court was wrong that the Rule by its terms does not apply to the provisional class members. Order 31. The opposite is true: The Rule by its terms *clearly* applies to class members. The Rule applies to an alien who "enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019." 84 Fed. Reg. at 33,843. By definition, class members will enter, attempt to enter, or arrive in the United States after July 16, 2019. Indeed, that obvious truth is why the Plaintiffs in this case *sought an injunction of the Rule*. The district court thought that the Rule does not apply to class members because those aliens "attempted to enter or arrived at the southern border *before* July 16, 2019 to seek asylum" but could not apply for asylum because of the metering policy. Order 31. But the Rule makes no exception for aliens who attempted to enter before July 16 but were metered and will not enter until after July 16. Indeed, it makes no exception based on prior entry (or attempted entry) for *any alien* who enters or attempts to enter after July 16. The district court was clearly wrong.

A stay is warranted because the injunction irreparably harms the United States. The injunction bars the government from applying a critical Rule to tens of thousands of aliens, it imposes major systematic burdens on the government that undermine the Rule's sound functioning, and it thus undercuts the multiple aims of the Rule to address an ongoing crisis. The injunction therefore causes the very harms

that the Rule sought to address—and it does so where the Supreme Court issued a stay allowing the Rule to go into effect nationwide.

Without a stay in this case, many of the irreparable burdens associated with the injunction—including the system-wide burdens that the injunction will inflict on administration of the Rule and of the asylum system—will occur before this appeal is resolved. The harms to class members, in contrast, are self-inflicted, because class members are subject to the Rule's eligibility bar only because they have declined to seek protection in a third country. Those harms are also minimal, because the Rule preserves class members' ability to seek mandatory protection from removal and renders them ineligible only for the discretionary benefit of asylum.

This Court should stay the injunction pending appeal.

BACKGROUND

A. This Lawsuit: Plaintiffs' Challenge to CBP's Metering Practices

In 2016, in response to an overwhelming surge of aliens entering the San Ysidro port of entry in San Diego, California, CBP instituted an informal "metering" or "queue management" system at some ports of entry. When a port is metering, a CBP officer is posted at the boundary line between the United States and Mexico and preliminarily screens pedestrians' travel documents. *See* Owen Mem. 1 (App202). Travelers with facially legitimate documents are permitted to cross the border and proceed to inspection inside the port. Travelers without documents may

be instructed to wait to cross the border until the port has enough resources—including personnel and holding space, and taking into account CBP's other mission responsibilities—to process their resource-intensive applications for admission and detain them for further processing. *Id.* In April 2018, as this surge of undocumented migrants spread across the U.S.-Mexico border, CBP issued a guidance memorandum to CBP's four border field offices, which states that metering procedures may be implemented "[w]hen necessary or appropriate to facilitate orderly processing and maintain the security and safety of the port and safe and sanitary conditions for the traveling public." *Id.*

In July 2017, plaintiffs Al Otro Lado and several individual aliens filed this case. In their operative complaint, Plaintiffs claim that CBP's metering practices unlawfully "denied" them "access to the asylum process" in violation of (among other legal authorities) the Immigration and Nationality Act (INA) and the Administrative Procedure Act (APA). SAC ¶¶ 2, 203–35 (App099–100, 173–83). Plaintiffs ground their INA-based claims in the asylum statute, which generally allows an alien "who is physically present in the United States or who arrives in the United States" to apply for asylum, 8 U.S.C. § 1158(a)(1), and the expedited removal statute, which authorizes expedited asylum pre-screening (credible-fear screening) and potential removal of an alien "who is arriving in the United States," *id.* § 1225(b)(1)(B)(i), (ii). Plaintiffs claim that sections 1158 and 1225 bar the government from instructing

aliens without travel documents to wait in Mexico until CBP has the resources to process their applications for admission. *See* SAC ¶¶ 244–69 (App186–91).

The case has proceeded through significant discovery and through two motions to dismiss, both of which the district court denied. In denying the second motion to dismiss, the court held that Plaintiffs stated claims regarding the government's alleged failure to process them for asylum under the metering policy. *See Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1199–1205 (S.D. Cal. July 29, 2019). The court reasoned that the asylum and expedited removal statutes apply extraterritorially to aliens who are outside the United States and wish to arrive through a port of entry to apply for asylum, conferring on such aliens a right to apply for asylum and a duty on the government to process their asylum applications. *See id.* The court reasoned that section 1158(a)(1) provides a right to apply for asylum both to any alien "who is physically presented in the United States" and to any alien "who arrives in the United States" (*id.* at 1199); that, under the rule against surplusage, the latter category presumptively must encompass a different group of aliens than the former category (*see id.*); and that, given the rule against surplusage and the Dictionary Act's general rule that "the present tense include[s] the future as well as the present" (1 U.S.C. § 1), section 1158(a)(1) provides a right to an alien who has not yet arrived in the United States but who has approached a port of entry to seek admission—that is, someone who is "in the process of arriving in the United States"

through a port of entry (394 F. Supp. 3d at 1200; *see also id.* at 1199–1203). The court applied similar reasoning to section 1225, which imposes on immigration officers a duty to inspect aliens who are "seeking admission" (8 U.S.C. § 1225(a)(3)) and a duty to refer to a credible-fear interview an alien "who is arriving in the United States" who intends to seek asylum (*id.* § 1225(b)(1)(A)(ii)). The court concluded that the quoted language shows that the expedited removal statute applies to aliens who were "in the process of seeking admission into the United States or otherwise attempting to do so"—and thus covers aliens who reached the southern border to seek asylum. 394 F. Supp. 3d at 1205; *see id.* at 1203–05. Although the court ruled that Plaintiffs stated claims of violations of these statutes, the district court did not rule that metering is categorically unlawful. Rather, the court acknowledged that "there may exist potentially legitimate factors that prevent CBP officers from immediately" processing aliens seeking to enter the ports. *Id.* at 1212.

B. The Third-Country-Transit Rule and the Litigation Challenging It

Generally, an alien "who is physically present in the United States or who arrives in the United States ... may apply for asylum in accordance with [section 1158] or, where applicable, section 1225(b)." 8 U.S.C. § 1158(a)(1). But a grant of asylum is discretionary. Asylum "*may* [be] grant[ed] to an alien who has applied," *id.* § 1158(b)(1)(A) (emphasis added), if the alien satisfies certain standards and is not subject to an application or eligibility bar, *id.* § 1158(a)(2), (b)(1)(B), (b)(2). And

the "Attorney General [and the Secretary of Homeland Security] may by regulation establish additional limitations and conditions, consistent with [section 1158], under which an alien shall be ineligible for asylum." *Id.* § 1158(b)(2)(C).

On July 16, 2019, the Attorney General and the Acting Secretary issued the Rule, which provides that "any alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019, after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence in route to the United States, shall be found ineligible for asylum." 84 Fed. Reg. at 33,843. The Rule does not apply to an alien who shows that he or she applied for and was denied protection in a third country through which the alien traveled en route to the United States. *Id.* at 33,843. Nor does it apply to an alien who is a victim of a severe form of trafficking or who traveled exclusively through countries that, at the time of transit, were not parties to certain international agreements governing non-refoulement. *Id.*

Multiple organizations, including Al Otro Lado, challenged the Rule. On July 24, a district judge in the Northern District of California enjoined the Rule nationwide. *East Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922 (N.D. Cal. 2019). The Ninth Circuit stayed the injunction as to all jurisdictions but its own, ruling that the record did not support the injunction's nationwide scope. 934 F.3d 1026 (9th Cir. 2019). The district court nonetheless restored the nationwide scope of the injunction.

391 F. Supp. 3d 974 (N.D. Cal. 2019). On September 11, the Supreme Court stayed the district court's injunctive orders "in full," over Al Otro Lado's and others' opposition, allowing the Rule to go into effect nationwide. *Barr v. East Bay Sanctuary Covenant*, No. 19A230, 2019 WL 4292781 (U.S. Sept. 11, 2019). That stay remains in effect "pending disposition of the Government's appeal ... and disposition of the Government's petition for a writ of certiorari, if such writ is sought." *Id.*

C. Plaintiffs' Preliminary-Injunction Motion in This Case and the District Court's Injunction of the Third-Country-Transit Rule

After the Supreme Court allowed the Rule to go into effect, Al Otro Lado and the individual Plaintiffs in this case filed preliminary-injunction and class-certification motions, alleging that metering is unlawful and asking the district court to enjoin the government from applying the Rule to a class of aliens who were metered before the Rule took effect and still seek to access the U.S. asylum process.

On November 19, the district court granted a preliminary injunction, ordering that the Rule could not be applied to a class of "all non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. POE [i.e., port of entry] before July 16, 2019 because of the U.S. Government's metering policy, and who continue to see access to the U.S. asylum process." Order 36; *see* Order 1–36. The court did not address the legality of the Rule or of metering. Order 15, 23. Instead, "[a]dopting and applying" the reasoning of its order denying the second motion to dismiss, the court concluded that the Rule, "by its express terms, does not apply to

those non-Mexican foreign nationals who attempted to enter or arrived at the southern border *before* July 16, 2019 to seek asylum but were prevented from making a direct claim at a [port of entry] pursuant to the metering policy." Order 31; *see* Order 30–32. In the court's view, an alien who approached the border to seek asylum before July 16 but was metered was "in the processing of arriving in the United States" (and thus, under the statute, was "arriving in the United States") before the Rule's effective date, Order 31, and so that alien is not covered by the Rule because the Rule "clearly states that it applies only to aliens who entered, attempted to enter, or arrived on or after July 16, 2019," Order 32. The court added that applying the Rule to Plaintiffs would irreparably harm them by stripping them of "an opportunity to have their asylum claims heard," and that the equities favored an injunction because class members purportedly "relied on the Government's representations" that "they would eventually have an opportunity to make a claim for asylum in the United States." Order 34; *see* Order 32–35.

ARGUMENT

This Court should stay the district court's injunction pending resolution of this appeal. The government is likely to prevail on appeal and considerations of irreparable harm and the equities favor a stay. *See Hilton v. Braunskill*, 481 U.S. 770, 776

(1987). This appeal also warrants expedited consideration, including expedited consideration of this stay request, and this Court should grant an administrative stay while it considers this stay request.

I. The Government Is Likely to Succeed on Appeal Because the Preliminary Injunction Rests on Serious and Clear Errors of Law.

The Rule by its terms plainly applies to class members, and the district clearly erred in holding otherwise. *See* Order 30–32. The Rule applies to "any alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019." 84 Fed. Reg. at 33,843; 8 C.F.R. §§ 208.13(c)(4), 1208.13(c)(4). By definition, aliens in the provisional class fall within that plain text. The class comprises aliens who "were unable to make a direct asylum claim" before July 16 (because they were metered before then and so did not enter the United States and apply for asylum) and "who continue," after July 16, "to seek access to the U.S. asylum process." Order 36. The class thus comprises aliens who were outside of the United States after July 16 and who will therefore enter the United States only after that date—which is to say, they are plainly covered by the Rule.

The district court thought that the Rule does not apply to provisional class members because those aliens "attempted to enter or arrived at the southern border *before* July 16, 2019 to seek asylum," Order 31, and the Rule applies only to those who arrived entered, attempted to enter, or arrived "*after*" July 16, Order 32 (emphasis added). That reasoning is incorrect. The provisional class members may have

attempted to enter the United States before July 16, 2019, but they will *also* attempt to enter the United States after that date. Nothing in the Rule suggests that only an alien's first attempt at entry counts, and nothing makes prior attempts at entry relevant. The Rule applies (for example) to an alien who entered at the southern border in May 2019, left the United States in June 2019, and then again entered at the southern border in August 2019. It likewise applies to (for example) an alien who attempted to enter in May 2019 and again attempted to enter August 2019. It does not matter that an alien entered, attempted to enter, or arrived *before* July 16: the Rule makes no exception for such an alien when the alien enters or attempts to after July 16. The Rule covers provisional class members.

The district court believed that its conclusion followed from the logic of its prior motion-to-dismiss order, because an alien who approached a port of entry to seek asylum before July 16 but was metered was "in the process of arriving in the United States" before the Rule's effective date, and so that alien is not covered by the Rule because the Rule "clearly states that it applies only to aliens who entered, attempted to enter, or arrived on or after July 16, 2019." Order, 31 32. Even if the district court's motion-to-dismiss reasoning were sound, it would not show that the Rule does not apply to class members: as explained above, regardless of whether a

class member was "in the process of arriving in the United States" before the effective date, the class member would still be entering, attempting to enter, or arriving in the United States after that date—and so would be covered by the Rule.

In any event, the district court's motion-to-dismiss reasoning is highly flawed and cannot support the injunction here. Aliens who approach a port of entry to seek asylum but never enter the United States are not covered by the relevant statutes. The statutes simply do not provide a right to apply for asylum to—or a duty on U.S. officials to process for asylum—aliens who are standing outside of the United States who wish to seek asylum and so are purportedly "in the process of arriving in the United States." Section 1158(a)(1) entitles only an alien "who is physically present *in* the United States or who arrives *in* the United States" to apply for asylum. (Emphases added.) The statute confers a right to apply for asylum only on those who are within the United States. The district court believed that the present-tense statutory phrase "arrives in" shows that arrival is not a discrete event of physically being within the United States, but is instead a process that begins before arrival: someone who approaches the border with an intent to apply for asylum is someone who "arrives in" the United States, because they are "in the process of arriving in" the United States. 394 F. Supp. 3d at 1199–1203. But section 1158(a)(1) does not speak to a *process* of arrival; it speaks to "physical presen[ce] *in*" and "arriv[al] *in*" the United

States. The statute's use of the simple present tense creates a nexus between an alien's right to apply for asylum and his current physical presence or arrival "*in* the United States." A present-tense phrase like "arrives in" speaks to the *present* moment of arrival, not some potential arrival in the future.

Section 1225 confirms that the right to apply for asylum attaches only when an alien is within the United States, and that aliens who are outside of the United States have not arrived in the United States. The government's obligation to inspect aliens, which triggers its obligation to permit aliens "to apply for asylum under section 1158," 8 U.S.C. § 1225(b)(1)(A)(ii), applies only when an alien is "present *in* the United States" or "arrives *in* the United States," *id.* § 1225(a)(1). Indeed, aliens cannot apply for asylum in expedited removal proceedings until they are actually "inspected by immigration officers," *id.* § 1225(a)(3); *see id.* § 1225(b)(1)(A)(ii) (aliens must be "inspect[ed]" before they can be "refer[red] ... for an interview by an asylum officer"). And an alien cannot be "inspected" until he is "present in the United States ... or [] arrives in the United States." *Id.* § 1225(a)(1).

The presumption against extraterritoriality confirms this understanding. It is settled that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). Applying this principle in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), the Supreme Court concluded that

INA procedures concerning exclusion and asylum did not apply beyond our borders because they plainly did not contemplate any extraterritorial application. *See id.* at 174. Sections 1158 and 1225 contain no clear statement of extraterritorial application—indeed, as explained above, those provisions by their terms apply to aliens who are inside U.S. territory. The presumption against extraterritoriality also defeats the Dictionary Act's general rule that "the present tense include[s] the future as well as the present," 1 U.S.C. § 1: that general rule would give the asylum statutes extraterritorial effect, by conferring sweeping rights on those who are outside our borders when there is no clear statement to that effect and when the statute indeed says otherwise. And the presumption against extraterritoriality likewise defeats the district court's view (*see* 394 F. Supp. 3d at 1203–05) that other phrases in section 1225—such as references to an alien who "is arriving in" the United States or is "otherwise seeking" admission—encompass aliens who are not within the United States.

The district court thought that the statutory reference to an alien "who is physically present in the United States" already covers aliens in the United States, so (under the rule against surplusage) the phrase embracing any alien "who arrives in the United States" must apply to another group of aliens—including "an alien who may not yet be in the United States, but who is in the process of arriving in the United States" through a port of entry. 394 F. Supp. 3d at 1199–1200. But Congress included both phrases in section 1158(a)(1) to ensure that aliens in ordinary removal

proceedings (the alien who "is physically present") and aliens in expedited removal (the alien "who arrives in") both may apply for asylum, which was an important clarifying measure after Congress enacted major immigration legislation in 1996 that modified deportation and exclusion hearings into removal and expedited removal proceedings. *See, e.g.*, *Vartelas v. Holder*, 566 U.S. 257, 261–63 (2012) (discussing proceedings before and after that legislation); *Sale*, 509 U.S. at 174–76 (both deportable and excludable aliens would presumptively "continue to be found only within United States territory").

The district court manifestly erred on the merits.

II. Considerations of Irreparable Injury and the Balance of Harms Strongly Favor a Stay.

The district court's injunction undermines the Executive Branch's constitutional and statutory authority to secure the country's borders, and invites the harms to the public that the Rule sought to address. The injunction bars the government from applying the Rule to tens of thousands of aliens who fall within the heart of the Rule: aliens who claim to need asylum but who spent meaningful time in a third country without seeking protection there, raising questions about the validity and urgency of their asylum claims. 84 Fed. Reg. at 33,839. In granting the government's emergency stay request in *East Bay*, the Supreme Court necessarily already concluded that the government will suffer irreparable harm from an injunction of the Rule. *See* 2019 WL 4292781.

The injunction also imposes system-wide harm on the Rule's operation. Because the government reasonably does not maintain records of who was metered, Howe Decl. ¶¶ 4–6 (App205–07), in determining whether aliens in expedited removal are class members, USCIS will need to add 15–30 minutes of question for *each alien* who seeks the injunction's benefits. Caudill-Mirillo Decl. ¶¶ 3–4 (App209–11). Given the extremely high volume of credible-fear cases that USCIS processes—an average of about 390 completions per business day over the past four months—adding even 15–30 minutes of questions per interview will dramatically undermine the overall rate of credible-fear processing. *Id.* ¶¶ 4–5. Many aliens will surely seek extensions or rescheduling of their interviews to obtain documentary evidence or consult with attorneys, further exacerbating the problem. *Id.* ¶¶ 3–4. If an alien receives a negative credible-fear determination and seeks review from an immigration judge, EOIR will need to engage in similar burdensome fact-finding. *See* Owen Decl. ¶ 7 (App218). USCIS has also identified approximately 700 aliens in government custody with Rule-based removal orders; those aliens will need to be re-screened for class membership in interviews that are burdened by the same time-intensive fact-finding procedures. Caudill-Mirillo Decl. ¶¶ 6–11 (App212–15).

Immigration judges will need to determine in regular removal proceedings whether an alien is a class member subject to the Rule. Hearings will take longer—potentially up to 45 minutes each—so that the immigration judge can hear witnesses,

receive and review additional documentary evidence, and provide government counsel and the alien's counsel the chance to examine the alien to elicit facts regarding potential class membership. Owen Decl. ¶ 7 (App218). Hearings will be continued to give the alien the change to obtain evidence and present witnesses in support of his claim to class membership. *Id.* Given the immigration-court backlog—more than 980,000 cases—and the scarcity of available docket space, the impacts of the injunction will ripple across the entire immigration system. *Id.* ¶¶ 4–7.

In carving out tens of thousands of aliens from the Rule's scope and systemically frustrating its operation, the injunction dramatically undermines the Rule's aims. The Rule represents the government's response to a massive backlog in the asylum system, where, from May 2017 to May 2019, the number of apprehended non-Mexican border-crossers increased over 1600 percent. *See* 84 Fed. Reg. at 33,838. This corresponds with a trend over the past decade, where the number of aliens in expedited removal who are referred for credible-fear interviews jumped from about 5 percent to above 40 percent. *Id.* Many such aliens secure release into our country and then never apply for asylum, never show up for their hearings, or ultimately have their asylum claims rejected as meritless. *Id.* at 33,839–41. The proliferation of such claims depletes our asylum resources and has overwhelmed our immigration-enforcement agencies. By rendering ineligible for asylum aliens who cross our southern border after failing to apply for protection in a third country

through which they transited en route to the United States, the Rule aims to channel our asylum system's resources to aid those who truly have nowhere else to turn, to discourage the gaming of our system by those who seek asylum simply to gain indefinite entry to our country, and to press our foreign partners to share the burdens presented by mass migration. *Id.* at 33,839. The injunction undercuts those aims and reintroduces the burdens that the Rule sought to alleviate.

Against these harms to the government and the public, the provisional class members would not be substantially or irreparably harmed by a stay. The Rule potentially denies them a purely discretionary benefit, and it allows them to seek other forms of protection in the United States, including withholding of removal and CAT protection. Denial of only a discretionary benefit is not typically understood to be an irreparable injury. And, contrary to the district court's reasoning, Plaintiffs have no entitlement to any particular asylum-eligibility rules. And any injury to Plaintiffs is largely of their own making. The provisional class members have all had the opportunity to seek relief in Mexico to comply with the Rule. Plaintiffs note that Mexico places a 30-day time limit on such claims, but Plaintiffs themselves acknowledge that this requirement can be waived. PI Mot. 12 (D. Ct. Dkt. 294-1). Plaintiffs cannot refuse to even attempt to comply with the Rule—by declining to seek relief as it lays out—and then assert that the Rule, rather than their own inaction, causes irreparable injury. *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir.

1995) (self-inflicted harm "does not qualify as irreparable"). In any event, the Supreme Court already considered similar claims regarding Mexican law but nonetheless stayed the nationwide injunction in the litigation directly challenging the Rule. *See* Opp. to Stay Appl. 28–29, *East Bay*, No. 19A230 (U.S. Sept. 4, 2019). Equitable considerations strongly favor Defendants.

CONCLUSION

This Court should expedite this appeal and, pending the appeal's resolution, stay the district court's preliminary injunction.

DATED: December 12, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2019, I served a copy of this document on the Court and all parties by filing it with the Clerk of the Court through the CM/ECF system, which will provide electronic notice and a link to this document to all counsel of record.

DATED: December 12, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27 because it contains 5,198 words, including footnotes. This motion complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27 because it has been prepared in a proportionally-spaced typeface using Microsoft Word 14-point Times New Roman font.

DATED: December 12, 2019

Respectfully submitted,

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No. 19-56417

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AL OTRO LADO, INC., *et al.*,
Appellees,

v.

CHAD WOLF, Acting Secretary of Homeland Security, *et al.*,
Appellants.

On Appeal from a Preliminary Injunction Issued by the
U.S. District Court for the Southern District of California,
Civil Action No. 17-cv-02366-BAS-KSC

APENDIX TO APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR ADMINISTRATIVE STAY AND MOTION FOR STAY PENDING APPEAL

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

Kevin K. McAleenan, *et al.*,

Defendants.

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

ORDER:

(1) GRANTING PLAINTIFFS' MOTION FOR PROVISIONAL CLASS CERTIFICATION (ECF No. 293);

AND

(2) GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (ECF No. 294)

Before the Court are Plaintiffs' Motion for Provisional Class Certification and Plaintiffs' Motion for a Preliminary Injunction. (Mot. for Provisional Class Certification, ECF No. 293; Mot. for Prelim. Inj., ECF No. 294.) These Motions identify a subclass of asylum-seekers caught in the legal bind created by Defendants' previous policies at the southern border and a newly-promulgated regulation known as the Asylum Ban. The Asylum Ban requires non-Mexican nationals who enter, attempt to enter, or arrive at a port of entry ("POE") at the southern border on or after July 16, 2019 to first seek asylum in Mexico, subject to narrow exceptions. Plaintiffs ask the Court to prevent the Government Defendants from applying the Asylum Ban to a class of non-Mexican nationals who were prevented from making direct claims

for asylum at POEs before July 16, 2019 and instructed to instead wait in Mexico pursuant to the Government's own policies and practices.

The putative class members in this case did exactly what the Government told them to do: they did not make direct claims for asylum at a POE and instead returned to Mexico to wait for an opportunity to access the asylum process in the United States. Now, the Government is arguing that these class members never attempted to enter, entered, or arrived at a POE before July 16, 2019, and, therefore, the newly promulgated Asylum Ban is applicable to them.

The Court disagrees. Because the Court finds that members of the putative class attempted to enter a POE or arrived at a POE before July 16, 2019, and that as such, the Asylum Ban by its terms does not apply to them, the Court **GRANTS** Plaintiffs' Motions.

I. BACKGROUND

Plaintiffs filed their initial complaint in the underlying action on July 12, 2017 in the Central District of California. (Compl., ECF No. 1.) The case was subsequently transferred to the Southern District of California. (ECF Nos. 113, 114.) The Court provides a brief overview of the action's lengthy litigation history below.

A. Overview of the Litigation

Plaintiffs' putative class action complaint alleges that Customs and Border Protection ("CBP") uses various unlawful tactics, "including misrepresentation, threats and intimidation, verbal abuse and physical force, and coercion" to systematically deny asylum seekers access to the asylum process. (Compl. ¶ 2.) Defendants moved to dismiss the Complaint on December 14, 2017. (ECF No. 135.) In its order on the motion, the Court found that organizational Plaintiff Al Otro Lado had standing to bring the case and that the case was not moot, even though some named Plaintiffs had received an asylum hearing. *See Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1296–1304 (S.D. Cal. 2018). The Court further denied requests to dismiss the lawsuit based on sovereign immunity and held that Plaintiffs

had adequately alleged a claim under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1), to "compel agency action unlawfully withheld." (*Id.* at 1304–05, 1309–10.)

However, the Court dismissed the § 706(1) claims brought by Plaintiffs Abigail Doe, Beatrice Doe and Carolina Doe to the extent they sought to compel relief under 8 C.F.R. § 235.4 for allegedly being coerced into withdrawing their applications for admission. *Id.* at 1314–15 (concluding that § 235.4 did not require CBP to take "discrete agency action" to determine whether a withdrawal was made voluntarily). The Court also dismissed Plaintiffs' § 706(2) claims based on an alleged "pattern or practice" because Plaintiffs had not alleged facts to plausibly "support [] the inference that there is an overarching policy" to deny access to the asylum process, and thus had not identified a "final agency action" reviewable under this provision of the APA. *Id.* at 1320. The Court granted Plaintiffs leave to amend their § 706(2) claims. *Id.* at 1321.

Plaintiffs then filed a First Amended Complaint ("FAC") on October 12, 2018, followed by a Second Amended Complaint ("SAC") on November 13, 2018. (ECF Nos. 176, 189). The amended complaints added allegations regarding the Government's purported "Turnback Policy," which included a "metering" or "waitlist" system in which asylum seekers were instructed "to wait on the bridge, in the pre-inspection area, or at a shelter"—or were simply told that "they [could not] be processed because the [POE] is 'full' or 'at capacity[.]'" (SAC ¶ 3.) Plaintiffs contend that CBP officials "routinely tell asylum seekers approaching POEs that in order to apply for asylum, they must get on a list or get a number" and that CBP prevents asylum-seekers from coming to the POE "until their number is called which can take days, weeks or longer." (*Id.* ¶ 100.) Some individuals are prevented from registering on the lists due to discrimination based on race, sexual orientation, or gender identity by the Mexican officials or third parties managing the lists. (*Id.*) Plaintiffs allege that CBP's rationale for this system—that the POEs did not have the

capacity to process the asylum claims—is a pretext to serve "the Trump administration's broader, public proclaimed goal of deterring individuals from seeking access to the asylum process." (*Id.* ¶¶ 3, 5; *see also id.* ¶¶ 72–83.)

Defendants moved to dismiss the SAC on November 29, 2018. (ECF No. 192.) Following briefing—including six amicus briefs filed in support of Plaintiffs' arguments[1]—and oral argument, the Court largely denied Defendants' motion to dismiss the SAC. *See Al Otro Lado v. McAleenan*, 394 F. Supp. 3d 1168 (S.D. Cal. 2019). First, the Court denied Defendants' Motion to Dismiss the SAC with respect to the amended § 706(2) allegations, finding that:

> Unlike the original Complaint, the SAC now alleges that as early as 2016, Defendants were implementing a policy to restrict the flow of asylum seekers at the San Ysidro Port of Entry. Plaintiffs allege that Defendants formalized this policy in spring 2018 in the form of the border-wide Turnback Policy, an alleged "formal policy to restrict access to the asylum process at POEs by mandating that lower-level officials directly or constructively turn back asylum seekers at the border," including through pretextual assertions that POEs lack capacity to process asylum seekers.

Id. at 1180 (citing SAC ¶¶ 3, 48–93).

The Court also rejected, without prejudice, Defendants' argument that the SAC raised issues barred by the political question doctrine because they implicated "Defendants' coordination with a foreign national to regulate border crossings." *Id.* at 1190–93. The Court found that although some allegations "touch on coordination with Mexican government officials[,]" this coordination was "merely an outgrowth of the alleged underlying conduct by U.S. Officials." *Id.* at 1192

Finally, the Court rejected Defendants' arguments that Plaintiffs located on Mexican soil were not "arriving in" the United States for purposes of asylum. *Id.* at 1199–1201 (citing 8 U.S.C. § 1158(a)(1) (applicants for asylum include "[a]ny alien who is physically present in the United States or who arrives in the United States") and 8 U.S.C. § 1225(b)(1)(A)(ii) (requiring an immigration officer to refer for an

[1] Amicus briefs were filed in support of Plaintiffs by: (1) twenty states; (2) Amnesty International; (3) certain members of Congress; (4) certain immigration law professors; (5) nineteen organizations representing asylum seekers; and (6) Kids In Need of Defense ("KIND").

asylum interview certain individuals who are "arriving in the United States")). The Court found that the plain language and legislative histories of these statutes supported the conclusion that the statute applies to asylum seekers in the process of arriving. *Id.* at 1199–1201. Furthermore, the Court concluded that the allegations in the SAC plausibly showed that Plaintiffs were in the process of arriving in the United States at the time they attempted to raise their asylum claims at POEs. *Id.* at 1203.

Defendants then answered the Complaint on August 16, 2019. (ECF No. 283).

B. The Asylum Ban

On July 16, 2019, the Government issued a joint interim final rule entitled "Asylum Eligibility and Procedural Modifications," widely known as the "Asylum Ban." 84 Fed. Reg. 33,829 (July 16, 2019), *codified at* 8 C.F.R. § 208.13(c)(4). In relevant part, Asylum Ban provides the following:

> (c) Mandatory denials—
>
> > (4) Additional limitation on eligibility for asylum. Notwithstanding the provisions of § 208.15, any alien who enters, *attempts to enter*, *or arrives* in the United States across the southern land border *on or after July 16, 2019*, after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence en route to the United States, shall be found ineligible for asylum unless:
> >
> > (i) The alien demonstrates that he or she applied for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the United States, and the alien received a final judgment denying the alien protection in such country.

Id. (emphasis added). Although the initial implementation of this new regulation was enjoined by the Northern District of California, the Supreme Court subsequently stayed the district court's injunction of the Asylum Ban on September 11, 2019, without explanation, "pending disposition of the Government's appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government's petition for a writ of certiorari, if such a writ is sought." *Barr v. East Bay Sanctuary Covenant*, __S. Ct. __, 2019 WL 4292781 (Sept. 11, 2019) (mem.). Thus, at present,

non-Mexican asylum-seekers who entered, attempted to enter, or arrived at the United States-Mexico border after July 16, 2019 must first seek and be denied asylum in Mexico to establish eligibility for asylum in the United States.[2]

Due to the Government's metering policies, these individuals were prevented from crossing through POEs and were instead instructed to "wait their turn" in Mexico for U.S. asylum processing.[3] Many understood this to be a necessary and sufficient way to legally seek asylum in the United States.[4] Their understanding of the process, under the law that existed at the time of they sought asylum at the southern border, was correct.

Plaintiffs argue the Asylum Ban would, if applied to non-Mexican asylum-seekers who were metered at the border *before* July 16, 2019, preclude these individuals from accessing any asylum process altogether due to circumstances entirely of the Government's making. Mexico's Commission to Assist Refugees, the administrative agency responsible for processing asylum claims, requires that applicants for asylum submit their petitions within 30 days of entering Mexico. (*See* Decl. of Alejandra Macias Delgadillo ¶¶ 34–37, Ex. 27 to Mot. for Prelim. Inj., ECF No. 294-27; Decl. of Michelle Brané ¶ 22, Ex. 28 to Mot. for Prelim. Inj., ECF No. 294-28.) However, because the Asylum Ban was not promulgated until after the time these individuals were subject to metering, none of the members of the putative

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[2] The regulation provides two alternative circumstances in which an individual will still be considered eligible for asylum in the United States even though he or she cannot demonstrate compliance with subsection (i): (1) if an individual can show that he or she is a victim of trafficking; or (2) if the countries through which an individual traveled in transit to the United States were not parties to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, or the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. *See* 8 C.F.R. § 208.13(c)(4)(ii)–(iii). Neither exception is relevant to the instant action.

[3] *See, e.g.*, Decl. of Roberto Doe ¶¶ 4–6, Ex. 5 to Mot. for Prelim. Inj., ECF No. 294-7; Decl. of K-S ¶¶ 15-–16, Ex. 6 to Mot. for Prelim. Inj., ECF No. 294-8; Decl. of S.N. ¶¶ 14–16, Ex. 7 to Mot. for Prelim. Inj., ECF No. 294-9; Decl. of Dora Doe ¶¶ 6–9, Ex. 13 to Mot. for Prelim. Inj., ECF No. 294-15; Decl. of Jordan Doe ¶ 9, Ex. 15 to Mot. for Prelim. Inj., ECF No. 294-17; Decl. of B.B. ¶ 8, Ex. 22 to Mot. for Prelim. Inj., ECF No. 294-24; Decl. of Mowha Doe ¶ 8, Ex. 49 to Mot. for Prelim. Inj., ECF No. 294-47.

[4] *See, e.g.*, Decl. of K-S ¶ 16; Decl. of S.N. ¶ 17; Decl. of China ¶ 9, Ex. 9 to Mot. for Prelim. Inj., ECF No. 294-11; Decl. of Jordan Doe ¶ 9; Decl. of A.V.M.M. ¶ 8, Ex. 17 to Mot. for Prelim. Inj., ECF No. 294-19.

class attempted to exhaust Mexico's asylum procedures within the 30-day window. In short, should the Asylum Ban apply to these individuals, the situation would effectively be this: Based on representations of the Government they need only "wait in line" to access the asylum process in the United States, the members of the putative class may have not filed an asylum petition in Mexico within 30 days of entry, thus unintentionally and irrevocably relinquishing their right to claim asylum in Mexico and, due to the Asylum Ban, their right to claim asylum in the United States.[5]

Thus, Plaintiffs seek to provisionally certify a subclass of the original class consisting of "all non-Mexican noncitizens who were denied access to the U.S. asylum process before July 16, 2019 as a result of the Government's metering policy and continue to seek access to the U.S. asylum process[.]" (Mot. for Provisional Class Certification at 13.) Plaintiffs further request that the Court preliminarily enjoin Defendants from applying the Asylum Ban to provisional class members who were metered prior to July 16, 2019. (Mot. for Prelim. Inj. at 24–25.)

Defendants argue that this Court has no jurisdiction to issue the requested relief in either Motion under a variety of provisions in the Immigration and Nationality Act ("INA") and because the subject of Plaintiffs' injunction is not of the same character as the underlying lawsuit. As to the merits of Plaintiffs' Motions, Defendants contend that Plaintiffs are not entitled to an injunction because the Government's metering policies are lawful, the balance of equities tips sharply in favor of the Government, and Plaintiffs have failed to satisfy any of the prerequisites to class certification under Federal Rule of Civil Procedure 23. For the reasons explained below, the Court rejects Defendants' arguments.

[5] Plaintiffs note that Mexico's 30-day limitation to file petitions for asylum is subject to a waiver for good cause. However, appealing untimeliness determinations on the basis of the waiver "are often decided on legal formalities" that generally require the legal expertise of an attorney, which very few of those waiting in Mexico have the means to retain. (Decl. of Alejandra Macias Delgadillo ¶¶ 35–36; Decl. of Michelle Brané ¶ 22.)

II. JURISDICTION

Defendants challenge the Court's jurisdiction to grant the requested relief, citing to various provisions of 8 U.S.C. § 1252 that preclude jurisdiction in certain contexts. Before turning to the specific subsections, it is necessary to clarify the factual and legal framework within which this Order operates. First, it is important to identify what precise question the Court has been asked to decide—and what it has *not* been asked to decide—on Plaintiffs' two Motions. Plaintiffs ask that the Court enjoin the Government from applying the Asylum Ban to them because they arrived at POEs before July 16, 2019. Plaintiffs do not make a facial challenge to the Asylum Ban's legality by asking the Court to pass upon the constitutionality of the regulation as an exercise of the Executive Branch's powers. Plaintiffs' request also does not require the Court to make any determinations about the merits of their asylum claims, review removal proceedings (expedited or otherwise), or determine the legitimacy of any orders of removal.

Second, Defendants' challenge to jurisdiction in this case calls into question bars on courts' inherent powers of equity. It is undisputed that Congress can restrict a federal courts' traditional equitable discretion. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194–95 (1978). "However, because of the long and established history of equity practice, 'we do not lightly assume that Congress has intended to depart from established principles [of equitable discretion].'" *Owner Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co. (AZ)*, 367 F.3d 1108, 1112 (9th Cir. 2004) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)). Therefore, "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *see also United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001) (holding that trial courts' equitable discretion "is displaced only by a clear and valid legislative command") (internal quotations omitted); *Rodriguez v. Hayes*, 591 F.3d 1105, 1120

(9th Cir. 2010) ("[T]raditional equitable powers can be curtailed only by an unmistakable legislative command.").

Turning to Defendants' specific challenges to the Court's jurisdiction, Defendants make two arguments. First, Defendants argue that various subsections of 8 U.S.C. § 1252 divest this Court of jurisdiction to review the implementation of the Asylum Ban. (Opp'n to Prelim. Inj. Mot. at 6–10, ECF No. 307.) Second, Defendants argue that the requested injunction is improper because it is not of the same character as the underlying lawsuit and deals with matter lying wholly outside the issues in the suit. (*Id.* at 10–11.) The Court rejects both arguments for the reasons discussed below.

A. Bars to Jurisdiction Under 8 U.S.C. § 1252

The provisions of 8 U.S.C. § 1252 deprive this Court of jurisdiction over certain cases. Defendants take a scattershot approach, arguing that multiple subsections are applicable to Plaintiffs' requests and thus the court has no jurisdiction to reach the issues raised. The Court disagrees.

1. The relief requested does not arise from, pertain to, or otherwise relate to pending removal proceedings or removal orders.

Several subsections of § 1252 limit judicial review of claims and questions that relate to removal proceedings or existing orders of removal. Defendants argue that §§ 1252(a)(2)(A)(i), 1252(g), 1252(a)(5), and 1252(b)(9) all strip this Court of jurisdiction.[6]

[6] *See* 8 U.S.C. § 1252(a)(2)(A)(i) (precluding jurisdiction over causes or claims "arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1)"); § 1252(a)(5) (directing that "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 chapter, except as provided in subsection (e)"); § 1252(b)(9) ("Judicial review of all questions of law and fact, including interpretation and application of statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section."); 8 U.S.C. § 1252(e)(1)(A) (divesting courts' jurisdiction to issue equitable relief "in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1)[,]" with exceptions); § 1252(g) (barring exceptions, "no court shall have jurisdiction to hear any cause or claim by or on behalf of an alien arising from the decision or action by the

Section 1252(a)(2)(A)(i) prohibits "a direct challenge to an expedited removal order." *Pena v. Lynch*, 815 F.3d 452, 455 (9th Cir. 2016); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (§ 1252(b)(9) did not apply where respondents were not asking for review of an order of removal, challenging the decision to detain them or seek removal, or challenging the process for determining removability); *M.M.M. on Behalf of J.M.A. v. Sessions*, 347 F. Supp. 3d 526, 532 (S.D. Cal. 2018) (§ 1252(a)(2)(A)(i) did not apply where plaintiffs did not have final removal orders and where they were "not challenging the Government's ultimate decision to detain or remove them").

Section 1252(g), by its terms, applies to only the three discrete actions that the Attorney General may take—to commence proceedings, adjudicate cases, or execute removal orders. *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 482 (1999). It does not refer to "all claims arising from deportation proceedings." *Id.*

Finally, the prohibitory language in § 1252(a)(5) and § 1252(b)(9) "mean[s] that any issue—whether legal or factual—arising from any removal-related activity can be reviewed only through the PFR [petition for review] process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (emphasis omitted). However, § 1259(b)(9) "excludes from the PFR process any claim that does not arise from removal proceedings. Accordingly, claims that are independent of or collateral to the removal process do not fall within the scope of § 1252(b)(9)." *Id.* at 1032; *see also Jennings*, 138 S. Ct. at 841. The question is not whether the challenged action "is an action taken to remove an alien but whether the legal questions in this case arise from such an action." *Jennings*, 138 S. Ct. at 841 n.3.

The Government does not allege that any Plaintiff is in removal proceedings or that a final order of removal has been issued as to any Plaintiff. Likewise, Plaintiffs

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Attorney General to commence proceedings, adjudicate cases or execute removal orders against any alien under this chapter").

do not request review of an order of removal, challenge the decision to seek removal, or contest any step that has been taken by the Government to determine their removability, including a decision to commence or adjudicate proceedings. (*See* Mot. for Prelim. Inj. at 2 (stating that Plaintiffs did not "file this motion to seek a specific outcome in provisional class members' asylum cases").) In fact, the very relief Plaintiffs seek is to commence such proceedings and have their asylum claims adjudicated by being granted access to the asylum process.

Defendants have not alleged that any final removal orders have been issued as to any Plaintiff, or that Plaintiffs' requests challenge any such orders per subsection (a)(2)(A), implicate the discrete actions outlined in subsection (g), or arise from actions taken to remove these aliens under subsections (a)(5) and (b)(9). Thus, the Court finds that these provisions do not preclude its jurisdiction over the claims raised in Plaintiffs' Motions.

2. The Asylum Ban does not implement the expedited removal statute (8 U.S.C. § 1225(b)).

Two subsections in § 1252 prohibit judicial review of policies, regulations, or procedures issued or adopted by the Attorney General "to implement 8 U.S.C. § 1225(b)(1)."[7] Defendants claim that § 1225(b)(1) is implicated because of the possibility that some Plaintiffs "will be adjudicated in expedited removal proceedings under section 1225(b)(1), and some in regular removal proceedings under section 1229a." (Opp'n to Mot. for Prelim. Inj. at 6–7.)

Although the Asylum Ban's limitation on eligibility requirements may derivatively affect certain aspects of the expedited removal process authorized in

[7] *See* 8 U.S.C. § 1252(a)(2)(A)(iv) (providing courts have no jurisdiction to review "procedures or policies adopted by the Attorney General to implement the provisions of § 1225(b)(1)" except as provided in subsection (e)); § 1252(e)(3)(A)(ii) (limiting judicial review to the United States District Court for the District of Columbia to determine "whether a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement" 8 U.S.C. § 1225(b)(1) is inconsistent with the statute or otherwise unlawful).

§ 1225(b)(1), the Asylum Ban does not *implement* § 1225(b)(1). *See E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1118–19 (N.D. Cal. 2018), *appeal filed*, Nos. 18-17274, 18-17436 (9th Cir. Dec. 26, 2018). Rather, the Asylum Ban implements the asylum eligibility requirements stated in the asylum statute, 8 U.S.C. § 1158.

Section 1158 states that asylum may be granted "to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section." 8 U.S.C. § 1158(b)(1)(A). The Asylum Ban, housed in the Code of Federal Regulations under Part 208 ("Procedures for Asylum and Withholding of Removal"), Section 208.13 ("Establishing Asylum Eligibility"), appears to be one such procedure. The Ban itself is characterized not as an additional procedure for expedited removal, but as an "Additional limitation on eligibility for asylum." *See* 8 C.F.R. § 208.13(c)(4). Nothing in the language of the Ban discusses § 1225(b)(1), cites to § 1225(b)(1), or otherwise indicates that it implements expedited removal under § 1225(b)(1). Thus, the Court sees no basis for concluding that the Asylum Ban implements expedited removal. *See Kucana v. Holder*, 558 U.S. 233, 252 (2010) ("[T]he textual limitations upon a law's scope are no less a part of its purpose than its substantive authorizations.") (quoting *Rapanos v. United States*, 547 U.S. 715, 752 (2006) (plurality op.)).

An analysis of the relevant provisions of § 1252 leads to the same conclusion. Nothing in the language of § 1252, including in § 1252(a)(2)(A)(iv) and § 1252(e)(3)(A)(ii), precludes judicial review of regulations implementing asylum eligibility requirements under 8 U.S.C. § 1158. Courts must interpret congressional language barring jurisdiction precisely. *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968) (holding that a statute affecting federal jurisdiction "must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes"). "[W]here Congress includes particular language in one section of a statute

but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Nken v. Holder*, 556 U.S. 418, 430 (2009). Thus, in these provisions, where Congress sought to limit judicial review of policies, procedures, and regulations made under only § 1225(b)(1), the Court must presume that Congress intentionally excluded § 1158 from this jurisdictional bar. *See E. Bay Sanctuary Covenant*, 354 F. Supp. at 1118–19.

Further, the regulatory scheme for immigration law already includes a separate section discussing the implementation of the expedited removal system. *See* 8 C.F.R. Part 235 (Inspection of Persons Applying for Admission). These regulations specify the record an immigration officer must create during the expedited removal process and the advisements that the officer must give to individuals subject to expedited removal. *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1081 (9th Cir. 2011) (citing 8 C.F.R. §§ 235.3, 1235.3 ("Inadmissible aliens and expedited removal")); *see also Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 43 (D.D.C. 1998) (Part 235 "regulate[s] how the inspecting officer is to determine the validity of travel documents, how the officer should provide information to and obtain information from the alien, and how and when an expedited removal order should be reviewed"), *aff'd*, 199 F.3d 1352 (D.C. Cir. 2000). Courts have identified these regulations as the "implementing regulations" for the expedited removal system. *See id.* at 43–45 (applying § 1252(e)(3) to bar claims challenging regulations in Part 235).

A decision from the District Court for the District of Columbia illustrates when a rule or policy implements § 1225(b)(1). In *Grace v. Whitaker*, asylum applicants challenged new credible fear policies, established by the Attorney General's decision in *Matter of A-B-*, for asylum applications based on domestic or gang violence. 344 F. Supp. 3d 96, 108–10 (D.D.C. 2018), *appeal docketed*, No. 19-5013 (D.C. Cir. Jan. 30, 2019). In finding that § 1252(e)(3)(A)(ii) conferred jurisdiction on the D.C. District Court to hear the challenge, the court focused on the fact that the Attorney

General's decision in *Matter of A-B-* "went beyond" asylum and "explicitly address[ed] 'the legal standard to determine whether an alien has a credible fear of persecution' under 8 U.S.C. § 1225(b)." *Id.* at 116 (citing *Matter of A-B-*, 27 I. & N. Decl. 316, 320 n.1 (A.G. 2018)). Further, in *Matter of A-B-*, the Attorney General expressly directed immigration judges and asylum officers to "analyze the requirements as set forth" in the decision and stated that generally, claims of domestic or gang-related violence would often fail to satisfy the credible fear standard. The District Court cited this direction as evidence that the decision constituted a "written policy directive" or "written policy guidance" about expedited removal such that it was brought "under the ambit of section 1252(e)(3)." *Id.* Thus, the court concluded that "[b]ecause the Attorney General cited section 1225(b) and the standard for credible fear determinations when articulating the new general legal standard, the Court finds that *Matter of A-B-* implements section 1225(b) within the meaning of section 1252(e)(3)." *Id.*

Conversely, here, the Asylum Ban contains no similar explicit invocation of § 1225 or articulation of the credible fear standard such that the Court can conclude that this regulation falls within the ambit of § 1252(e)(3). As stated above, the regulation is framed as an additional limitation on asylum eligibility and makes no reference to the expedited removal statute or the procedures contained therein. Therefore, the Asylum Ban does not "implement" § 1225(b).

Defendants have not demonstrated how determinations about asylum eligibility constitute an "implement[ation]" of § 1225(b), the statute governing expedited removal. *See East Bay Sanctuary Covenant*, 354 F. Supp. at 1118–19. Hence, the Court does not find that § 1252(a)(2)(A)(iv) or § 1252(e)(3)(A)(ii) divests it of jurisdiction to hear challenges to the Asylum Ban's applicability in this case.

3. The Court is not being asked to determine the lawfulness of the Asylum Ban.

Several statutes also prohibit the judicial review of certain regulations.[8] Here, the Court is not reviewing the Asylum Ban such that these statutes apply.

Plaintiffs are not asking the Court to allow a class action challenge to the implementation of § 1225 or the Asylum Ban, to enjoin the operation of either provision, or to determine whether the Asylum Ban itself is constitutional, consistent with the Immigration and Nationality Act ("INA"), or otherwise lawful. Instead, Plaintiffs request that the Court enjoin the Government's improper application of the Asylum Ban—the constitutionality of which is the subject of other lawsuits—outside the confines of its self-imposed limitations on its scope, *i.e.*, to those who arrived in the United States before July 16, 2019.

In other words, Plaintiffs ask the Court to enjoin the Government from taking actions not authorized by the Asylum Ban or, in fact, by any implementing regulation or statute. The Court's authority to do so is well-recognized. *See, e.g.*, *Rodriguez*, 591 F.3d at 1120 ("Where, however, a petitioner seeks to enjoin conduct that allegedly is not even authorized by the statute, the court is not enjoining the operation of part IV . . . and § 1252(f)(1) therefore is not implicated.") (quoting *Ali v. Ashcroft*, 346 F.3d 873, 886 (9th Cir. 2003)), *vacated on unrelated ground sub nom.*, *Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2005).

4. The Court is not reviewing the Attorney General's decision to invoke or apply expedited removal to individual cases.

Various subsections of § 1252 also prevent the Court from reviewing decisions by the Attorney General to "invoke expedited removal proceedings" or the

[8] *See* 8 U.S.C. § 1252(a)(2)(A)(iv) and 1252(e)(3)(A)(ii) (prohibiting review of regulations implementing expedited removal and limiting determinations about a regulation's constitutionality, consistency with the INA, and general lawfulness to the United States District Court for the District of Colombia); § 1252(f)(1) (divesting the courts of "jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter . . . other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated").

application of expedited removal in individual cases.[9] *See, e.g.*, *In re Li*, 71 F. Supp. 2d 1052, 1061 (D. Haw. 1999) ("Section 1252(a)(2), entitled Matters not subject to judicial review, provides that no court shall have jurisdiction to review the application of section 1225(b)(1) *to individual aliens*.") (citing 8 U.S.C. § 1252(a)(20(A)(iv)) (emphasis added). Here, neither party has alleged that there has been any such decision to invoke expedited removal or apply expedited removal to individual Plaintiffs. Instead, Defendants argue that this provision, particularly subsection (iii), divests this Court of jurisdiction "to enjoin the application of the [Asylum Ban] to putative provisional subclass members who *will* be placed in expedited removal proceedings." (Opp'n to Mot. for Prelim. Inj. at 7.)

Defendants offer no support for the proposition that any relevant subsection of § 1252 seeks to prevent review of any issue because the Attorney General will invoke expedited removal as to Plaintiffs in the future. Further, as stated before, Plaintiffs do not seek review of any decision to place them in expedited removal proceedings. The Court's determination at the injunction stage, therefore, is not a "review" of decisions related to expedited removal, and these sections do not apply to divest this Court of jurisdiction regarding Plaintiffs' Motions.

5. Plaintiffs do not raise systemic challenges to expedited removal.

The Court also finds that the jurisdictional bar under 8 U.S.C. § 1252(e)(3) does not apply to Plaintiffs' claims. This provision states that judicial review of "determinations under section 1225(b) of this title and its implementation" may only be brought in the U.S. District Court for the District of Columbia, and limits those actions to questions about whether a regulation "issued to implement such section [1225(b)]" is constitutional, inconsistent with other provisions of the Immigration

[9] *See* 8 U.S.C. § 1252(a)(2)(A)(ii) ("[N]o court shall have jurisdiction to review . . . a decision by the Attorney General to invoke the provisions of [§ 1225(b)(1)]"); § 1252(a)(2)(A)(iii) ("[N]o court shall have jurisdiction to review "the application of [§ 1225(b)(1)] to individual aliens," including credible fear determinations); § 1252(a)(2)(A)(iv) (courts have no jurisdiction to review "procedures or policies adopted by the Attorney General to implement the provisions of § 1225(b)(1)").

and Nationality Act ("INA"), or "is otherwise in violation of the law." *See* 8 U.S.C. § 1252(e)(3)(A)(i)–(ii).

The provision, entitled "Challenges on validity of the system," limits its jurisdictional reach only to actions calling into question the legality of the expedited removal process itself. *See Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1120 (N.D. Cal. 2019), *reversed on other grounds*, *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019). The challenges that are subject to the circumscribed jurisdiction in subsection (e)(3) must therefore target the process of removal directly, not target other circumstances incidental to removal, such as access to the asylum process. *See Padilla v. U.S. Immigration & Customs Enf't*, 387 F. Supp. 3d 1219, 1227 (W.D. Wash. 2019) ("[Section] 1252(e)(3) is addressed to challenges to the removal *process* itself, not to detentions attendant upon that process."), *appeal filed*, No. 19-35565 (9th Cir. July 2, 2019).

In *Innovation Law Lab*, the Northern District found the plaintiffs' challenge to the Migrant Protection Protocols ("MPP")—namely, that MPP did not apply to them—was not a challenge to the expedited removal system under § 1252(e)(3). *Id.* at 1119–20. Similarly, here, Plaintiffs are not raising a systemic challenge to any part of the expedited removal process. As Plaintiffs state, they do not seek to challenge, either as individual cases or systemically, Defendants' discretion to place them in expedited removal proceedings. (*See* Reply in Supp. of Mot. for Prelim. Inj. at 10–11 ("Plaintiffs take no position on whether provisional class members should be put into expedited removal, or instead placed directly into regular removal proceedings or paroled into the United States."), ECF No. 313.) Rather, they are challenging the Government's application of a specific condition of asylum eligibility to Plaintiffs themselves, regardless of the type of removal proceedings in which they are currently placed or will be placed in the future. *See Olivas v. Whitford*, No. 14-CV-1434-WQH-BLM, 2015 WL 867350, at *8 (S.D. Cal. Mar. 2, 2015) ("Plaintiff's challenge is not subject to 8 U.S.C. section 1252(e)(3) because it is not a challenge to the

validity of expedited removal proceedings pursuant to section 1225(b)(1).”). Accordingly, the Court finds that § 1252(e)(3) does not bar the relief requested in Plaintiffs’ Motions.

In sum, this Court finds that none of the cited subsections of 8 U.S.C. § 1252 divest this Court of jurisdiction to decide the issues raised by Plaintiffs’ Motions.

B. Different Character From the Underlying Suit

Defendants argue that the request for a preliminary injunction must be denied because Plaintiffs are seeking relief that is of a different character and deals with matter lying wholly outside the issues in the suit. The Court disagrees.

“A preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally.” *See Kaimowitz v. Orlando*, 122 F.3d 41, 43 (11th Cir. 1997) (citing *De Beers Consol. Mines v. United States*, 325 U.S. 212, 220 (1945)). To determine whether the preliminary and final relief are of the same character, “there must be a relationship between the injury claimed in the motion for injunctive relief and the conduct asserted in the underlying complaint.” *Pac. Radiation Oncology, LLC v. Queen’s Med. Ctr.*, 810 F.3d 631, 636 (9th Cir. 2015) (adopting the rule in *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994)). This requires “a sufficient nexus between the claims raised in a motion for injunctive relief and the claims set forth in the underlying complaint itself.” *Id.*

The Court finds that a sufficient nexus exists between Plaintiffs’ request for an injunction of the Asylum Ban and the claims in the SAC. In their SAC, Plaintiffs allege numerous violations of the law based on CBP’s “unlawful, widespread pattern and practice of denying asylum seekers access to the asylum process at POEs with the United States border through a variety of illegal tactics.” (SAC ¶ 2.) For example, according to Plaintiffs, Defendants are “[i]mposing unreasonable delays before granting access to the asylum process” and “denying outright access to the asylum process.” (*Id.*) In the Prayer for Relief, Plaintiffs include a request that the Court certify a class and issue injunctive relief requiring Defendants to comply with the

INA, the APA, the Due Process Clause of the Fifth Amendment and the duty of *non-refoulement* under international law. (SAC, Prayer for Relief, ¶ 3.)

In the instant Motions, Plaintiffs request that the Court require Defendants to comply with the limited scope of the Asylum Ban to preserve their access to the asylum process. This relates to the allegations in the SAC, described above, regarding Defendants' denial of Plaintiffs' right to asylum access. *See Williams v. Navarro*, No. 3:18-CV-01318-DMS (RBM), 2019 WL 2966314, at *4 (S.D. Cal. July 9, 2019) ("The character of relief requested in the Motion, i.e., increased law library access, relates to conduct alleged in the Complaint, i.e., denial of the right to law library access."). Indeed, Plaintiffs' claims regarding the Asylum Ban and Plaintiffs' underlying claims in their SAC are so intertwined that denying Plaintiffs' Motion for Preliminary Injunction could effectively eviscerate the asylum claims Plaintiffs seek to preserve in their underlying suit.

Thus, Plaintiffs are not seeking relief that is of a different character than that sought in the SAC, and a preliminary injunction can be appropriately granted.

C. All Writs Act

Alternatively, the Court finds that the All Writs Act ("AWA"), 28 U.S.C. § 1651, authorizes this Court to issue injunctive relief to preserve its jurisdiction in the underlying action. The AWA allows Article III courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The AWA provides this Court with the ability to construct a remedy to right a "wrong [which] may [otherwise] stand uncorrected." *United States v. Morgan*, 346 U.S. 502, 512 (1954). In the context of administrative law, the AWA allows court "to preserve [its] jurisdiction or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels." *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 604 (1966).

Plaintiffs claim the AWA independently authorizes this Court to grant injunctive relief to prevent the claims in the SAC from being "prematurely extinguished" by the application of the Asylum Ban. (Mot. For Prelim. Inj. at 23.) Defendants argue that the AWA is not a source of this Court's authority to grant the requested relief because: (1) the Court "does not have jurisdiction in the first instance over the substantive standards governing the putative provisional subclass members' asylum applications"; (2) Plaintiffs have not shown how application of the Asylum Ban affects the Court's jurisdiction over the claims in the SAC; and (3) the INA divests this Court of jurisdiction over the expedited removal process. (Opp'n to Mot. for Provisional Class Certification at 24–25, ECF No. 308.) The Court does not find Defendants' arguments persuasive.

First, Defendants misidentify the source of the Court's jurisdiction for purposes of the AWA. Jurisdiction over the claims in the SAC arises not from the substantive standards governing the subclass's asylum applications, but from the statutory and constitutional questions over Defendants' issuance of policies and practices barring access to the asylum process. The Government does not argue that this Court lacks jurisdiction in the underlying lawsuit concerning the Government's metering practices. Therefore, jurisdiction has already been independently conferred on this Court. *See Hamilton v. Nakai*, 453 F.2d 152, 157 (9th Cir. 1971) (§ 1651 "does not confer original jurisdiction, but rather, prescribes the scope of relief that may be granted when jurisdiction otherwise exists").

Second, as Plaintiffs argue, the improper application of the Asylum Ban affects this Court's jurisdiction because it would effectively moot Plaintiffs' request for relief in the underlying action by extinguishing their asylum claims. Should the Asylum Ban be applied to Plaintiffs, these individuals' asylum claims would be foreclosed, as would any claim and request for relief regarding their right to access the asylum process. As a result, an order from this Court finding metering practices unlawful and requiring Defendants to comply with the law at the time of the metering

would provide no remedy. Thus, the metering practices, if found unlawful, are the type of wrong that may otherwise stand uncorrected without the invocation of the AWA, as contemplated by the Supreme Court. *See Morgan*, 346 U.S. at 512.

Hence, to preserve its jurisdiction over the underlying claims in the SAC, the Court finds that it possesses the authority under the AWA to issue an injunction preserving the status quo in this case and allow this Court to resolve the underlying questions of law before it. *See United States v. N.Y. Tel. Co.*, 434 U.S. 159, 173 (1977) (holding that the AWA allows a federal court to "avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it").

III. CLASS CERTIFICATION

Concurrent with their request for a preliminary injunction, Plaintiffs request that the Court provisionally certify a subclass consisting of "all non-Mexican noncitizens who were denied access to the United States Asylum process before July 16, 2019 as a result of the Government's metering policy and continue to seek access to the U.S. asylum process." (Mem. of P. & A. in support of ("ISO") Mot. for Provisional Class Certification at 13, ECF No. 293-1.) The Court is inclined to modify this subclass to consist of

> all non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. POE before July 16, 2019 because of the Government's metering policy, and who continue to seek access to the U.S. asylum process.

See Victorino v. FCA US LLC, 326 F.R.D. 282, 301–02 (S.D. Cal. 2018) ("[D]istrict courts have the inherent power to modify overbroad class definitions.")

The Court may provisionally certify a class for purposes of a preliminary injunction. *Meyer v. Portfolio Recovery Assoc., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012). However, "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). Therefore, Plaintiffs have the burden

of meeting the threshold requirements of Federal Rule of Civil Procedure 23(a). *Meyer*, 77 F.3d at 1041.

> Rule 23(a) provides that a class may be certified only if:
>
> (1) the class is so numerous that joinder of members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). In addition to meeting the 23(a) requirements, a class action must fall into one of the categories laid out in Rule 23(b). Fed. R. Civ. P. 23(b). Plaintiffs move for provisional certification under Rule 23(b)(2).

A. Fed. R. Civ. P. 23(a)

1. Numerosity

Plaintiffs claim that as of August 2019, there were 26,000 asylum seekers either on waitlists or waiting to get on those waitlists in 12 Mexican border cities. (*See* Decl. of Stephanie Leutert ¶¶ 4, 7, Ex. A, Ex. 6 to Mot. for Provisional Class Certification, ECF No. 293-8.) The numerosity requirement is generally satisfied when the class contains 40 or more members, a threshold far exceeded in this case. *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *Celano v. Marriott Int'l, Inc*., 242 F.R.D. 544, 549 (N.D. Cal. 2007). Defendants do not contest that Plaintiffs have met the numerosity requirement in this case. Further, a class of 26,000 individuals is large enough on its face that individual joinder of all class members would be impracticable. Rule 23(a)(1) is, therefore, satisfied.

2. Commonality

The commonality requirement requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "What matters to class certification . . . is not the raising of common questions—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 (quotations omitted).

"All questions of fact and law need not be common to satisfy the [commonality requirement]. The existence of shared legal issues with divergent factual predicates is sufficient." *Meyer*, 707 F.3d at 1041 (quotations omitted). "The common contention 'must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Id.* at 1041–42 (quoting *Dukes*, 564 U.S. at 350).

In this case, Plaintiffs argue that the common question capable of generating a common answer involves whether the metering is statutorily and constitutionally legal. (Mem. of P. & A. ISO Mot. for Provisional Class Certification at 18–19.) Defendants argue that this requires individual determinations of whether there was capability to process the asylum applications at each POE for each class member at the time they sought asylum. (Opp'n to Mot. for Provisional Class Certification at 17, ECF 308.)

The Court sees the common question differently. The common question raised by the instant preliminary injunction and class certification motions is whether Defendants are improperly construing the Asylum Ban to apply to those class members who attempted to enter or arrived at a U.S. POE before July 16, 2019. Even assuming the Government's metering practice was legal, the fact remains that the members of the proposed subclass intended to apply for asylum at a U.S. POE and yet were required, pursuant to the Government's policy, to wait their turn in Mexico. The Court can determine, in one fell swoop, whether class members attempted to enter or arrived in the United States such that the Asylum Ban is inapplicable to them. This is a common issue for all subclass members. Thus, the Court finds the requirement of Rule 23(a)(2) has been met.

3. Typicality

In general, the claims of the representative parties "need not be substantially identical" to those of all absent class members and need only be "reasonably co-

extensive" in order to qualify as typical. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998*), overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 464 U.S. 338 (2011). "The test of typicality is 'whether other members [of the class] have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (citation omitted).

Defendants contend that the named Plaintiffs in this action have not and will not be injured "in the manner in which they claim the putative subclass members have been or will be injured." (Opp'n to Mot. for Provisional Class Certification at 11.) Defendants allege that the named individual Plaintiffs are either Mexican nationals to whom the Asylum Ban does not apply or eventually entered and were processed before July 16, 2019. (*Id.* at 11–12.) Further, Defendants claim that Roberto Doe, the one named Plaintiff whose case does not suffer from the above deficiencies, has not provided "sufficient information to establish that he is subject to the" Asylum Ban. (*Id.* at 12–13.)

The Court finds that, contrary to Defendants' assertions, the Declaration of Roberto Doe contains such sufficient information. Roberto Doe alleges that he is a national of Nicaragua and traveled through Mexico to reach the United States' southern border. (Decl. of Roberto Doe ¶¶ 2–4.) He attests that on October 2, 2018, he presented himself to U.S. immigration officials at the Reynosa-Hidalgo POE with a group of Nicaraguan nationals and requested asylum. (*Id.* ¶ 4.) He then alleges that U.S. officials told him the POE was "all full" and that he would have to wait "hours, days, or weeks" before he would have the opportunity to apply before contacting the Mexican authorities to remove them from the POE. (*Id.* ¶¶ 5–6.) While waiting in Mexico, he applied for asylum but was denied due to the 30-day time bar and was subsequently deported from Mexico. (Suppl. Decl. of Roberto Doe ¶ 7, Ex. 2 to

Reply ISO Mot. for Provisional Class Certification, ECF No. 315-3.) He still seeks to apply for asylum in the United States. (*Id.*)

Because Roberto Doe claims he came to a U.S. POE from a country other than Mexico to seek asylum, attempted to make a direct claim for asylum at a POE before July 16, 2019 but was turned away due to the metering policy, and still intends to seek asylum in the United States, the Court finds that he has provided sufficient information to satisfy the test of typicality for the purposes of Rule 23.

4. Adequacy of Representation

For the class representative to adequately and fairly protect the interests of the class, two criteria must be satisfied. "First, the named representatives must appear able to prosecute the action vigorously through qualified counsel, and second, the representatives must not have antagonistic or conflicting interests with the unnamed members of the class." *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). Defendants do not contest the adequacy of the representation in this case.

Pursuant to its own assessment, the Court finds no evidence that the proposed class representatives have any antagonistic or conflicting interests with the unnamed members of the class, and counsel has shown that they are qualified and willing to prosecute this action vigorously. (*See* Decl. of Stephen Medlock ISO Mot. for Provisional Class Certification ¶¶ 2–6, ECF No. 293-2.) Thus, the requirements of Rule 23(a)(4) have been met.

B. Fed. R. Civ. P. 23(b)(2)

Plaintiffs seek certification under subsection (b)(2), which allows the court to certify a class if it finds that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "The key to a (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that

it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360 (quotation omitted). "In other words, Rule 23(b)(2) applies only when a single injunctive or declaratory judgment would provide relief to each member of the class." *Id.*

In this case, a single preliminary injunctive or declaratory judgment would provide that each member of the subclass does not fall within the Asylum Ban. The conduct of the Government, therefore, can be enjoined or declared unlawful as to all members of the subclass. Hence, Plaintiffs have shown that the requirements of Rule 23(b)(2) have been met.

Defendants make an additional argument that the requirements of Rule 23(b)(2) are not met because the class is not ascertainable. Specifically, they contend that "there is no reliable way to confirm the date when individuals first sought to present themselves at ports to seek access to the U.S. asylum process." (Opp'n to Mot. for Provisional Class Certification at 23.)

Although the Ninth Circuit has yet to expressly address the ascertainability requirement in the context of Rule 23(b)(2), courts in this Circuit have held that it does not apply. *See In re Yahoo Mail Litig.*, 308 F.R.D. 577, 597 (N.D. Cal. 2015) (distinguishing (b)(2) actions from (b)(3) actions in finding that ascertainability was not required under the former); *Inland Empire-Immigrant Youth Collective v. Nielsen*, No. EDCV 17-2048 PSG (SHKx), 2018 WL 1061408, at *12 (C.D. Cal. Feb. 26, 2018) (same); *see also Hernandez v. Lynch*, No. EDCV 16-00620-JGB (KKx), 2016 U.S. Dist. LEXIS 191881, at *43 n.17 (C.D. Cal. Nov. 10, 2016) ("Courts have held that ascertainability may not be required with respect to a class seeking injunctive relief."). This Court has itself noted in previous opinions that "ascertainability should not be required when determining whether to certify a class in the Rule 23(b)(2) context." *Bee, Denning, Inc. v. Capital Alliance Group*, No. 13-

CV-2654-BAS (WVG), 14-cv-2915-BAS (WVG), 2016 WL 3952153 at *5 (S.D. Cal. July 21, 2016).[10]

The Court notes, however, that even if the class was required to satisfy the ascertainability requirement, "it would be satisfied because it is 'administratively feasible' to ascertain whether an individual is a member." *Inland Empire-Immigrant Youth Collective*, 2018 WL 1061408, at *12 (citing *Greater L.A. Agency on Deafness, Inc. v. Reel Servs. Mgmt. LLC*, No. CV 13–7172 PSG (ASx), 2014 WL 12561074, at *5 (C.D. Cal. May 6, 2014)).

Defendants' arguments to the contrary do not alter this conclusion. Defendants allege that because they do not maintain a systematic record of encounters at the limit line, the class is not ascertainable. Specifically, Defendants state the Government of Mexico, and not the U.S. Government, was responsible for implementing a process to monitor asylum-seekers (Opp'n to Mot. for Provisional Class Certification at 24) and CBP officers who metered asylum-seekers at the limit line "do not memorialize the encounter in any way." (Decl. of Randy Howe ¶¶ 4–5, Ex. 4 to Opp'n to Mot. for Provisional Class Certification, ECF No. 308-5.)

Ironically, however, the class is based on a system established to facilitate the Defendants' metering policy. As the system currently stands, when a port is allegedly at capacity, asylum-seekers are informed that access to the POE "is not immediately available" and that they will be permitted to enter "once there is sufficient space and resources to process them." (Decl. of Randy Howe ¶ 2; CBP Metering Guidance Memorandum, Ex. 5 to Opp'n to Mot. for Provisional Class Certification, ECF No. 308-6.) Further, Defendants do not address, let alone challenge, that Grupo Beta, a

[10] The absence of an ascertainability requirement "does not obviate the basic requirement that Plaintiffs provide a clear class definition under Rule 23(c)(1)(B)." *In re Yahoo Mail Litig.*, 308 F.R.D. at 597–98 (citing Fed.R.Civ.P. 23(c)(1)(B) ("An order that certifies a class action must define the class and the class claims, issues, or defenses . . . . ")). However, Defendants do not argue that the definition of the class proposed by Plaintiff is so unclear as to fail to satisfy Rule 23(c)(1)(B). In any event, "[a] precise class definition is less important in cases in which plaintiffs are attempting to certify a class for injunctive relief because the representative plaintiffs may move the Court to enforce compliance." *Conant v. McCaffrey*, 172 F.R.D. 681, 693 (N.D. Cal. 1997).

service run by the Mexican Government's National Institute of Migration, maintains a formalized list of asylum-seekers, communicates with CBP regarding POE capacity, and transports asylum-seekers from the top of the list to CBP. (Decl. of Nicole Ramos ¶ 7, Ex. 26 to Mot. for Provisional Class Certification, ECF No. 293-28; Decl. of J.R. ¶ 11, Ex. 14 to Mot. for Prelim. Inj., ECF No. 294-16 (alleging waitlist "was controlled by Mexican immigration officials, and they were in touch with U.S. officials who would ask every day for a certain number of people to present themselves at the U.S. offices").)

Therefore, CBP relied on these lists to facilitate the process of metering, which was premised on the idea that those individuals who were metered would have to wait—but were not precluded from—applying for asylum in the United States. Despite this, Defendants now take the position, without contradicting claims that they themselves relied on the lists for purposes of metering, that the waitlists are "subject to fraud and corruption and are not themselves reliable means of ascertaining class membership." (Opp'n to Mot. for Provisional Class Certification at 34.)

The Court does not find Defendants' position persuasive. Class members are defined by a completely objective criteria: whether these individuals were prohibited from requesting asylum at a U.S. POE and instead required to place themselves on a waitlist and effectively "take a number" before July 16, 2019 pursuant to the U.S. Government's metering policy. Class membership can be determined by cross-checking a class members' name with the names included on these waitlists. Surely the Government can determine, taking into account the delay in processing asylum claims at each POE, which individuals listed arrived before July 16, 2019, the Asylum Ban's effective date. Alternatively, individuals could be required to submit proof (either by list or declaration) that he or she is a member of the class in order to get the relief sought. *See In re Vitamin C Antitrust Litig.*, 279 F.R.D. at 116 ("The fact that this manual process may be slow and burdensome cannot defeat the ascertainability requirement.") (internal quotations omitted); *see also Inland Empire-*

Immigrant Youth Collective, 2018 WL 1061408, at *13 ("That some administrative effort is required does not preclude certification."). Thus, even if ascertainability is required under Rule 23(b)(2), the Court finds that the proposed class satisfies this requirement.

Because Plaintiffs have met the requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(2), the Court finds certification of a subclass is appropriate. Accordingly, the Court **GRANTS** Plaintiffs' Motion for Provisional Class Certification consisting of all non-Mexican noncitizens who sought unsuccessfully to make a direct asylum claim at a U.S. POE before July 16, 2019, were instead required to wait in Mexico due to the U.S. Government's metering policy, and who continue to seek access to the U.S. asylum process.

IV. PRELIMINARY INJUNCTION

The Court now turns to Plaintiffs' Motion for Preliminary Injunction. Plaintiffs request that the Court enjoin the newly passed Asylum Ban, 8 C.F.R. § 208.13(c)(4)(i), from applying to members of the provisionally certified class who arrived before the regulation's stated date of effect.

"A preliminary injunction is a matter of equitable discretion and is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). "Crafting a preliminary injunction is 'an exercise of discretion and judgment often dependent as much on the equities of a given case as the substance of the legal issues it presents.'" *Azar*, 911 F.3d at 582 (quoting *Trump v. Int'l Refugee Assistance Project*, __U.S. __, 137 S. Ct. 2080, 2087 (2017)). "'The purpose of such interim equitable relief is not to conclusively determine the rights of the parties but to balance the equities as the litigation moves forward.'" *Id.*

In order to obtain a preliminary injunction, the plaintiff must establish: (1) that he or she is likely to succeed on the merits; (2) that he or she is likely to suffer

irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his or her favor; and (4) that an injunction is in the public interest. *Winter*. 555 U.S. at 20. "When the government is a party, the last two factors merge." *Azar*, 911 F.3d at 575 (citing *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014)).

A preliminary injunction can take two forms. *Marlyn Nutraceuticals Inc. v. Mucus Pharma GmbH & Co.*, 571 F.3d 873, 878–79 (9th Cir. 2009). "'A mandatory injunction orders a responsible party to take action,' while '[a] prohibitory injunction prohibits a party from taking action and preserves the status quo pending a determination of the action on the merits.'" *Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1060 (9th Cir. 2014) (quoting *McCormack v. Hiedeman*, 694 F.3d 1004, 1019 (9th Cir. 2012)). "The 'status quo' refers to the legally relevant relationship *between the parties* before the controversy arose." *Id.* at 1061. When the Government seeks to revise a policy, it is affirmatively changing the status quo, and any injunction ordering that the new policy not take effect is a prohibitory injunction. *Id.* A mandatory injunction is particularly disfavored and requires heightened scrutiny. *Marlyn Nutraceuticals*, 571 F.3d at 878; *Ariz. Dream Act Coalition*, 757 F.3d at 1060.

The Plaintiffs in this case seek a prohibitory injunction. The Government has passed a regulation which affirmatively changes the status quo. Plaintiffs are seeking an injunction ordering that this new policy not be applied to a small subclass of asylum seekers. As such, the heightened scrutiny is not applicable to Plaintiffs' Motion.

A. Likelihood of Success on the Merits

The wording of the Asylum Ban is clear. It is only applicable to aliens who enter, attempt to enter, or arrive in the United States after July 16, 2019. *See* 8 C.F.R. § 208.13(c)(4)(i) (applying additional limitation on asylum eligibility to "any alien

who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019").

In its most recent order in this case, this Court concluded that class members "who may not yet be in the United States, but who [are] in the process of arriving in the United States through a POE[,]" were "arriving in the United States" such that the statutory and regulatory provisions at issue applied to them. *See Al Otro Lado*, 394 F. Supp. at 1199–1205. Adopting and applying the same reasoning here, the Court concludes that the Asylum Ban, by its express terms, does not apply to those non-Mexican foreign nationals in the subclass who attempted to enter or arrived at the southern border *before* July 16, 2019 to seek asylum but were prevented from making a direct claim at a POE pursuant to the metering policy.

"A regulation should be construed to give effect to the natural and plain meaning of its words." *Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n*, 366 F.3d 692, 698 (9th Cir. 2004) (quoting *Crown Pac. v. Occupational Safety & Health Review Comm'n*, 197 F.3d 1036, 1038 (9th Cir. 1999)). Construing the Asylum Ban consistent with this principle, the Court finds that Plaintiffs are likely to succeed on the merits of their claim that the Asylum Ban does not apply to them.

The Government knowingly and intentionally implemented the Turnback Policy at its POEs before July 16, 2019. The Government also knew that, pursuant to this policy, CBP turned away many asylum-seekers who had approached a United States POE but could not cross the international boundary because they were required to wait in Mexico as a condition to accessing the asylum process in the United States. Despite this knowledge, the Government decided to issue a regulation applying only from July 16, 2019 forward. The Government could have enacted the Asylum Ban without specifying a time period, and thus imposed it on those subject to the metering procedures of the Turnback Policy. It could have also enacted the Asylum Ban with language specifying that it would be effective retrospectively to those metered at the border before the date the regulation was adopted. The Government chose to do

neither. Instead, although the regulation clearly states that it applies only to aliens who entered, attempted to enter, or arrived on or after July 16, 2019, the Government is now attempting to apply the Asylum Ban beyond its unambiguous constraints to capture the subclass of Plaintiffs who are, by definition, not subject to this rule.

The Government's position that the Asylum Ban applies to those who attempted to enter or arrived at the southern border seeking asylum before July 16, 2019 contradicts the plain text of their own regulation. Thus, the Court finds that Plaintiffs are likely to succeed on this issue on the merits.

B. Irreparable Harm

"Irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages." *Ariz. Dream Coalition*, 757 F.3d at 1068. "Because intangible injuries generally lack an adequate legal remedy, 'intangible injuries [may] qualify as irreparable harm.'" *Id.* (quoting *Rent-A-Ctr, Inc. v. Canyon Television and Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991)). One potential component of irreparable harm in an asylum case can be the claim that the individual is in physical danger if returned to his or her home country. *Leiva-Perez v. Holder*, 640 F.3d 962, 969 (9th Cir. 2011).

In this case, the provisionally certified subclass came to the southern border seeking asylum, claiming that they faced physical danger, torture or death if returned to their country of origin.[11]

CBP officers prevented asylum-seekers from crossing the international line to U.S. soil on the basis that the POE was at capacity, and CBP guidance instructed officers to inform individuals "that they will be permitted to enter once there is sufficient space and resources to process them." (OIG Special Review at 6, Ex. 2 to Mot. for Prelim. Inj., ECF No. 294-4.) In other words, these asylum seekers

[11] *See, e.g.*, Decl. of Roberto Doe ¶ 3; Decl. of S.N. ¶ 5; Decl. of Bianka Doe ¶ 3, Ex. 8 to Mot. for Prelim. Inj., ECF No. 294-10; Decl. of Djamal Doe ¶ 3, Ex. 12 to Mot. for Prelim. Inj., ECF No. 294-14; Decl. of Jordan Doe ¶ 3; Decl. of S.M.R.G. ¶ 4, Ex. 16 to Mot. for Prelim. Inj., ECF No. 294-20; Decl. of B.B. ¶ 4; Decl. of Mowha Doe ¶¶ 3–6.

understood their access to asylum in the United States to be premised on their willingness to wait in Mexico. In reliance on this representation by the U.S. Government, they did so. (*See* Decl. of B.B. ¶ 9 ("We put our names on the list because we believed in the process.").)

The Government—in a shift that can be considered, at best, misleading, and at worst, duplicitous—now seeks to change course. Although these individuals had already attempted to seek asylum in the United States and returned to Mexico only at the instruction of the Government, the Government intends to construe the fact that they were waiting in Mexico on or after July 16, 2019 as a failure to arrive in the United States before that date, thus subjecting them to the asylum eligibility bar contained in the Asylum Ban.

As such, the Government argues that the members of the subclass must first seek asylum in Mexico before they will be permitted to make a claim for asylum in the United States. *See* 8 C.F.R. § 208.13(c)(4)(i) (requiring foreign nationals to apply for asylum in at least one country through which they transited to the United States, "and receive[]a final judgment denying the alien protection in such country"). Again, however, based on the representations of the Government, these individuals have not done so because they believed that the process to receive an asylum hearing in the United States required only that they place themselves on a waitlist. As a result, they are now subject to Mexico's 30-day window for submitting asylum petitions and will likely be unable to meet the requirements of Asylum Ban. (Mot. for Prelim. Inj. at 12 ("[P]rovisional class members who were metered before July 16, 2019, by definition, have been in Mexico longer than a month, and are now barred from applying for asylum in Mexico by that country's 30-day bar on asylum applications."); *see also* Suppl. Decl. of Roberto Doe ¶ 7.). By extension, should the Asylum Ban be imposed on them, they will also lose their right to claim asylum in the United States.

Plaintiffs are simply seeking an opportunity to have their asylum claims heard. Failure to grant this preliminary injunction and return Plaintiffs to the status quo before the Asylum Ban went into effect, giving rise to the instant controversy, would therefore lead Plaintiffs to suffer irreparable harm.

C. Balance of Equities/Public Interest

While the Court must consider the public interest in preventing asylum-seekers from being improperly denied their access to the asylum process—particularly when the resulting ban could result in their removal to countries where they could face substantial harm—the Court is also mindful of the Government's position that it has a limited capacity to process all asylum-seekers in a timely fashion. Defendants argue that the Asylum Ban was passed in response to these limitations and that a preliminary injunction could complicate the Government's ability to deal with these issues, slowing the asylum process for others.

However, ultimately the Court finds the balance of equities and public interest tips in Plaintiffs' favor for two reasons. First, the putative subclass relied on the Government's representations. They returned to Mexico reasonably believing that if they followed these procedures, they would eventually have an opportunity to make a claim for asylum in the United States. But for the Government's metering policy, these asylum-seekers would have entered the United States and started the asylum process without delay. Similarly, but for the Government's current attempt to apply the Asylum Ban to them, these individuals could have their asylum claims adjudicated under the law in place at the time of their metering, which did not include the requirement that they first exhaust asylum procedures in Mexico. But because they did as the Government initially required and waited in Mexico, the Government is now arguing that they did not enter, attempt to enter, or arrive in the United States before July 16, 2019 and are now subject to this additional eligibility limitation. This situation, at its core, is quintessentially inequitable.

Second, as discussed above, if the Asylum Ban was meant to apply to those individuals waiting for their asylum hearing in Mexico due to the metering policy, the regulation could simply have said so. The fact that the Government is now so broadly interpreting a regulation that could have, but did not, include those who were metered, also leads the Court to include that the balance of equities tips in favor of Plaintiffs.

The Court concludes Plaintiffs have clearly shown a likelihood of success on the merits and irreparable harm, and that the balance of equities and public interest fall in their favor. Hence, the Court **GRANTS** Plaintiffs' Motion for a Preliminary Injunction.

D. Scope of the Injunction

"[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). In the immigration context, moreover, courts "have consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779 (9th Cir. 2018) (citing cases).

Unlike *East Bay Sanctuary*, however, nationwide injunctive relief is not necessary in this case to offer complete redress. Rather, the scope of the injunctive relief is limited by the class definition. *See All. to End Repression v. Rochford*, 565 F.2d 975, 980 (7th Cir. 1977) ("If, however, the suit is based on the constitutionality of a statute as applied or of a general practice, as is the case here, then the scope of the appropriate remedy can be defined more clearly by reference to the definition of the plaintiff class.").[12] The injunctive relief in this case would apply only to the class

[12] In fact, critics of the universal or nationwide injunction endorse the use of Rule 23(b)(2) class actions when injunctive relief limited to the named plaintiff "proves too narrow." Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 475–76 (2017) ("Indeed, if federal courts were to end the practice of issuing national injunctions, and instead were to issue only plaintiff-protective injunctions, it would become easier to see the rationale for the Rule 23(b)(2) class action as a means of achieving broad injunctive relief.").

certified in this case, defined in Section III, *supra*. The preliminary injunction therefore does not restrain nationwide effect of the Asylum Ban; it restrains only the effect of the Ban on those members of the provisionally certified class who fall outside the Ban's stated parameters.

V. CONCLUSION

For the reasons stated above, the Court **GRANTS** Plaintiffs' Motion for Provisional Class Certification (ECF No. 293). The Court provisionally certifies a class consisting of "all non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. POE 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."

Furthermore, the Court **GRANTS** Plaintiffs' Motion for a Preliminary Injunction (ECF No. 294) and orders the following: Defendants are hereby **ENJOINED** from applying the Asylum Ban to members of the aforementioned provisionally certified class and **ORDERED** to return to the pre-Asylum Ban practices for processing the asylum applications of members of the certified class.

IT IS SO ORDERED.

Dated: November 19, 2019

Cynthia Bashant
Hon. Cynthia Bashant
United States District Judge

AL OTRO LADO, INC.; Abigail Doe, Beatrice Doe, Carolina Doe, Dinora Doe, Ingrid Doe, Roberto Doe, Maria Doe, Juan Doe, Úrsula Doe, Victoria Doe, Bianca Doe, Emiliana Doe, and César Doe, individually and on behalf of all others similarly situated, Plaintiffs,

v.

Kevin MCALEENAN, Acting Secretary of U.S. Department of Homeland Security, in his official capacity, et al., Defendants.

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

United States District Court,
S.D. California.

Signed 07/29/2019

As Amended 08/02/2019

Background: Legal services organization and alien asylum seekers who either had been in ports of entry along border of United States and Mexico or allegedly had been turned away by United States officers while arriving at ports but while still in Mexico brought action against United States government officials in their official capacities, raising Administrative Procedure Act (APA), procedural due process, and Alien Tort Statute (ATS) claims challenging alleged policy of limiting asylum seekers' access to asylum process based on false claims of port of entry capacity constraints. Government officials moved to dismiss for failure to state claim.

Holdings: The District Court, Cynthia Bashant, J., held that:

(1) political question doctrine did not bar action;

(2) portion of Immigration and Nationality Act (INA) providing that alien who "arrives in" United States could apply for asylum applied to asylum seekers allegedly turned away while still in Mexico;

(3) such asylum seekers stated APA claim to compel allegedly unlawfully withheld agency action concerning asylum process;

(4) legal services organization and asylum seekers stated APA claim for judicial review of alleged asylum policy;

(5) asylum seekers allegedly turned away while still in Mexico stated procedural due process claim;

(6) the District Court lacked jurisdiction over legal services organization's ATS claim; but

(7) asylum seekers stated ATS claim.

Motion granted in part and denied in part.

1. Constitutional Law ⚿2580
Federal Civil Procedure ⚿1825
Federal Courts ⚿2078

A motion to dismiss for failure to state a claim that asserts a lack of jurisdiction due to the alleged presence of a political question in a case is more appropriately construed as a motion to dismiss for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1), 12(b)(6).

2. Federal Courts ⚿2078

When a defendant asserts a motion to dismiss for lack of subject-matter jurisdiction which is limited to the pleadings, the court accepts the plaintiffs' factual allegations as true and draws all reasonable inferences in the plaintiffs' favor to determine whether the allegations are sufficient to invoke federal jurisdiction. Fed. R. Civ. P. 12(b)(1).

3. Constitutional Law ⚿2580

Political question doctrine did not bar action by legal services organization and alien asylum seekers against government officials in their official capacities, an action raising Administrative Procedure Act (APA), procedural due process, and Alien

Tort Statute (ATS) claims challenging alleged policy of limiting asylum seekers at ports of entry along border of United States and Mexico from accessing asylum process based on false capacity constraint claims, although some allegations concerned coordination between United States and Mexican officials, where coordination was merely outgrowth of alleged conduct by United States officials, and claims primarily raised statutory questions about violations of Immigration and Nationality Act (INA) and regulatory provisions governing asylum process. U.S. Const. Amend. 5; 5 U.S.C.A. § 706; Immigration and Nationality Act § 235, 8 U.S.C.A. § 1225; 28 U.S.C.A. § 1350; 8 C.F.R. § 235.3(b)(4).

4. Federal Courts ⚿2571

In general, the Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid.

5. Constitutional Law ⚿2580

The political question doctrine is a recognized narrow exception to the Judiciary's Article III responsibility. U.S. Const. art. 3, § 2, cl. 1.

6. Constitutional Law ⚿2580

The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.

7. Constitutional Law ⚿2580

The political question doctrine concerns the jurisdictional case or controversy requirement of Article III of the Constitution, and a court must address it before proceeding to the merits of a case. U.S. Const. art. 3, § 2, cl. 1.

8. Constitutional Law ⚿2580

If a political question is inextricable from a case, the political question doctrine prevents a plaintiff's claims from proceeding to the merits.

9. Constitutional Law ⚿2580

There are multiple different formulations for determining whether a case presents a political question that is understood to deprive a federal court of subject-matter jurisdiction.

10. Constitutional Law ⚿2580

For a political question to preclude jurisdiction, a case need only present one formulation for determining whether the case presents a political question that is understood to deprive a federal court of subject-matter jurisdiction.

11. Constitutional Law ⚿2580

One formulation for determining whether a case presents a political question that is understood to deprive a federal court of subject-matter jurisdiction is whether there is a textually demonstrable constitutional commitment of the issue to a coordinate political department.

12. Aliens, Immigration, and Citizenship ⚿211

The exclusion of aliens is a fundamental act of sovereignty by the political branches of government.

13. Aliens, Immigration, and Citizenship ⚿211

The Executive possesses a recognized power to regulate the entry of aliens into the United States through its inherent executive power to control the foreign affairs of the nation.

14. United States ⚿251, 253

The Executive's foreign affairs powers are understood to derive from the President's role as Commander in Chief, the President's right to receive ambassadors

and other public ministers, and the President's general duty to take care that the laws be faithfully executed. U.S. Const. art. 2, § 2, cl. 1; U.S. Const. art. 2, § 3.

15. Aliens, Immigration, and Citizenship ⚿211, 690

Commerce ⚿4

Constitutional Law ⚿2340

By virtue of Article I, Congress possesses certain powers that render the admission or exclusion of aliens and foreign affairs an intimately legislative matter, including the specific constitutionally enumerated legislative powers to establish a uniform rule of naturalization, to regulate commerce with foreign nations, and to declare war. U.S. Const. art. 1, § 8, cl. 3, 4, 11.

16. Aliens, Immigration, and Citizenship ⚿211

Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.

17. Constitutional Law ⚿2453

Federal courts have the power to review the political branches' action to determine whether they exceed the constitutional or statutory scope of their authority.

18. Constitutional Law ⚿2588

When Congress has expressed its intent regarding an aspect of foreign affairs through a legislative command and a court is asked to evaluate the Government's compliance with that command, the court is not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy should be; instead, the court must engage in the familiar judicial exercise of reading and applying a statute, conscious of the purpose expressed by Congress.

19. Aliens, Immigration, and Citizenship ⚿602, 766

Constitutional Law ⚿4440

International Law ⚿351

Act of state doctrine did not bar action by legal services organization and alien asylum seekers against government officials in their official capacities, an action raising Administrative Procedure Act (APA), procedural due process, and Alien Tort Statute (ATS) claims challenging alleged policy of limiting asylum seekers at ports of entry along border of United States and Mexico from accessing asylum process based on false capacity constraint claims, although action alleged that United States officials had instructed Mexican officials to perform certain conduct in furtherance of alleged asylum policy, since assessing legality of United States officials' alleged conduct and ordering any corresponding relief did not necessitate declaring any official acts of Mexican government unlawful. U.S. Const. Amend. 5; 5 U.S.C.A. § 706; 28 U.S.C.A. § 1350.

20. International Law ⚿342

The act of state doctrine bars a suit where (1) there is an official act of a foreign sovereign performed within its own territory, and (2) the relief sought or the defense interposed in the action would require a court in the United States to declare invalid the foreign sovereign's official act.

21. Aliens, Immigration, and Citizenship ⚿602

Fact that nonprofit legal services organization which provided services to indigent deportees, migrants, refugees, and their families was not itself alien or refugee did not bar it from raising Administrative Procedure Act (APA) claims against government officials in their official capacities to challenge alleged policy of limiting asylum seekers at ports of entry along

border of United States and Mexico from accessing asylum process based on false claims of capacity constraints as being inconsistent with Immigration and Nationality Act (INA) and regulatory provisions governing asylum process, although provisions pertained to aliens or refugees rather than legal services organizations. 5 U.S.C.A. § 706; Immigration and Nationality Act § 235, 8 U.S.C.A. § 1225; 8 C.F.R. § 235.3(b)(4).

22. Administrative Law and Procedure ⚿2010

An Administrative Procedure Act (APA) claim to compel agency action unlawfully withheld or unreasonably delayed can only proceed where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take. 5 U.S.C.A. § 706(1).

23. Administrative Law and Procedure ⚿2011

The limitation on Administrative Procedure Act (APA) claims to compel agency action unlawfully withheld or unreasonably delayed to required agency action rules out judicial direction of even discrete agency action that is not demanded by law. 5 U.S.C.A. § 706(1).

24. Administrative Law and Procedure ⚿2011

Because of the limitation on Administrative Procedure Act (APA) claims to compel agency action unlawfully withheld or unreasonably delayed to required agency action, courts have no authority to compel agency action merely because the agency is not doing something the courts may think it should do. 5 U.S.C.A. § 706(1).

25. Aliens, Immigration, and Citizenship ⚿507

Alien asylum seekers adequately alleged unlawful withholding of government officers' mandatory Immigration and Nationality Act (INA) duties to inspect and refer them for asylum interviews so as to state Administrative Procedure Act (APA) claim against government officials in their official capacities to compel such allegedly unlawfully withheld action, where asylum seekers alleged that they had sought asylum at ports of entry by asserting intent to apply for asylum and fear of persecution, only for government officers to coerce them into signing documents stating that they lacked fear of persecution and were withdrawing their applications for admission. 5 U.S.C.A. § 706(1); Immigration and Nationality Act § 235, 8 U.S.C.A. § 1225; 8 C.F.R. § 235.3(b)(4).

26. Aliens, Immigration, and Citizenship ⚿507

Alien asylum seekers adequately alleged that they had been subject to protections of Immigration and Nationality Act (INA) provisions governing asylum process, as element of their Administrative Procedure Act (APA) claims against government officials in their official capacities to compel unlawfully withheld agency action, claims alleging unlawful withholding of government officers' INA duties to inspect and refer asylum seekers for asylum interviews, where asylum seekers alleged that they had been "at" ports of entry when they had requested asylum. 5 U.S.C.A. § 706(1); Immigration and Nationality Act § 235, 8 U.S.C.A. § 1225; 8 C.F.R. § 235.3(b)(4).

27. Statutes ⚿1079, 1091

The starting point of statutory interpretation is the statute's language; if the statutory language is plain, a court enforces it according to its terms.

28. Statutes ⚿1082

A court interprets a statute to give effect, if possible, to every clause and word of the statute; this process of statutory

interpretation proceeds with reference to the statutory context, structure, history, and purpose, as well as overall common sense.

29. Statutes ⚿1156

The rule against surplusage is not absolute.

30. Statutes ⚿1156

A court need not apply the rule against surplusage when its application would be at the expense of a statute's more natural reading, the structure of the statutory provision, and the structure of the act.

31. Aliens, Immigration, and Citizenship ⚿507

Portion of Immigration and Nationality Act (INA) providing that any alien who "arrives in" United States could apply for asylum covered alien who was not yet in United States but who was in process of arriving in United States through port of entry. Immigration and Nationality Act § 208, 8 U.S.C.A. § 1158(a)(1).

32. Statutes ⚿1128

Congress's use of a verb tense is significant in construing statutes.

33. Statutes ⚿1128

A statute's use of the present progressive tense, like use of a present participle, denotes an ongoing process.

34. Constitutional Law ⚿2474

A court is not at liberty to rewrite statutory words chosen by Congress.

35. Statutes ⚿1415

Application of the presumption against the extraterritoriality of legislation by Congress is a two-step process, which may reveal that Congress has rebutted the presumption for an entire statutory provision or that the presumption is displaced in the context of a particular case's facts; under the first step, a court considers whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially—and second, if the statute does not clearly indicate an intent that it applies extraterritorially, the court must consider whether the case involves a domestic application of the statute by looking to the statute's focus.

36. Statutes ⚿1415

If the conduct relevant to the focus of a statute which does not clearly indicate an intent that it applies extraterritorially occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad, but if the conduct relevant to the focus occurred in a foreign country, then under the presumption against extraterritoriality the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in United States territory.

37. Aliens, Immigration, and Citizenship ⚿507

Immigration and Nationality Act (INA) language providing that any alien who "arrives in" United States could apply for asylum displaced presumption against extraterritoriality for purposes of Administrative Procedure Act (APA) claims against government officials in their official capacities by alien asylum seekers who allegedly had been turned away by United States officers while arriving at ports of entry but while still outside of United States, claims alleging unlawful withholding of government officers' INA duties to inspect and refer asylum seekers for asylum interviews; reading of INA language, when placed into context, showed that Congress had intended statute to apply to asylum seekers in process of arriving. 5

U.S.C.A. § 706(1); Immigration and Nationality Act §§ 208, 235, 8 U.S.C.A. §§ 1158(a)(1), 1225; 8 C.F.R. § 235.3(b)(4).

38. Aliens, Immigration, and Citizenship ⚿507

Even if Immigration and Nationality Act (INA) language providing that any alien who "arrives in" United States could apply for asylum did not alone displace presumption against extraterritoriality, relevant application of statute was domestic such that presumption was displaced for purposes of Administrative Procedure Act (APA) claims against government officials in their official capacities by alien asylum seekers who allegedly had been turned away by United States officers while arriving at ports of entry but while still outside of United States, claims alleging unlawful withholding of government officers' INA duties to inspect and refer asylum seekers for interviews; claims concerned conduct of United States officials acting from areas over which United States exercised sovereignty. 5 U.S.C.A. § 706(1); Immigration and Nationality Act §§ 208, 235, 8 U.S.C.A. §§ 1158(a)(1), 1225; 8 C.F.R. § 235.3(b)(4).

39. Aliens, Immigration, and Citizenship ⚿507

Interpreting portion of Immigration and Nationality Act (INA) providing that any alien who "arrives in" United States could apply for asylum to cover alien asylum seekers who allegedly had been turned away by United States officers while arriving at ports of entry but while still outside of United States did not render redundant INA section providing process for applications for refugee status from persons outside of United States so as to violate rule against surplusage in asylum seekers' Administrative Procedure Act (APA) action against United States officials challenging alleged unlawful withholding of government officers' INA duties to inspect and refer asylum seekers for interviews; scheme for admission of refugees was fundamentally different and separate from asylum process. 5 U.S.C.A. § 706(1); Immigration and Nationality Act §§ 207, 208, 235, 8 U.S.C.A. §§ 1157, 1158(a)(1), 1225; 8 C.F.R. § 235.3(b)(4).

40. Aliens, Immigration, and Citizenship ⚿507

Alien asylum seekers who allegedly had been turned away by United States officers while arriving at ports of entry but while still outside of United States adequately alleged unlawful withholding of officers' mandatory Immigration and Nationality Act (INA) duty to inspect them as aliens seeking admission so as to state Administrative Procedure Act (APA) claim against government officials in their official capacities to compel such allegedly unlawfully withheld action, where asylum seekers alleged that they had sought admission to United States by presenting themselves to United States officers at ports of entry, upon which officers allegedly had told them that ports lacked capacity to accept applications from asylum seekers. 5 U.S.C.A. § 706(1); Immigration and Nationality Act § 235, 8 U.S.C.A. § 1225(a)(3).

41. Aliens, Immigration, and Citizenship ⚿507

Alien asylum seekers who allegedly had been turned away by United States officers while arriving at port of entry on border of United States and Mexico but while still in Mexico adequately alleged unlawful withholding of officers' mandatory Immigration and Nationality Act (INA) duty to refer them to asylum interviews so as to state Administrative Procedure Act (APA) claim against government officials in their official capacities to compel such allegedly unlawfully withheld action; asylum seekers alleged that they had been

crossing international bridge to physical port of entry when they had been stopped midway on bridge despite telling United States officers that they wanted to seek asylum in United States. 5 U.S.C.A. § 706(1); Immigration and Nationality Act § 235, 8 U.S.C.A. § 1225(b)(1)(A)(ii); 8 C.F.R. § 235.3(b)(4).

42. Administrative Law and Procedure ⚷1242

A regulation should be construed to give effect to the natural and plain meaning of its words.

43. Administrative Law and Procedure ⚷1661(4)

Two conditions must be satisfied for an agency action to be final for purposes of Administrative Procedure Act (APA) judicial review: (1) the action must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature—and (2) the action must be one by which rights or obligations have been determined, or from which legal consequences will flow. 5 U.S.C.A. §§ 551(13), 704, 706(2).

44. Administrative Law and Procedure ⚷1661(4)

In determining whether an agency's action is final for purposes of Administrative Procedure Act (APA) judicial review, a court looks to whether (a) the action amounts to a definitive statement of the agency's position, or (b) the action has a direct and immediate effect on the day-to-day operations of the subject party, or (c) immediate compliance with the terms is expected. 5 U.S.C.A. §§ 551(13), 704, 706(2).

45. Administrative Law and Procedure ⚷1661(3)

The focus in determining whether an agency's action is final for purposes of Administrative Procedure Act (APA) judicial review is on the practical and legal effects of the agency action. 5 U.S.C.A. §§ 551(13), 704, 706(2).

46. Administrative Law and Procedure ⚷1661(3)

Agency action need not be in writing to be final and judicially reviewable pursuant to the Administrative Procedure Act (APA). 5 U.S.C.A. §§ 551(13), 704, 706(2).

47. Administrative Law and Procedure ⚷1661(10)

An unwritten policy can still satisfy the Administrative Procedure Act's (APA) pragmatic final agency action requirement for judicial review; a contrary rule would allow an agency to shield its decisions from judicial review simply by refusing to put those decisions in writing. 5 U.S.C.A. §§ 551(13), 704, 706(2).

48. Administrative Law and Procedure ⚷1661(10)

There are limitations on whether challenged agency action is properly characterized as a policy subject to Administrative Procedure Act (APA) judicial review, even if the policy is alleged to be unwritten; a plaintiff may not simply attach a policy label to disparate agency practices or conduct. 5 U.S.C.A. §§ 551(13), 704, 706(2).

49. Aliens, Immigration, and Citizenship ⚷607

Legal services organization and alien asylum seekers adequately alleged that alleged government policy of limiting asylum seekers at ports of entry along border of United States and Mexico from accessing asylum process based on false claims of capacity constraints was final agency action, as element of Administrative Procedure Act (APA) claim against government officials in their official capacities for judicial review of such alleged action; organization and asylum seekers alleged that policy had been formalized as culmination

of Customs and Border Protection (CBP) agency decisionmaking process, pointed to various alleged instances of government officials' acknowledgement of policy, and otherwise made extensive anecdotal allegations of alleged turn-backs of asylum seekers along border. 5 U.S.C.A. §§ 551(13), 704, 706(2).

50. Aliens, Immigration, and Citizenship ⚿607

Legal services organization and alien asylum seekers adequately alleged final agency action, as element of Administrative Procedure Act (APA) claim against government officials in their official capacities for judicial review of alleged pattern or practice of subordinate government officers using unlawful tactics to limit asylum seekers at ports of entry along border of United States and Mexico from accessing asylum process; organization and asylum seekers alleged that defendant officials had sanctioned pattern or practice, and alleged that pattern or practice had been designed alongside alleged formal government policy of limiting asylum seekers' access to asylum process based on false claims of port of entry capacity constraints. 5 U.S.C.A. §§ 551(13), 704, 706(2).

51. Aliens, Immigration, and Citizenship ⚿607

Statutes making Secretary of Homeland Security responsible for ensuring orderly and efficient flow of traffic at ports of entry did not commit agency action to agency discretion so as to preclude Administrative Procedure Act (APA) claim by legal services organization and alien asylum seekers against Secretary and other government officials in their official capacities for judicial review of alleged policy of limiting asylum seekers at ports of entry along border of United States and Mexico from accessing asylum process based on false claims of capacity constraints, with APA claim alleging that policy was unlawful under Immigration and Nationality Act (INA); general statutory provisions for Secretary's authority did not nullify INA provisions that outlined asylum process with specificity. 5 U.S.C.A. § 706(2); 6 U.S.C.A. § 202; Immigration and Nationality Act §§ 103, 208, 235, 8 U.S.C.A. §§ 1103, 1158, 1225.

52. Administrative Law and Procedure ⚿1655

There exists a strong presumption that Congress intends judicial review of administrative action.

53. Administrative Law and Procedure ⚿1656

The presumption that Congress intends judicial review of administrative action may be rebutted only if the relevant statute precludes review or if the action is committed to agency discretion by law. 5 U.S.C.A. § 701(a).

54. Administrative Law and Procedure ⚿1664(2)

The exception to Administrative Procedure Act (APA) judicial review for agency action committed to agency discretion by law is read quite narrowly as restricted to those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. 5 U.S.C.A. §§ 701(a)(2), 706(2).

55. Administrative Law and Procedure ⚿1104

The power of executing the laws does not include a power to revise clear statutory terms that turn out not to work in practice, and it is thus a core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.

56. Aliens, Immigration, and Citizenship ⚿504

Legal services organization and alien asylum seekers sufficiently alleged unlawfulness of alleged government policy of limiting asylum seekers at ports of entry along border of United States and Mexico from accessing asylum process based on false claims of capacity constraints so as to state Administrative Procedure Act (APA) claim against government officials in their official capacities for judicial review of alleged policy; organization and asylum seekers alleged that policy violated Immigration and Nationality Act (INA) provisions outlining asylum process, with government officers' alleged use of false claims of lack of capacity as excuse to turn away asylum seekers suggesting existence of unlawful de facto numerical limit on number of asylum applicants which found no support in INA. 5 U.S.C.A. § 706(2); Immigration and Nationality Act §§ 208, 235, 8 U.S.C.A. §§ 1158, 1225.

57. Aliens, Immigration, and Citizenship ⚿607

Review of alien asylum seekers' procedural due process claims separate from review of their Administrative Procedure Act (APA) claims was appropriate in action against government officials in their official capacities by asylum seekers who allegedly had been turned away by United States officers while arriving at ports of entry along border of United States and Mexico but while still in Mexico, although due process and APA claims were premised on same Immigration and Nationality Act (INA) provisions governing asylum process. U.S. Const. Amend. 5; 5 U.S.C.A. § 706; Immigration and Nationality Act §§ 208, 235, 8 U.S.C.A. §§ 1158, 1225.

58. Constitutional Law ⚿3869

The requirements of procedural due process apply to the deprivation of interests encompassed by the Due Process Clause's protection of liberty and property. U.S. Const. Amend. 5.

59. Constitutional Law ⚿3869

To assert a procedural due process claim under the Fifth Amendment, a plaintiff must first establish a constitutionally protected interest. U.S. Const. Amend. 5.

60. Constitutional Law ⚿3869

A procedural due process plaintiff must have more than a unilateral expectation of a constitutionally protected interest; instead, she must have a legitimate claim of entitlement. U.S. Const. Amend. 5.

61. Constitutional Law ⚿3869

If a procedural due process plaintiff shows the existence of a constitutionally protected interest, the plaintiff must further establish a denial of adequate procedural protections. U.S. Const. Amend. 5.

62. Constitutional Law ⚿686

Aliens legally within the United States may challenge the constitutionality of federal and state actions.

63. Aliens, Immigration, and Citizenship ⚿507

Constitutional Law ⚿4440

Fifth Amendment Due Process Clause applied to alien asylum seekers who allegedly, in violation of Immigration and Nationality Act (INA) asylum procedures, had been turned away by United States officers while arriving at port of entry on border of United States and Mexico but while still in Mexico, as prerequisite for asylum seekers' procedural due process claim against United States government officials challenging such alleged conduct; asylum seekers alleged that they had been stopped in middle of international bridge between Mexico and United States and had been denied access by United States

officers who had been located on United States side of bridge, and practical necessities also favored Due Process Clause's application insofar as claim concerned violation of statutory procedure. U.S. Const. Amend. 5; Immigration and Nationality Act §§ 208, 235, 8 U.S.C.A. §§ 1158, 1225.

64. Aliens, Immigration, and Citizenship ⚿507

Constitutional Law ⚿4440

Alien asylum seekers who allegedly had been turned away by United States officers while arriving at ports of entry along border of United States and Mexico but while still in Mexico stated procedural due process claim against United States government officials in their official capacities challenging such alleged conduct; asylum seekers alleged that, through such conduct, United States officers had failed to discharge their mandatory duties under Immigration and Nationality Act's (INA) asylum procedures regarding aliens who were in process of arriving in United States and who expressed intent to seek asylum. U.S. Const. Amend. 5; Immigration and Nationality Act §§ 208, 235, 8 U.S.C.A. §§ 1158, 1225.

65. Aliens, Immigration, and Citizenship ⚿163

Congress has the power to prescribe the terms and conditions upon which aliens may come to the country.

66. Constitutional Law ⚿3869

In the enforcement of congressional policies, the Executive Branch of the Government must respect the procedural safeguards of due process. U.S. Const. Amend. 5.

67. Aliens, Immigration, and Citizenship ⚿760

The Alien Tort Statute (ATS) is a strictly jurisdictional statute in its own right that creates no new causes of action. 28 U.S.C.A. § 1350.

68. Aliens, Immigration, and Citizenship ⚿766

Nonprofit California legal services organization which provided services to indigent deportees, migrants, refugees, and their families was not alien, and thus court lacked jurisdiction over organization's Alien Tort Statute (ATS) claim against government officials in their official capacities challenging alleged policy of limiting asylum seekers at ports of entry along border of United States and Mexico from accessing asylum process based on false claims of capacity constraints. 28 U.S.C.A. § 1350.

69. Aliens, Immigration, and Citizenship ⚿766

Irrespective of the substantive cause of action that underlies an asserted Alien Tort Statute (ATS) claim, a federal court lacks jurisdiction under the ATS over claims asserted by anyone or anything other than an alien. 28 U.S.C.A. § 1350.

70. Aliens, Immigration, and Citizenship ⚿763

Alien asylum seekers adequately alleged that duty of non-refoulement forbidding country from expelling individual to country where he had well-founded fear of persecution was jus cogens norm recognized by law of nations, as element of asylum seekers' Alien Tort Statute (ATS) claim against United States government officials in their official capacities challenging alleged policy of limiting asylum seekers at ports of entry along border of United States and Mexico from accessing asylum process based on false claims of capacity constraints; asylum seekers located asserted jus cogens norm in range of fundamental international treaties and in statements by international law bodies

and international law commentators. 28 U.S.C.A. § 1350.

71. Aliens, Immigration, and Citizenship ⚿763

By its terms, the Alien Tort Statute (ATS) enables federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law. 28 U.S.C.A. § 1350.

72. Aliens, Immigration, and Citizenship ⚿763

When a plaintiff seeks to plead an Alien Tort Statute (ATS) claim based on an alleged violation of the law of nations, the plaintiff must identify an international norm that is specific, universal, and obligatory. 28 U.S.C.A. § 1350.

73. International Law ⚿104

As a general matter, courts ascertain customary international law by consulting the works of jurists writing professedly on public law, or by the general usage and practice of nations, or by judicial decisions recognizing and enforcing that law.

74. International Law ⚿105

Courts determine whether a jus cogens norm exists by looking to the works of jurists writing professedly on public law, or by the general usage and practice of nations, or by judicial decisions recognizing and enforcing that law, but courts must make the additional determination whether the international community recognizes the norm as one from which no derogation is permitted.

75. Aliens, Immigration, and Citizenship ⚿763

Immigration and Nationality Act's (INA) specific provision of asylum procedures did not preclude alien asylum seekers from asserting Alien Tort Statute (ATS) claim against government officials in their official capacities claiming that alleged policy of limiting asylum seekers at ports of entry along border of United States and Mexico from accessing asylum process based on false claims of capacity constraints violated jus cogens norm of non-refoulement, which forbid country from expelling individual to country where he had well-founded fear of persecution; nothing in ATS limited its application to situations where there was no relief available under domestic law, and at a minimum asylum seekers could plead ATS claim as alternative to INA-based claims. 28 U.S.C.A. § 1350; Immigration and Nationality Act §§ 208, 235, 8 U.S.C.A. §§ 1158, 1225.

76. Aliens, Immigration, and Citizenship ⚿766

Because the Alien Tort Statute (ATS) is a jurisdictional statute, defendants are not foreclosed from challenging plaintiffs' ATS claims at a stage later than the motion to dismiss stage. 28 U.S.C.A. § 1350; Fed. R. Civ. P. 12(b)(1), 12(h)(3).

West Codenotes

Validity Called into Doubt

8 C.F.R. §§ 208.13(c)(3), 1208.13(c)(3)

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Shepherd, Pro Hac Vice, American Immigration Council, Melissa E. Crow, Pro Hac Vice, Southern Poverty Law Center, Washington, DC, Michaela R. Laird, Latham & Watkins, LLP, San Diego, CA, Rebecca Cassler, Pro Hac Vice, Sarah Marion Rich, Pro Hac Vice, Southern Poverty Law Center, Decatur, GA, for Plaintiffs.

Alexander James Halaska, Brian Ward, Katherine J. Shinners, U.S. Department of Justice Office of Immigration Litigation, Gisela Ann Westwater, Sherease Rosalyn Pratt, Yamileth G. Davila, U.S. Department of Justice, Danielle K. Schuessler, Genevieve M. Kelly, Sairah G. Saeed, Civil Division—Office of Immigration Litigation, OIL-DCS Trial Attorney, Office of Immigration Litigation District Court Section, Washington, DC, for Defendants.

AMENDED ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT [1]

[ECF No. 192]

Hon. Cynthia Bashant, United States District Judge

In this case, Organizational Plaintiff Al Otro Lado, Inc. ("Al Otro Lado"), an organization that helps individuals seek asylum in the United States, and thirteen Individual Plaintiffs—Abigail Doe, Beatrice Doe, Carolina Doe, Dinora Doe, Ingrid Doe, Roberto Doe, Maria Doe, Juan Doe, Úrsula Doe, Victoria Doe, Bianca Doe, Emiliana Doe, and César Doe—challenge conduct that they allege is "designed to serve the Trump [A]dministration's broader, publicly proclaimed goal of deterring individuals from seeking access to the asylum process." (ECF No. 189 Second Am. Compl. ("SAC") ¶ 4.) According to Plaintiffs, U.S. Customs and Border Protection ("CBP") officials "have systematically restricted the number of asylum seekers who can access the U.S. asylum process through POEs along the U.S.-Mexico border." (*Id.* ¶ 48.) Plaintiffs seek to hold various Defendant federal officials [2] that have authority over immigration enforcement liable in their official capacities for an alleged pattern or practice by CBP officers of denying asylum seekers at ports of entry ("POEs") along the U.S.-Mexico border access to the U.S. asylum process, and an alleged formalized policy designed for the same end, which Plaintiffs refer to as the Turnback Policy.

In the months following the Court's grant in part and denial in part of Defendants' motion to dismiss the original complaint, *see Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284 (S.D. Cal. 2018), Plaintiffs filed the operative Second Amended Complaint ("SAC"). Like the original complaint, Plaintiffs allege in the SAC that since late 2016 there is an alleged pattern and practice amongst CBP officials at POEs along the U.S-Mexico

1. This Amended Order amends certain citations in the Court's July 29, 2019 order. (ECF No. 278.) It is substantively identical to the July 29, 2019 order.

2. The SAC names the following Defendants in their official capacities: (1) Kirstjen M. Nielsen, Secretary, U.S. Department of Homeland Security ("DHS"), (2) Kevin McAleenan, Commissioner, U.S. Customs and Border Protection ("CBP"), and (3) Todd C. Owens, Executive Assistant Commissioner, Office of Field Operations, U.S. CBP. (SAC ¶¶ 36–39.) In the time since the SAC's filing in November 2018, at least two defendants have changed. Pursuant to Rule 25(d), the Court hereby substitutes (1) Kevin McAleenan as Acting Secretary of DHS in place of Nielsen and (2) John P. Sanders as the Acting Commissioner of CBP. Defendants shall notify the Court in the event any further substitution is warranted.

border to "deny[ ] asylum seekers access to the asylum process" "through a variety of illegal tactics." (SAC ¶ 2.) Five original Individual Plaintiffs—Plaintiffs Abigail Doe, Beatrice Doe, Carolina Doe, Dinora Doe, and Ingrid Doe (the "Original Individual Plaintiffs")—once more allege that they were subjected to these tactics when CBP officials denied them access to the U.S. asylum process at various POEs.[3] Unlike the original complaint, the SAC now alleges that as early as 2016, Defendants were implementing a policy to restrict the flow of asylum seekers at the San Ysidro POE. Plaintiffs allege that Defendants formalized this policy in spring 2018 in the form of the border-wide Turnback Policy, an alleged "formal policy to restrict access to the asylum process at POEs by mandating that lower-level officials directly or constructively turn back asylum seekers at the border," including through pretextual assertions that POEs lack capacity to process asylum seekers. (*Id.* ¶¶ 3, 48–83.) Eight new Individual Plaintiffs—Roberto Doe, Maria Doe, Juan and Úrsula Doe, Victoria Doe, Bianca Doe, Emiliana Doe, and César Doe (the "New Individual Plaintiffs")—have joined this lawsuit, alleging that they were subjected to this Turnback Policy. Both the illegal tactics and the alleged Turnback Policy have resulted in many asylum seekers, particularly those from Central America, who present themselves at POEs along the U.S.-Mexico border being "turned back by" and "at the instruction of" CBP officials. (*Id.* ¶ 58.)

Based on the conduct alleged, Plaintiffs press claims for violations of various Immigration and Nationality Act ("INA") provisions, which Plaintiffs call "the U.S. asylum process." In connection with the alleged INA violations, Plaintiffs assert claims under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 706(1), 706(2), and claims directly under the Fifth Amendment Due Process Clause for alleged procedural due process violations. All Plaintiffs further assert claims under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, on the ground that the alleged conduct violates a duty of non-*refoulement*, which Plaintiffs contend is an international law norm that "forbids a country from returning or expelling an individual to a country where he or she has a well-founded fear of persecution and/or torture[.]" Defendants move to dismiss the SAC under Rule 12(b)(6) for failure to state a claim. (ECF Nos. 192, 238.) Plaintiffs oppose. (ECF No. 210.) The parties presented oral argument to the Court. (ECF No. 259; ECF No. 260, Hr'g Tr.) In addition to the parties' submissions, six amicus briefs have been submitted with the Court's permission. (ECF Nos. 215, 216, 219, 221, 223.)[4]

3. For reasons unknown to the Court, Original Individual Jose Doe was dropped from this suit in the First Amended Complaint ("FAC") filed nearly two months after the Court's prior dismissal order and he is not a plaintiff to the SAC filed a month after the FAC. (ECF Nos. 176, 189.)

4. The briefs are: (1) *Amicus Curiae* Brief of the States of California, Connecticut, the District of Columbia, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington in support of Plaintiffs, (ECF No. 215-1); (2) *Amicus Curiae* Brief of Amnesty International in Opposition to Defendants' Motion to Dismiss, (ECF No. 216-1); (3) *Amicus* Brief of Certain Members of Congress in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss the Second Amended Complaint, (ECF No. 219-1); (4) Brief of Certain Immigration Law Professors as *Amici Curiae* in Support of Plaintiffs' Opposition to Defendants' Motion to Partially Dismiss the Second Amended Complaint, (ECF No. 221-1); (5) *Amicus Curiae* Brief of Nineteen Organizations Representing Asylum Seekers, (ECF No. 223-2); and (6) Brief of *Amici Curiae* Kids in Need of De-

For the reasons herein, the Court grants in part and denies in part Defendants' motion to dismiss the SAC.

BACKGROUND

I. Statutory and Regulatory Background

8 U.S.C. § 1158(a)(1) is this case's statutory bedrock. It provides that:

> 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 . . . section 1225(b)[.]

8 U.S.C. § 1158(a)(1).

This case turns on the Section 1225(b) asylum procedure that Section 1158 incorporates. Section 1225 sets forth, in relevant part, certain inspection duties of immigration officers, which undergird additional specific duties that arise when certain aliens express an intent to seek asylum in the United States or a fear of persecution.

Section 1225(a) establishes the general inspection duty: "[a]ll aliens . . . who are applicants for admission or otherwise seeking admission . . . to . . . the United States shall be inspected by immigration officers." 8 U.S.C. § 1225(a)(3). In language that echoes Section 1158(a)(1), Section 1225(a) defines as an "applicant for admission" "[a]n 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 including an alien who is brought to the United States after having been interdicted in international or United States waters)[.]" 8 U.S.C. § 1225(a)(1). An implementing regulation more broadly defines "arriving alien" as "an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport." 8 C.F.R. § 1.2. By regulation, "application to lawfully enter the United States shall be made in person to an immigration officer at a U.S. port-of-entry when the port is open for inspection, or as otherwise" provided. 8 C.F.R. § 231.1(a).

Section 1225(b) sets forth two sets of procedures that apply to aliens "arriving in the United States." First, pursuant to the procedure under Section 1225(b)(1), an arriving alien may be summarily "removed from the United States without further hearing or review" "if an immigration officer determines" that the alien "is inadmissible" for making certain fraudulent or misleading representations or for not having valid entry or travel documents. 8 U.S.C. § 1225(b)(1)(A)(i); *Thuraissigiam v. U.S. Dep't of Homeland Sec.*, 917 F.3d 1097, 1100 (9th Cir. 2019) (citing, *inter alia*, 8 U.S.C. § 1182(a)(6)(C) and 8 U.S.C. § 1182(a)(7)). Section 1225(b)(1)'s removal mandate, however, does not apply if "the alien indicates either an intention to apply for asylum under section 1158 [ ] or a fear of persecution." *Id.* Instead, "[i]f the immigration officer determines that an alien" is "inadmissible" for making certain fraudulent or misleading representations or for not having valid entry or travel documents "*and* the alien indicates either an intention to apply for asylum under section 1158 [ ]

fense, *et al.*, in Support of Plaintiffs' Opposition to Motion to Dismiss, (ECF No. 225-1).)

or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer[.]" 8 U.S.C. § 1225(b)(1)(A)(ii) (emphasis added). An implementing regulation governing this expedited removal procedure imposes an analogous obligation. 8 C.F.R. § 235.3(b)(4). In these circumstances, the immigration officer must refer the alien to an "asylum officer," who is statutorily required to be "an immigration officer who has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications under section 1158 of this title," and "is supervised by an officer who," *inter alia*, "has had substantial experience adjudicating asylum applications." 8 U.S.C. § 1225(b)(1)(E).

In contrast with the Section 1225(b)(1) procedure, Section 1225(b)(2) establishes the procedure for "inspection of other aliens." 8 U.S.C. § 1225(b)(2). "Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission," the alien "shall be detained for a proceeding under [8 U.S.C. §] 1229a" (the general "removal proceedings" provision) "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted[.]" 8 U.S.C. § 1225(b)(2)(A). Subparagraph (C) provides that "in the case of an alien described in subparagraph (A) who is arriving on land . . . from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a[.]" 8 U.S.C. § 1225(b)(2)(C). In relevant part, Subparagraph (B) provides that "[s]ubparagraph (A) shall not apply to an alien—(ii) "to whom paragraph (1) applies"—*i.e.* aliens who are subject to the procedure in 8 U.S.C. § 1225(b)(1). 8 U.S.C. § 1225(b)(2)(B)(ii). Consistent with Section 1225(b)(2)'s instruction that asylum applicants are channeled through the Section 1225(b)(1) procedure, Section 1225(b)(2) does not elaborate on any asylum procedure.

During the Section 1225 admission process, "[a]n alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States." 8 U.S.C. § 1225(a)(4). By regulation, "the alien's decision to withdraw his or her application for admission must be made voluntarily[.]" 8 C.F.R. § 235.4.

II. Factual Allegations

A. Allegations Regarding Defendants

Defendants are U.S. government officials sued in their official capacity who exercise authority over CBP in various capacities. The Defendant Secretary of Homeland Security (the "Secretary") "has ultimate authority over all CBP policies, procedures, and practices." (SAC ¶ 36.) The Secretary "is responsible for ensuring that all CBP officials perform their duties in accordance with the Constitution and all relevant laws." (*Id.*) The Defendant CBP Commissioner "has direct authority over all CBP policies, procedures, and practices." (*Id.* ¶ 37.) Defendant oversees a staff of more than 60,000 employees and "exercises authority over all CBP operations." (*Id.*) The Defendant Executive Assistant Commissioner ("EAC") of CBP's Office of Field Operations oversees "the largest component of CBP and is responsible for border security, including immigration and travel through U.S. POEs," for which the EAC oversees a staff of "more than 24, 000 CBP officials and specialists[.]" (*Id.* ¶ 38.) Plaintiffs also sue 25 Doe Defendants who "were agents or alter egos of Defendants, or [who] are otherwise re-

sponsible for all of the acts" alleged. (*Id.* ¶ 39.) Defendants allegedly have denied access to the U.S. asylum process to non-citizens fleeing "grave harm in their countries to seek protection in the United States" "in contravention of U.S. and international law" pursuant to (1) "a policy initiated by Defendants"—the Turnback Policy—and (2) "practices effectively ratified by Defendants." (*Id.* ¶ 1.) The Court describes Plaintiffs' allegations regarding each.

1. Alleged Pattern and Practice of Illegal Tactics

"Since 2016 and continuing to this day, CBP has engaged in an unlawful, widespread pattern and practice of denying asylum seekers access to the asylum process at POEs on the U.S.-Mexico border through a variety of illegal tactics." (SAC ¶¶ 2, 84.) CBP officials have carried out this practice through misrepresentations, threats and intimidation, verbal and physical abuse, and coercion. (*Id.* ¶¶ 84–106.) For example, CBP officials are alleged to turn away asylum seekers by falsely informing them that the U.S. is no longer providing asylum, that President Trump signed a new law ending asylum, that a law providing asylum to Central Americans ended, that Mexican citizens are not eligible for asylum, and that the U.S. is no longer accepting mothers with children for asylum. (*Id.* ¶¶ 85–86.) CBP officials allegedly intimidate asylum seekers by threatening to take away their children if they do not renounce a claim for asylum and by threatening to deport asylum seekers. (*Id.* ¶¶ 87–88.) CBP officials allegedly force asylum seekers to sign forms in English, without translation, in which the asylum seekers recant their fears of persecution. (*Id.* ¶¶ 91–92.) CBP officials are alleged to instruct some asylum seekers to recant their fears of persecution while being recorded on video. (*Id.*) In some instances, CBP officials have "simply turn[ed] asylum seekers away from POEs without any substantive explanation." (*Id.* ¶¶ 93– 94.) Other alleged tactics include: (1) CBP officers physically block access to the POE, including by "CBP sometimes enlist[ing] Mexican officials to act as their agents"; (2) CBP officials impose "a fixed number of asylum seekers" per day and place asylum seekers on a waiting list that results in "asylum-seeking men, women and children wait[ing] endlessly on or near bridges leadings to POEs in rain, cold, and blistering heat, without sufficient food or water and with limited bathroom access"; and (3) racially discriminatory denials of access by CBP officers, including by denying asylum seekers from specific countries access to POEs and allowing "lighter-skinned individuals to pass." (*Id.* ¶¶ 95–106.) Plaintiffs point to numerous reports by non-governmental organization and "other experts working in the U.S.-Mexico border region" as corroborating the existence and use of these tactics by CBP officers. (*Id.* ¶¶ 107–08, 110–111, 113–16.)

2. The Alleged "Turnback Policy"

a. Nascent Stages

Plaintiffs allege that "evidence of a Turnback Policy" exists as early as May 2016, at least insofar as it concerns the San Ysidro POE, a POE that figures prominently in the SAC and the Plaintiffs' allegations. (SAC ¶¶ 51–53, 60; *see also id.* ¶¶ 16, 25–26, 28, 32–35, 48 & n.37.) Plaintiffs point to a communication from the "Watch Commander at the San Ysidro POE" indicating that "[t]he Asylee line in the pedestrian building is not being used at this time," with a follow-up communication indicating that "it's even more important that when the traffic is free-flowing that the limit line officers ask for and check documents to ensure that groups that may be seeking asylum are directed to remain in the waiting area on the Mexi-

can side." (*Id.* ¶ 51.) At the time, CBP allegedly "collaborat[ed] with the Mexican government to turn back asylum seekers at the San Ysidro POE," collaboration that was allegedly formalized in July 2016 and confirmed in December 2016. (*Id.* ¶¶ 52–53.)

A border-wide policy allegedly existed as early as November 2016 because the Assistant Director of Field Operations for the Laredo Field Office "instructed all Port Directors under his command to follow the mandate of the then-CBP Commissioner and Deputy Commissioner" to request that Mexico's immigration agency "control the flow of aliens to the port of entry." (*Id.* ¶ 55.) Under this mandate, the Commissioner allegedly directed that "if you determine that you can only process 50 aliens, you will request that [Mexico's immigration agency] release only 50," and if the agency "cannot or will not control the flow," then CBP staff "is to provide the alien with a piece of paper identifying a date and time for an appointment and return then [sic] to Mexico." (*Id.*) This directive "was promptly implemented" at POEs along the Texas-Mexico portion of the U.S.-Mexico border and "memorialized in January 2017." (*Id.* ¶¶ 56, 57.) Plaintiffs allege that in a June 13, 2017 hearing before the House Appropriations Committee, John P. Wagner, the Deputy Executive Assistant Commissioner for CBP's Office of Field Operations, admitted that CBP officials were turning back asylum seekers at POEs along the U.S-Mexico border and argued that "the practice was justified by a lack of capacity." (*Id.* ¶ 59.) The CBO Field Operations Director in charge of the San Ysidro POE similarly acknowledged and defended the turnbacks in December 2017. (*Id.* ¶ 60.)

b. Alleged Formalization and High-Level Recognition

The alleged border-wide policy to turnback asylum seekers through false assertions of lack of capacity took on a new life in spring 2018 "following an arduous, widely-publicized journey" of "a group of several hundred asylum seekers"—dubbed by the press as a "caravan"—who "arrived at the San Ysidro POE." (*Id.* ¶ 61.) "President Trump posted a series of messages on Twitter warning of the dangers posed by the group, including one indicating that he had instructed DHS 'not to let these large Caravans of people into our Country.' " (*Id.* (citations omitted).)

Around this time, high-level Trump Administration officials unambiguously proclaimed, "the existence of their policy to intentionally restrict access to the asylum process at POEs in violation of U.S. law." (*Id.* ¶¶ 5, 62.) Then-U.S. Attorney General Jeff Session "characterized the caravan's arrival as 'a deliberate attempt to undermine our laws and overwhelm our system.' " (*Id.* ¶ 63.) Following the arrival of the "caravan," "CBP officials indicated—in accordance with the Turnback Policy—that they had exhausted their capacity to process individuals traveling without proper documentation." (*Id.* ¶¶ 7, 64, 67.) On May 15, 2018, then-Secretary of Homeland Security Kirstjen Nielsen "characterized the asylum process . . . as a legal 'loophole' and publicly announced a 'metering' process designed to restrict—and constructively deny—access to the asylum process through unreasonable and dangerous delay." (*Id.* ¶¶ 5, 65.) President Trump made a number of tweets throughout June and July 2018 that further confirmed the alleged Turnback Policy, including statements that "[w]hen somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came from," and "we must IMMEDIATELY escort them back without going through years of maneuvering." (*Id.* ¶ 66.) Plaintiffs point to numerous other confir-

mations of the existence of the alleged Turnback Policy, designed and implemented by U.S. officials, including statements by then-CBP Commissioner McAleenan in April 2018 indicating that "individuals [without appropriate entry documentation] may need to wait in Mexico as CBP officers work to process those already within our facilities"; a September 27, 2018 report from the Office of the Inspector General (the "OIG Report"); and statements by Mexican immigration officials, one of whom allegedly complained that "[CBP] was making [the Mexican immigration agency] do [CBP's] dirty work." (*Id.* ¶¶ 68–76 & nn. 56–71.)

According to Plaintiffs, the asserted capacity concerns used to justify the alleged Turnback Policy are a pretextual and false "cover for a deliberate slowdown of the rate at which agency receives asylum seekers at POEs." (*Id.* ¶¶ 3, 76–83.) They allege that "CBP's own statistics indicate that there has not been a particular surge in [the] numbers of asylum seekers coming to POEs." (*Id.* ¶ 76.) Amnesty International has allegedly characterized capacity concerns as "a fiction" based on the available statistics. (*Id.* (citation omitted).) Plaintiffs point to statements by "senior CBP and ICE officials in San Ysidro, California" in early 2018, in which the officials stated that "CBP has only actually reached its detention capacity a couple times per year and during 'a very short period' in 2017." (*Id.* ¶ 77.) Plaintiffs further note that in the OIG Report, "the OIG team did not observe severe overcrowding at the ports of entry it visited." (*Id.*) And "[h]uman rights researchers visiting seven POEs in Texas in June 2018 reported that '[t]he processing rooms visible in the [POE] . . . appeared to be largely empty.' " (*Id.* (citations omitted).) Plaintiffs otherwise point to anecdotal accounts for specific POEs, which Plaintiffs allege show "abrupt" changes in assertions of a lack of capacity at POEs and CBP officers allowing some asylum seekers to cross—sometimes in the span of a few hours. (*Id.* ¶ 78.) For example, CBP officials at the Nogales, Arizona POE abruptly switched from processing 6 asylum seekers a day, based on assertions of lack of capacity, to 20 asylum seekers a day. (*Id.*) And, of course, there are the alleged experiences of the eight New Individual Plaintiffs, which provide a further gloss on the Turnback Policy. (*Id.* ¶ 83.)

B. The Plaintiffs

The challenge to Defendants' alleged conduct is pressed by Organizational Plaintiff Al Otro Lado and thirteen Individual Plaintiffs. For the purposes of this order, the Court refers to the Individual Plaintiffs as two groups: the Original Individual Plaintiffs and the New Individual Plaintiffs.[5] As the Court has noted, Organizational Plaintiff Al Otro Lado and the Original Individual Plaintiffs have been parties since this case's inception. The Court will not retrace in great detail the allegations pertaining to these Plaintiffs. The Court, however will provide relatively more detail regarding the New Individual

5. In their present motion to dismiss, Defendants divide the Individual Plaintiffs into two groups. Defendants refer to the Original Individual Plaintiffs as "Territorial Plaintiffs" on the ground that the SAC's allegations show that all Original Individual Plaintiffs were in a POE at the time they were allegedly denied access to the asylum process. (ECF No. 192-1 at 1–2.) In contrast, Defendants refer to all New Individual Plaintiffs as "Extraterritorial Plaintiffs," based on Defendants' view that these Individual Plaintiffs' allegations show that "they experienced the purported 'Turnback Policy' when they approached the border to the territorial United States at the San Ysidro, Laredo, or Hidalgo [POEs] but were prevented by CBP officers or Mexican immigration officials from physically crossing the international boundary." (*Id.* at 2.) The Court declines to use Defendants' labeling.

Plaintiffs because this order is the first occasion to do so.

1. Organizational Plaintiff Al Otro Lado

Al Otro Lado is a non-profit California legal services organization established in 2014, which provides services to indigent deportees, migrants, refugees, and their families. (SAC ¶ 17.) Al Otro Lado alleges that the Defendants' alleged conduct has frustrated its ability to advance and maintain its "central" and "organizational mission" because Al Otro Lado has had "to divert substantial" time and resources away from its programs "to counteract the effects of the Turnback Policy and Defendants' other unlawful practices." (*Id.* ¶¶ 12–13, 17–23.)

2. Original Individual Plaintiffs

Plaintiffs Abigail Doe, Beatrice Doe, Carolina Doe are natives and citizens of Mexico, who fled to Tijuana, Mexico where they attempted to access the U.S. asylum process at various points in May 2017, due to violence they experienced at the hands of drug cartels. (SAC ¶¶ 24–26, 119–121, 125–127, 133–134.) They allege that CBP officers at the San Ysidro and Otay Mesa POEs located along the California-Mexico portion of the U.S.-Mexico border coerced them into signing English language forms in which they recanted their fears of returning to Mexico and withdrew their applications for admission. (*Id.* ¶¶ 24–26, 122–123, 128–130, 135–136.) Plaintiffs Dinora Doe and Ingrid Doe are natives and citizens of Honduras, who fled to Tijuana, Mexico after violence they experienced at the hands of criminal gangs and Ingrid experienced severe abuse from her partner. (*Id.* ¶¶ 27– 28, 138–140, 147–149.) Dinora presented herself at the Otay Mesa POE three times in August 2016 but was told "there was no asylum in the United States," including specifically "for Central Americans," and that she "would be handed over to Mexican authorities and deported to Honduras." (*Id.* ¶¶ 27, 141–144.) Ingrid presented herself at the Otay Mesa and San Ysidro POEs, where CBP officers told her and her children that they could not seek asylum in the United States. (*Id.* ¶¶ 28, 149–151.) Based on developments that occurred after the original complaint's filing and which the Court determined did not moot this case, *Al Otro Lado Inc.*, 327 F. Supp. 3d at 1295, 1302–04, the Original Individual Plaintiffs allege that "Defendants made arrangements to facilitate" their "entry . . . into the United States." (SAC ¶¶ 24–28, 124, 132, 137, 145, 152.)

3. New Individual Plaintiffs

Plaintiffs Juan and Úrsula Doe, husband and wife, are natives and citizens of Honduras, who fled Honduras "with their sons after receiving death threats from gangs." (SAC ¶¶ 31, 171–72.) They presented themselves at the Laredo POE in late September 2018, but when they "reached the middle of the bridge to the POE, CBP officials denied them access to the asylum process by telling them the POE was closed and that they could not enter." (*Id.* ¶¶ 31, 173–74.)

Plaintiff Roberto Doe is a native and citizen of Nicaragua, who alleges that he fled Nicaragua due to threats of violence "from the Nicaraguan government and paramilitaries allied with the government." (*Id.* ¶¶ 29, 153.) Roberto presented himself at the Hidalgo, Texas POE in October 2018, where he encountered CBP officials in the middle of the bridge between Mexico and the United States, who he told that he wanted to seek asylum in the United States. (*Id.* ¶¶ 29, 154.) The officials "t[old] him the POE was full and that he could not enter." (*Id.* ¶¶ 29, 155.) After the FAC was filed in October 2018, Roberto returned to the Hidalgo POE "where Mexican officials detained him as he was walking onto the international bridge to seek

access to the asylum process in the United States" and he "remains in the custody of the Mexican government." (*Id.* ¶¶ 29, 159.)

Plaintiff Maria Doe is a native and citizen of Guatemala and permanent resident of Mexico. (SAC ¶¶ 30, 160.) Maria "left her husband, who was abusive and is involved with cartels[.]" (*Id.* ¶¶ 30, 161.) Since she left him, "two different cartels have been tracking and threatening her," and located her despite her attempts to find a "safe place to live" in both Guatemala and Mexico. (*Id.* ¶¶ 30, 161.) Maria and her two children presented themselves at the Laredo, Texas POE on September 10, 2018. (*Id.* ¶¶ 30, 162.) However, "[w]hen Maria encountered CBP officials in the middle of the bridge, [and] she told them that she and her children wanted to seek asylum in the United States," the CBP officials told them to wait on the Mexican side of the bridge. (*Id.* ¶¶ 30, 162.)

Plaintiff Bianca Doe is a transgender woman who is a native and citizen of Honduras. (*Id.* ¶¶ 33–34, 184, 191.) Bianca "has been subjected to extreme and persistent physical and sexual assault, as well as discrimination and ongoing threats of violence in Honduras and Mexico City . . . because she is a transgender woman[.]" (*Id.* ¶¶ 33, 184–85.) Bianca presented herself at the San Ysidro POE on September 19, 2018, where "CBP officers . . . stat[ed] that she could not apply at that time because they were at capacity." (*Id.* ¶¶ 33, 185.) Bianca returned the next day and "was given a piece of paper with the number '919,' placed on a waiting list, and told that she would have to wait several weeks to proceed to the POE." (*Id.* ¶¶ 33, 186.) On September 28, 2018, Bianca "attempted to enter the United States without inspection by climbing a fence on a beach in Tijuana[,]" but "once over the fence, a U.S. Border Patrol officer stopped [her]" and she "expressed her desire to seek asylum in the U.S." (*Id.* ¶¶ 33, 187.) "The U.S. Border Patrol Officer told [her] that there was no capacity in U.S. detention centers and threatened to call Mexican police if [she] did not climb the fence back into Mexico." Bianca did so. Bianca presented herself "again" at the San Ysidro POE on October 8, 2018. (*Id.* ¶¶ 33, 188.) "She was told, once again, that CBP had no capacity for asylum seekers." (*Id.* ¶¶ 33, 188.)

Plaintiff Emiliana Doe is a transgender woman and a native and citizen of Honduras. (*Id.* ¶¶ 34, 191.) She "was subjected to multiple sexual and physical assaults, kidnapping, and discrimination, as well as threats of severe harm and violence in Honduras because she is a transgender woman." (*Id.* ¶ 34.) After fleeing Honduras in June 2018, Emiliana reached Tijuana in September 2018 and presented herself at the San Ysidro POE, where a stranger told her she would need to get on "the waiting list" to apply for asylum. (*Id.* ¶ 192.) After going to the San Ysidro POE and speaking with two women, "[s]he was given a piece of paper with the number '1014' on it, placed on a waiting list, and told to return in six weeks." (*Id.* ¶¶ 34, 192.) On October 8, 2018, "[f]eeling desperate and unsafe, Emiliana returned to the POE just a few weeks later," but "CBP officers . . . t[old] her that there was no capacity for asylum seekers and instruct[ed] her to wait for Mexican officials." (*Id.* ¶¶ 34, 193.)

Plaintiff César Doe is a native and citizen of Honduras. (*Id.* ¶¶ 35, 196.) "César has been threatened numerous times with severe harm and death and kidnapped by members of the 18th street gang." (*Id.* ¶¶ 35, 196.) He alleges, *inter alia*, that on one occasion, he "present[ed] himself at the San Ysidro POE" "with two staff members from Al Otro Lado" "but CBP officers refused to accept him." (*Id.* ¶¶ 35, 199.)

Plaintiff Victoria Doe is a 16-year old native and citizen of Honduras. (*Id.* ¶¶ 32, 179.) She "has been threatened with severe harm and death by members of the 18th street gang for refusing to become the girlfriend of one of the gang's leaders." (*Id.* ¶¶ 32, 179.) Victoria fled to Mexico where she gave birth to a son. (*Id.* ¶¶ 32, 179.) Victoria and her son arrived in Tijuana as part of a "refugee caravan" and went to the San Ysidro POE on October 8, 2018. (*Id.* ¶¶ 32, 180.) "When Victoria expressed her desire to seek asylum in the United States, CBP officers . . . stat[ed] that she could not apply for asylum at that time and t[old] her to speak to a Mexican official without providing any additional information." (*Id.* ¶¶ 32, 181.) Except for Roberto Doe, all New Individual Plaintiffs allege that "following the filing of the First Amended Complaint in this case, Defendants made arrangements to facilitate the[ir] entry . . . into the United States." (SAC ¶¶ 30–35.)

III. Procedural Synopsis

Organizational Plaintiff Al Otro Lado and, on behalf of themselves and a putative class, the Original Individual Plaintiffs commenced this action against Defendants on July 12, 2017 in the United States District Court for the Central District of California. (ECF No. 1.) After the Central District transferred the action to this Court on November 29, 2017, Defendants renewed their motion to dismiss the original complaint in its entirety. (ECF No. 135.)

The Court granted Defendants' motion in part. *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284 (S.D. Cal. 2018). In relevant part, the Court dismissed the Section 706(1) APA claims of Plaintiffs Abigail Doe, Beatrice Doe, and Carolina Doe to the extent they sought to compel relief under 8 C.F.R. § 235.4 for allegedly being coerced into withdrawing their applications for admission. *Id.* at 1314–15. The Court also dismissed Plaintiffs' Section 706(2) APA claims based on an alleged "pattern or practice" because the Court was not convinced that Plaintiffs had plausibly alleged facts to "support[ ] the inference that there is an overarching policy" and, consequently, had failed to identify a final agency action. *Id.* at 1320. The Court granted Plaintiffs leave to amend their Section 706(2) claims. *Id.* at 1321. The Court otherwise denied Defendants' motion to dismiss on all other grounds. *Id.* at 1295–1304 (rejecting Defendants' argument that the entire case was moot because Defendants had allowed original Individual Plaintiffs to be processed for admission at a POE after filing of the case); *id.* at 1306–08 (rejecting Defendants' argument that the United States had not waived sovereign immunity for ATS claims on the ground that Section 702 of the APA provides a "broad waiver of sovereign immunity for claims against the United States for nonmonetary relief"); *id.* at 1311–13 (rejecting Defendants' argument that Plaintiffs cannot challenge an alleged pattern or practice of alleged CBP officer denials of access to the asylum process under Section 706(1) of the APA).

In November 2018, Plaintiffs filed the operative Second Amended Complaint, a pleading that raises claims largely identical to those in the original complaint albeit upon an expanded set of factual allegations and with some refinement. (SAC ¶¶ 244–303.) All Individual Plaintiffs seek to press their claims on behalf of a putative class of "noncitizens who seek or will seek to access the U.S. asylum process by presenting themselves at a POE along the U.S.-Mexico border and are denied access to the U.S. asylum process by or at the instruction of CBP officials." (*Id.* ¶¶ 1, 236–43.) Once more, Plaintiffs seek only declaratory and injunctive relief. (*Id.* at 100.)

LEGAL STANDARDS

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). A defendant may test the sufficiency of a complaint on several grounds, including on the ground that the court lacks subject matter jurisdiction over the complaint or that the complaint fails to state a claim for relief. Fed. R. Civ. P. 12(b)(1), (6).

[1, 2] A Rule 12(b)(1) motion tests whether a court possesses subject matter jurisdiction to adjudicate the claims in the action. Fed. R. Civ. P. 12 (b)(1); *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039–40 (9th Cir. 2003), *cert. denied*, 541 U.S. 1009, 124 S.Ct. 2067, 158 L.Ed.2d 618 (2004). As is relevant here, a Rule 12(b)(6) motion that asserts lack of jurisdiction due to the alleged presence of a political question in a case is "more appropriately construed as a Rule 12(b)(1) motion[.]" *Corrie v. Caterpillar*, 503 F.3d 974, 982 (9th Cir. 2007); *Yellen v. United States*, Civ. No. 14-00134 JMS-KSC, 2014 WL 2532460, at *1 (D. Haw. June 4, 2014) (same). Thus, although Defendants nominally raise a Rule 12(b)(6) motion, the Court construes their motion on this issue as raised under Rule 12(b)(1). When a party asserts a Rule 12(b)(1) challenge limited to the pleadings, as Defendants do here, the Court accepts Plaintiffs' factual allegations as true and draws all reasonable inferences in Plaintiffs' favor to determine whether the allegations are sufficient to invoke federal jurisdiction. *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013).

A Rule 12(b)(6) motion tests whether the allegations, even if true, fail to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6); *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). To survive a Rule 12(b)(6) motion, a plaintiff is required to set forth "enough facts to state a claim for relief that is plausible on its face." *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw reasonable inferences that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citation omitted). To assess the legal sufficiency of a complaint, the court accepts as true the complaint's factual allegations and construes them in the light most favorable to the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). A court may consider materials properly submitted as part of the complaint. *Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001).

DISCUSSION

Defendants' motion to dismiss raises a variety of arguments for why the SAC should be dismissed in whole or in part, some of which are familiar and others of which are new. The Court distills Defendants' arguments into four overarching parts. First, Defendants argue that the Court lacks jurisdiction under the political question doctrine to consider certain factual allegations or grant certain forms of relief. Second, and forming the bulk of Defendants' motion to dismiss, is a set of arguments that Plaintiffs fail to state Sections 706(1) and 706(2) APA claims. Third, Defendants seek dismissal of the New Individual Plaintiffs' Fifth Amendment Due Process Clause claims, principally on the ground that the Fifth Amendment does

not apply extraterritorially. Fourth, Defendants seek dismissal of Plaintiffs' ATS claims. The Court considers each set of arguments in turn.

I. The Political Question Doctrine

[3] Defendants argue that the political question doctrine bars judicial review of "Defendants' coordination with a foreign nation to regulate border crossings." (ECF No. 192-1 at 25.) Pointing to allegations in the SAC regarding interactions between U.S. and Mexican government officials, Defendants argue that granting Plaintiffs' request to enjoin the alleged Turnback Policy "would prohibit Defendants from 'coordinating' with Mexican government officials as they carry out their statutory responsibility to manage the flow of traffic across the border." (*Id.* at 25– 26, 28 (citing SAC ¶¶ 3, 7, 50–83, 86–87, 96, 98–102, 108–10, 114, 116).) The Court rejects Defendants' political question doctrine argument at this juncture.

[4–8] "In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.' " *Zivotofsky v. Clinton*, 566 U.S. 189, 194–95, 132 S.Ct. 1421, 182 L.Ed.2d 423, (2012) (quoting *Cohens v. Virginia*, 19 U.S. 264, 404, 6 Wheat. 264, 5 L.Ed. 257 (1821)). The "political question doctrine" is a recognized "narrow exception" to the Judiciary's Article III responsibility. *Id.* at 195, 132 S.Ct. 1421 (citing *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986)). The doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch[.]" *Japan Whaling Ass'n*, 478 U.S. at 230, 106 S.Ct. 2860. As such, "[t]he political question doctrine concerns the jurisdictional 'case or controversy requirement' of Article III of the Constitution, . . . and the Court must address it '*before* proceeding to the merits[.]' " *Ahmed Salem Bin Ali Jaber v. United States*, 861 F.3d 241, 245 (D.C. Cir. 2017) (citing first *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 215, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974) and quoting second *Tenet v. Doe*, 544 U.S. 1, 6 n.4, 125 S.Ct. 1230, 161 L.Ed.2d 82 (2005)) (emphasis added). If a political question is inextricable from a case, the doctrine "prevents a plaintiff's claims from proceeding to the merits." *Ahmed Salem Bin Ali Jaber*, 861 F.3d at 245 (citing *Baker v. Carr*, 369 U.S. 186, 211, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)).

[9–11] There are at least six different "formulations" for determining whether a case presents a political question that is understood to deprive a federal court of subject matter jurisdiction. *Baker*, 369 U.S. at 217, 82 S.Ct. 691. As Defendants recognize, a case need only present one formulation for a political question to preclude jurisdiction. *Ahmed Salem Bin Ali Jaber*, 861 F.3d at 245 (citing *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005)). The only formulation on which Defendant rely here is that there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department[.]" *Baker*, 369 U.S. at 217, 82 S.Ct. 691.

In particular, Defendants contend that this case presents the political question "whether and to what extent it is lawful for the United States to (allegedly) collaborate with the government of Mexico to control the flow of travel across the countries' shared border[.]" (ECF No. 192-1 at 26.) Viewed in this light, Defendants contend that "Plaintiffs' allegations and requests for relief are squarely outside the Court's jurisdiction" under the first *Baker* formulation because "[f]oreign-relations matters

are clearly committed by [the] Constitution to the Executive Branch, particularly as they relate to the United States' efforts to manage the flow of travel across the border." (*Id.* at 27.) For this reason, Defendants argue that "[t]he Court does not have jurisdiction to declare unlawful or enjoin [the alleged coordination with Mexican government officials][.]" (*Id.* at 28.) The Court disagrees with Defendants' view about the questions this case presents and, thus, rejects Defendants' argument that the political question doctrine precludes this Court from reviewing Plaintiffs' claims or granting corresponding relief.

[12–16] The Court acknowledges that "[t]he exclusion of aliens is 'a fundamental act of sovereignty' by the political branches[.]" *Trump v. Hawaii*, —— U.S. ——, 138 S. Ct. 2392, 2407, 201 L.Ed.2d 775 (2018) (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542, 70 S.Ct. 309, 94 L.Ed. 317 (1950)). The Executive possesses a recognized power "to regulate the entry of aliens into the United States" through its "inherent" "executive power to control the foreign affairs of the nation[.]" *Knauff*, 338 U.S. at 542, 70 S.Ct. 309; *E. Bay Sanctuary Covenant v. Trump*, No. 18-17274, 932 F.3d 742, 755, 2018 WL 8807133, at *4 (9th Cir. Dec. 7, 2018). The Executive's foreign affairs powers are understood to "derive from the President's role as 'Commander in Chief,' [the President's] right to 'receive Ambassadors and other public Ministers,' and [the President's] general duty to 'take Care that the Laws be faithfully executed'[.]" *E. Bay Sanctuary Covenant*, 932 F.3d at 755, 2018 WL 8807133, at *4 (internally citing U.S. Const. art. II, § 2, cl. 1 (referring to President as "Commander in Chief") and *id.* § 3 (President's power to receive ambassadors) and further citing Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003)). But the Executive's recognized power over foreign affairs under Article II of the Constitution is not exercised in a constitutional vacuum. By virtue of Article I, Congress possesses certain powers that render the admission or exclusion of aliens and foreign affairs an intimately legislative matter, including the specific constitutionally enumerated legislative powers " '[t]o establish an uniform rule of Naturalization,' to 'regulate Commerce with foreign Nations,' and to 'declare War[.]' " *E. Bay Sanctuary Covenant*, 932 F.3d at 755, 2018 WL 8807133, at *4 (internally citing U.S. Const. art. I § 8, cl. 4 (uniform naturalization rule power), *id.* § 8, cl. 3 (foreign commerce power), *id.* § 8, cl. 11 (war power)). For this reason, it is indisputable that " 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339, 29 S.Ct. 671, 53 L.Ed. 1013 (1909)).

[17] The claims asserted in this case undercut Defendants' invocation of the political question doctrine. Plaintiffs' claims primarily concern alleged violations of various INA provisions and an implementing regulation through alleged denials of access to the U.S. asylum process and an alleged policy and pattern or practice of denying asylum seekers access to the U.S. asylum process. (SAC ¶¶ 203–223 (describing statutory and regulatory scheme that applies to asylum seekers); *id.* ¶¶ 256–69 (APA Section 706(1) claims based on certain INA provisions and implementing regulation); *id.* ¶¶ 270–82 (APA Section 706(2) claims premised on certain INA provisions and implementing regulation); *id.* ¶¶ 283–93 (Fifth Amendment Due Process Clause claims premised on certain INA provisions and implementing regulation).) Federal courts have the power to "review the polit-

ical branches' action to determine whether they exceed the constitutional or statutory scope of their authority." *E. Bay Sanctuary Covenant*, 932 F.3d at 756, 2018 WL 8807133, at *5 (citing *Hawaii*, 138 S. Ct. at 2419).

[18] Although Plaintiffs' claims concern immigration, the statutory questions the claims raise do not task the Court with, nor require the Court to engage in a freewheeling inquiry into the wisdom of immigration policy choices. *See Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 165–66, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993) (noting that "the wisdom of the policy choices made by Presidents Reagan, Bush, and Clinton is not a matter for our consideration. We must decide only whether Executive Order No. 12807, 57 Fed. Reg. 23133 (1992), which reflects and implements those choices, is consistent with § 243(h) of the INA."). When "Congress has expressed its intent regarding an aspect of foreign affairs" through a legislative command and a court is asked to "evaluate the Government's compliance" with that command, the court "is 'not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy . . . should be.' " *Ctr. for Bio. Diversity v. Mattis*, 868 F.3d 803, 823 (9th Cir. 2017) (quoting *Zivotofsky*, 566 U.S. at 196, 132 S.Ct. 1421). "Instead, a court must engage in the 'familiar judicial exercise' of reading and applying a statute, conscious of the purpose expressed by Congress." *Id.* (quoting *Zivotofsky*, 566 U.S. at 196, 132 S.Ct. 1421). In this case, resolution of Plaintiffs' claims turns on whether Defendants' alleged conduct complies with or violates the relevant INA provisions and implementing regulation. It is well within this Court's Article III province and duty to resolve these claims.

[19, 20] The Court acknowledges that there are some allegations that touch on alleged coordination with Mexican government officials.[6] (SAC ¶¶ 3, 7, 50–60.) The coordination, however, is merely an outgrowth of the alleged underlying conduct by U.S. officials. Based on the statutory claims in this case, review of such conduct does not present a nonjusticiable political question. Accordingly, the Court denies Defendants' present motion to dismiss based on the political question doctrine. Defendants may reassert their political question doctrine challenge "[i]f it becomes clear at a later stage that resolving any of the plaintiffs' claims requires" resolution of an asserted political question over which this Court might lack subject matter juris-

6. As Defendants point out (ECF No. 192-1 at 26 n.8), there are also allegations that concern alleged (mis)conduct by Mexican government officials. (SAC ¶¶ 29– 31, 35, 44–45, 52–54, 74–75, 83, 96–97, 110, 156–59, 163, 166, 175–76, 197, 199– 200.) Defendants argue that the act of state doctrine bars the issuance of declaratory or injunctive relief relating to these allegations. (ECF No. 192-1 at 26 n.8.) The Court does not agree. The act of state doctrine "bars a suit where '(1) there is an official act of a foreign sovereign performed within its own territory; and (2) the relief sought or the defense interposed [in the action would require] a court in the United States to declare invalid the [foreign sovereign's] official act.' " *Sea Breeze Salt, Inc. v. Mitsubishi Corp.*, 899 F.3d 1064, 1069 (9th Cir. 2018) (quoting *Credit Suisse v. U.S. Dist. Court*, 130 F.3d 1342, 1346 (9th Cir. 1997)). The act of state doctrine does not bar the claims in this case because the Court is not asked to declare that any official acts of the Mexican government are unlawful. Instead, pursuant to U.S. law, Plaintiffs challenge the legality of conduct by U.S. officials. Although these officials have allegedly instructed Mexican officials to take certain conduct in furtherance of the challenged Turnback Policy, the Court can assess the legality of the U.S. officials' alleged conduct and order any corresponding relief pursuant to the statutory provisions at issue in this case without contravening the act of state doctrine.

diction. *Al-Tamimi v. Adelson*, 916 F.3d 1, 14 (D.C. Cir. 2019).

II. Administrative Procedure Act Claims

The bulk of Defendants' motion to dismiss concerns the Plaintiffs' APA claims. (ECF No. 192-1 at 6–18, 28–31; ECF No. 238 at 2–12.) Defendants' multipronged challenge to Plaintiffs' APA claims consists of several arguments: (A) Organizational Plaintiff Al Otro Lado cannot state APA claims based on the INA provisions at issue as a "non-profit legal services organization," (B) (1) the repleaded Section 706(1) claims of Plaintiffs Abigail, Beatrice, and Carolina Doe fail because they allegedly withdrew their applications for admission and (2) the Section 706(1) claims of all New Individual Plaintiffs fail because the relevant INA provisions and implementing regulation underlying their claims for relief "do not apply to individuals in Mexico," and (C) Plaintiffs' Section 706(2) APA claims fail because (1) Plaintiffs do not identify final agency action, (2) Plaintiffs challenge discretionary conduct over which the APA forecloses judicial review, and (3) Plaintiffs have not plausibly alleged an unlawful agency action. The Court considers Defendants' arguments in turn and rejects each of them.

A. Al Otro Lado's APA Claims

[21] For a second time, Defendants challenge Al Otro Lado's ability to assert APA claims premised on violations of the INA provisions and regulations at issue. (ECF No. 192-1 at 28; ECF No. 238 at 20.) Defendants contend that Al Otro Lado's APA claims must be dismissed under Rule 12(b)(6) for failure to state a claim because whereas the statutory and regulatory provisions pertain exclusively to aliens or refugees, Al Otro Lado is merely a "non-profit legal services organization[.]" (ECF No. 192-1 at 28; ECF No. 238 at 20.) Defendants' argument simply reconfigures Defendants' prior argument that Al Otro Lado falls outside the zone of interests of the relevant INA provisions. The Court squarely rejected Defendants' argument in the prior dismissal order. *See Al Otro Lado Inc.*, 327 F. Supp. 3d at 1298–1302. Defendants identify no basis for the Court to depart from its prior decision.

However, in the time since the Court's prior dismissal order, the Ninth Circuit has issued a decision that strengthens the Court's prior rejection of Defendants' challenge to Al Otro Lado's APA claims in this case. Specifically, in *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 2018 WL 8807133 (9th Cir. Dec. 7, 2018), the government argued that various organizations, including Organizational Plaintiff Al Otro Lado who is also a plaintiff in that case, fell outside the zone of interests of certain INA provisions, including 8 U.S.C. § 1158, as "legal services organizations" and therefore could not challenge a rule promulgated by the Department of Justice and the Department of Homeland Security ("DHS"), coinciding with a presidential proclamation, which together purported to make aliens who entered the United States at a place other than at a POE ineligible to apply for asylum in the United States. *Id.* at 753–56, 759–62, 2018 WL 8807133, at *3–4, *8–10. The Ninth Circuit rejected the government's zone of interest argument, reasoning that "the Organizations' interest in aiding immigrants seeking asylum is consistent with the INA's purpose to 'establish[ ] . . . [the] statutory procedure for granting asylum to refugees.' " *Id.* at 768, 2018 WL 8807133, at *16 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 427, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987)). The Court noted that "[w]ithin the asylum statute, Congress took steps to ensure that pro bono legal services of the type that the Organizations provide are available to asy-

lum seekers." *Id.* (citing 8 U.S.C. § 1158(d)(4)(A)–(B)). The Ninth Circuit also determined that the INA, taken as a whole, otherwise supports the inference that Congress intended eligibility for organizations like the ones in *East Bay Sanctuary Covenant* to bring suit. *Id.* (identifying various INA provisions expressly referring to nongovernmental organizations as giving such organizations "a role in helping immigrants navigate the immigration process"). The Ninth Circuit's reasoning in *East Bay Sanctuary Covenant* is equally applicable to this case and reinforces the Court's prior rejection of Defendants' challenge to Al Otro Lado's APA claims.[7]

B. Section 706(1) APA Claims

[22–24] The Court has previously discussed the principles governing Section 706(1) APA claims. Under Section 706(1), a court "shall ... compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). A Section 706(1) claim "can only proceed where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004) [hereinafter "*SUWA*"]."); *Hells Canyon Preservation Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010). The "limitation to required agency action rules out judicial direction of even discrete agency action that is not demanded by law." *SUWA*, 542 U.S. at 65, 124 S.Ct. 2373. Because of this limitation, courts "have no authority to compel agency action merely because the agency is not doing something we may think it should do." *Zixiang Li v. Kerry*, 710 F.3d 995, 1004 (9th Cir. 2013).

Plaintiffs assert claims under Section 706(1) claims based on 8 U.S.C. § 1225(a)(3), § 1225(b)(1)(A)(ii), 1225(b)(2)(A), and 8 C.F.R. § 235.3(b)(4). (SAC ¶¶ 256–69). In broad terms, Section 1225(a)(3) imposes a mandatory duty for immigration officers to inspect "[a]ll aliens ... who are applicants for admission or otherwise seeking admission ... to ... the United States[.]" 8 U.S.C. § 1225(a)(3). Section 1225(b)(1)(A)(ii) imposes on an immigration officer a duty to refer an alien who indicates either an intention to apply for asylum under section 1158 or a fear of persecution for an asylum interview under 8 U.S.C. § 1225(b)(1)(B) with an asylum officer. 8 U.S.C. § 1225(b)(1)(A)(ii). In turn, 8 C.F.R. § 235.3(b)(4) imposes an analo-

7. In the time since both the Court's ruling and *East Bay Sanctuary Covenant*, one out-of-circuit district court has described this Court's prior zone of interests analysis as a "limited circumstance[ ]" for "organizations advocating for clients[.]" *De Dandrade v. United States Dep't of Homeland Sec.*, 367 F. Supp. 3d 174, 189 (S.D.N.Y. 2019) ("In the limited circumstances in which district courts determined organizations advocating for clients fell within the INA's zone of interest, the provisions of the INA at issue did not concern naturalization."). The *De Dandrade* court in part misreads this Court's prior analysis, which did not turn on whether Al Otro Lado has clients that fall within the zone of interests of the relevant INA provisions. The Court identified this as a potentially separate basis for Al Otro Lado to assert APA claims, but on which Al Otro Lado *did not rely*. *Al Otro Lado Inc.*, 327 F. Supp. 3d at 1301 n.7. In any event, as *East Bay Sanctuary Covenant* confirms, it is not necessary for an organization to premise its APA claims for the underlying INA provisions at issue in this case on the ground that the organization is representing specific clients seeking asylum. *See E. Bay Sanctuary Covenant*, 932 F.3d at 767–70, 2018 WL 8807133, at *15–16. Indeed, in *East Bay Sanctuary Covenant*, the Ninth Circuit expressly found that the organizations lacked third-party standing to assert claims on behalf of asylum seeker clients, yet concluded that the organizations possessed both Article III standing and fell within the INA's zone of interests in their capacity as legal organizations that assist asylum seekers. *Compare id. with id.* at 763–65, 2018 WL 8807133, at *12.

gous regulatory duty on the inspecting officer. For all other aliens, Section 1225(b)(2)(A) imposes on an immigration officer a duty to detain the alien for general removal proceedings under 8 U.S.C. § 1229a. 8 U.S.C. § 1225(b)(2)(A).

Defendants raise two dismissal arguments that together concern the Section 706(1) claims of ten Individual Plaintiffs. Defendants first move to dismiss the repleaded Section 706(1) claims of Original Individual Plaintiffs Abigail, Beatrice and Carolina Doe because these Plaintiffs allegedly withdrew their applications for admission. (ECF No. 192-1 at 5.) Second, Defendants argue that all New Individual Plaintiffs fail to state Section 706(1) claims because the statutory and regulatory provisions at issue "do not apply to individuals located in Mexico." (*Id.* at 6–11.) The Court considers each argument in turn.

1. Repleaded Section 706(1) Claims of Certain Plaintiffs

[25] Plaintiffs Abigail Doe, Beatrice Doe, and Carolina Doe once more each allege that, on one of the occasions they sought asylum at a POE, CBP officials coerced them into signing documents which stated that they lacked a fear of persecution and were withdrawing their applications for admission. (SAC ¶¶ 24–26, 122–23, 129– 30, 136.) Carolina further alleges that CBP officers coerced her into recanting her fear on video. (*Id.* ¶¶ 26, 135.)

Based on their coercion allegations, Plaintiffs claimed in the original complaint that "CBP officials failed to take actions mandated" by, *inter alia*, 8 C.F.R. § 235.4, the regulation which states that "[t]he alien's decision to withdraw his or her application for admission must be made voluntarily." (ECF No. 1 ¶ 153.) In the prior dismissal order, the Court dismissed Plaintiffs Abigail Doe, Beatrice Doe, and Carolina Doe's Section 706(1) claims insofar as the claims sought to compel agency action under 8 C.F.R § 235.4, reasoning that "[t]he regulation does not require CBP officers to determine whether a withdrawal was made voluntarily, and it does not specify what CBP officers must do if a withdrawal was not." *Al Otro Lado, Inc.*, 327 F. Supp. 3d at 1314. The Court stated that "[t]his determination does not affect the Court's conclusion that these Plaintiffs have otherwise stated Section 706(1) claims regarding their alleged denial of access to the asylum process in the United States." *Id.* at 1315. Plaintiffs Abigail Doe, Beatrice Doe, and Carolina Doe thus understandably replead Section 706(1) claims based on the alleged failure of immigration officers to inspect and refer them for asylum interviews or to otherwise detain them for a removal proceeding. (SAC ¶¶ 256, 260.)

Notwithstanding the Court's prior ruling expressly permitting Plaintiffs Abigail Doe, Beatrice Doe, and Carolina Doe's Section 706(1) claims to proceed and the fact that no Plaintiff now alleges Section 706(1) claims based on 8 C.F.R. § 235.4, (*see* SAC ¶ 260), Defendants argue that these Plaintiffs' Section 706(1) claims must be dismissed because these Plaintiffs withdrew their applications for admission. (ECF No. 192-1 at 29–30.) Citing 8 U.S.C. § 1225(a)(4) and 8 C.F.R. § 235.4—the statutory and regulatory provisions that authorize an alien to voluntarily withdraw an application for admission and "depart immediately from the United States"—Defendants argue that there is no continuing duty to inspect, refer, or detain an alien who has withdrawn her application. (ECF No. 192-1 at 30.)

Defendants' dismissal argument mistakes the Court's prior conclusion regarding a judicial inability to compel relief under 8 C.F.R. § 235.4 with an inability of the Court to otherwise compel discrete

"agency action unlawfully withheld." 5 U.S.C. § 706(1). As should have been clear from the Court's prior order, the inability to compel Section 706(1) relief under 8 C.F.R § 235.4 does not preclude relief under 8 U.S.C. § 1225(a)(3), 8 U.S.C. § 1225(b)(1)(A)(ii), and 8 C.F.R. § 235.3(b)(4) in this case. The parties agree that the mandatory duties to inspect all aliens and refer certain aliens seeking asylum are discrete actions for which this Court can compel Section 706(1) relief under 8 U.S.C. § 1225(a)(3), 8 U.S.C. § 1225(b)(1)(A)(ii), and 8 C.F.R. § 235.3(b)(4). In view of the parties' agreement regarding these duties, the Court does not understand Defendants' present dismissal argument.

Under the provisions that form the basis of the repleaded Section 706(1) claims, an immigration officer must inspect an alien applying for admission and if the alien is inadmissible for making misrepresentations or lacking proper documentation and states an intent to seek or apply for asylum, the officer must refer the alien for a credible fear interview. As even Defendants do not dispute, Plaintiffs Abigail Doe, Beatrice Doe, and Carolina Doe's allegations plausibly show that CPB officers failed to take the discrete actions an immigration officer must take during the admission process for aliens like these Plaintiffs, who allege that they asserted an intent to apply for asylum and a fear of persecution. (SAC ¶¶ 24–26, 122–23, 129–30, 134–36.) All parties also agree that 8 C.F.R § 235.4 requires that an alien voluntarily withdraw an application. Taking these Plaintiffs' factual allegations of coercion as true, these Plaintiffs did not voluntarily withdraw their applications for admission. Thus, the mandatory duties to inspect and refer or detain were plausibly "unlawfully withheld" such that these Plaintiffs may seek Section 706(1) relief. Accordingly, the Court denies Defendants' latest attempt to dismiss Plaintiff Abigail Doe, Beatrice Doe, and Carolina Doe's Section 706(1) claims.[8]

2. New Individual Plaintiffs' Section 706(1) Claims

As noted, all Plaintiffs' Section 706(1) claims are premised on alleged failures of CBP officers to take actions mandated by 8 U.S.C. § 1225(a)(3), 8 U.S.C. § 1225(b)(1)(A)(ii), 8 U.S.C. § 1225(b)(2), and 8 C.F.R. § 253.3(b)(4). (SAC ¶ 260.) Two interlocking arguments are central to Defendants' dismissal challenge to the New Individual Plaintiffs' Section 706(1) claims. First, Defendants contend that the text of the underlying statutory and regulatory provisions "do not apply to individuals in Mexico." (ECF No. 192-1 at 6–11; ECF No. 238 at 1–7.) Second, Defendants contend that, unlike the Original Individual Plaintiffs' allegations, the New Individuals Plaintiffs' allegations show that these latter Plaintiffs were in Mexico when they were allegedly turned away. (ECF No. 192-1 at 2 & n.2, 6–11; ECF No. 238 at 1–7.) The Court finds it prudent to outline the SAC's allegations and then to address whether the allegations are sufficient to

8. In opposition to Defendants' motion to dismiss the SAC, Plaintiffs state in a footnote that they "respectfully disagree with and preserve for appeal the Court's conclusion that it cannot compel relief under Section 706(1) based on Defendants' alleged violation of 8 C.F.R. § 235.4[.]" (ECF No. 210 at 34 n.30.) The Court does not understand how Plaintiffs have preserved an issue for appeal (1) which they chose not to replead in their Section 706(1) claims and (2) for which Plaintiffs offer no argument based on an application of the legal standards that govern a Section 706(1) claim to the text of 8 C.F.R. § 235.4. In any event, to the extent Plaintiffs' assertion is animated by a concern that the Court would dismiss the repleaded Section 706(1) claims on the grounds Defendants raise, this Order moots that concern.

state claims for Section 706(1) relief under a proper construction of the relevant INA statutory and regulatory provisions.

a. New Individual Plaintiffs' Factual Allegations

[26] As a threshold matter, Plaintiffs dispute whether the Court can even resolve Defendants' challenge to the New Individual Plaintiffs' Section 706(1) claims at this juncture. (ECF No. 210 at 4–5.) Plaintiffs contend that Defendants' argument calls for the Court to improperly find facts at the pleading stage, "specifically, that the new Individual Plaintiffs were standing in Mexico when they confronted CBP officers." (ECF No. 210 at 4.) According to Plaintiffs, the SAC "does not actually state that any Plaintiffs were in Mexico territory when CBP turned them back," and thus the Court must "assume that all Individual Plaintiffs were on U.S. soil when Defendants turned them back." (*Id.* at 4–5.) This argument is echoed by *Amici* Immigration law Professors. (ECF No. 221-1 at 4–5.)

Implicit in Plaintiffs' argument is the notion that the Court should assume facts essential to their ability to state Section 706(1) claims to compel agency action pursuant to 8 U.S.C. § 1225(a)(3), § 1225(b)(1)(A)(ii), 1225(b)(2)(A), and 8 C.F.R. § 235.3(b)(4). The Court cannot do this. "Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable theory or where the complaint presents a cognizable legal theory *yet fails to plead essential facts under that theory*." *C.B. v. Sonora Sch. Dist.*, 691 F. Supp. 2d 1123, 1128 (E.D. Cal. 2009) (citing *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984)) (emphasis added). And this Court has recognized, "[d]espite the deference the Court must pay to the plaintiff's allegations, it is not proper for the Court to assume that the [plaintiff] can prove facts that [he or she] has not alleged.' " *Tinoco v. San Diego Gas & Elec. Co.*, 327 F.R.D. 651, 657 (S.D. Cal. 2018) (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983)) (alterations in original). Tellingly, both sides expressly rely on the SAC's allegations to argue whether the relevant INA provisions embrace the New Individual Plaintiffs. (ECF No. 192-1 at 7, 8, 9, 11; ECF No. 210 at 4.) Thus, the Court rejects Plaintiffs' threshold dispute.

The Court turns to a key concession that undergirds Defendants' argument. Defendants concede that a POE is within the U.S. (*See* ECF No. 192-1 at 11 ("[A]s the regulation says, an 'arriving alien' is an 'applicant for admission' *at a port of entry, all of which are located within the territorial United States*." (quoting 8 C.F.R. §§ 1.2, 235.3(b)(4), 8 U.S.C. § 1225(a)(1)) (emphasis added).) Defendants further argue that a POE is not a "geographic area," but instead a discrete facility. (ECF No. 238 at 5–6.) Defendants ground this argument in a Ninth Circuit decision regarding a conviction for illegal entry under 8 U.S.C. § 1325—a statutory provision that criminalizes an alien's entry into the United States at any time or place other than as designed by immigration officers—for entry at a place other than a POE. *See United States v. Aldana*, 878 F.3d 877, 880–82 (9th Cir. 2017) ("[T]here is no indication that DHS intended to change the meaning of 'port of entry' [in 8 C.F.R. § 235.1(a)] to refer to geographical areas, as opposed to specific facilities where an alien could apply for entry.") (upholding convictions under Section 1325(a)(1) for unlawful entry in the United States based in part on 8 C.F.R. § 235.1(a)).

Under Defendants' own view, any New Individual Plaintiff who has sufficiently alleged that he or she was "at a POE" has

stated Section 706(1) claims for the various INA provisions and implementing regulation that form the basis of Plaintiffs' claims. Defendants' dismissal argument should therefore fail on its own terms for New Individual Plaintiffs Victoria Doe, Bianca Doe, Emiliana Doe, and César Doe. These four New Individual Plaintiffs offer allegations that, on one or more occasion, they were "at a POE" and requested asylum, but CBP officers refused. (SAC ¶¶ 32–35, 181, 185, 187, 193, 199.) As Plaintiffs observe, (ECF No. 210 at 7), the preposition "at" is a "function word" used "to indicate presence or occurrence in, on, or near." *See* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/at (last accessed May 2, 2019). Although Defendants would like these New Individual Plaintiffs to plead additional factual allegations, the word "at" can plausibly embrace the inference that these New Individual Plaintiffs are not subject to Defendants' challenge.[9]

The remaining four New Individual Plaintiffs, however, offer allegations that defeat such an inference. New Individual Plaintiffs Roberto Doe, Maria Doe, and Juan and Úrsula Doe allege that they "sought access to the asylum process by presenting" themselves at the Hidalgo, Texas POE and Laredo, Texas POE and "encountered CBP officials in the middle of the bridge" between Mexico and the U.S. POE and "told them" they "wanted to seek asylum in the United States." (SAC ¶¶ 29–31, 154–55, 162, 174.) The CBP officials, however, allegedly denied Roberto Doe access "by telling him the POE was full and that he could not enter," told Maria Doe to wait on the Mexican side of the border where she was told "U.S. officials would not let her and her children cross the bridge," and told Juan and Úrsula Doe that "the POE was closed and that they could not enter." (*Id.* ¶¶ 155, 162, 174.) These allegations squarely call on the Court to address Defendants' arguments regarding the proper construction of the statutory and regulatory provisions in this case and to apply that construction to the factual allegations.

b. Scope of the Relevant Provisions

[27, 28] The starting point of statutory interpretation is the statute's language. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685, 105 S.Ct. 2297, 85 L.Ed.2d 692 (1985). "[I]f the statutory language is plain," a court "enforce[s] it according to its terms." *King v. Burwell*, —— U.S. ——, 135 S. Ct. 2480, 2489, 192 L.Ed.2d 483 (2015) (citing *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251, 130 S.Ct. 2149, 176 L.Ed.2d 998 (2010)). A court interprets a statute "to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) (citation omitted). This process of statutory interpretation proceeds "with reference to the statutory context, structure, history, and purpose, 'as well as overall common sense.' " *Abramski v. United States*, 573 U.S. 169, 179, 134 S.Ct. 2259, 189 L.Ed.2d 262 (2014) (quoting *Maracich v. Spears*, 570 U.S. 48, 76, 133 S.Ct. 2191, 186 L.Ed.2d 275 (2013)). Two statutory provisions are relevant to Defendants' motion to dismiss: 8 U.S.C. § 1158(a)(1)'s general provision for asylum and 8 U.S.C. § 1225's articulation of certain immigration officer duties. The Court considers the relevant statutory text in light of these principles.

9. Even if the Court did not draw the inference that New Individual Plaintiffs Victoria Doe, Bianca Doe, Emiliana Doe, and César Doe were sufficiently "at a POE" for the purposes of Defendants' present motion, the Court's analysis regarding the scope of the statutory and regulatory provision similarly applies to their allegations and Section 706(1) claims.

(1) 8 U.S.C. § 1158(a)(1)

[29, 30] Although Plaintiffs do not premise their Section 706(1) claims to compel agency action on 8 U.S.C. § 1158(a)(1), both sides anchor their statutory analysis in this provision. Under Section 1158(a)(1)'s plain language, two classes of aliens may apply for asylum: (1) any alien "who is physically present in the United States" and (2) any alien "who arrives in the United States." Applying the rule against surplusage, the Court must presume that the phrases "mean different things." *Duncan*, 533 U.S. at 174, 121 S.Ct. 2120.[10] The parties' dispute turns on whether the New Individual Plaintiffs fall within the second class of aliens.

Defendants argue that any Plaintiffs on Mexican soil cannot qualify as an alien who was "arriving in the United States." Defendants' opening brief largely does not offer meaningful analysis regarding Section 1158(a)(1), except to contend that a plain language reading of the statute shows that it does not apply to the New Individual Plaintiffs. (ECF No. 192-1 at 7–8.) In the face of Plaintiffs' statutory analysis, however, Defendants advance three arguments. First, Defendants contend that "the use of the present simple tense creates a nexus between the alien's ability to apply for asylum and the alien's current physical presence (or arrival) in the United States." (ECF No. 238 at 2.) Defendants observe that the phrase "alien who arrives in" is still linked with the geographic location of the United States. Second, Defendants argue that the presumption against extraterritorial application of federal statutes forecloses application of Section 1158 to conduct that occurs outside the United States. (*Id.* at 3.) Third, Defendants argue that Congress has enacted a separate scheme to deal with refugee claims for persons outside the United States. (*Id.* at 3–4.) The Court rejects each of Defendants' arguments and, in doing so, the Court concludes that Congress included aliens in the process of arriving in the United States in Section 1158(a)(1)'s general authorization to apply for asylum.

(a) The Statute's Present Tense (Con)Text

[31] Defendants argue that the statute's use of the phrase "alien who arrives in" is linked with a geographic location because "use of the present simple tense creates a nexus between the alien's ability to apply for asylum and the alien's current physical presence (or arrival) in the United States." (ECF No. 238 at 2.) Although Plaintiffs assert that "arrives in" "must mean something different than geographic presence in the United States[,]" (ECF No. 210 at 8), Plaintiffs do not so much dispute that Section 1158(a)(1)'s use of "arrives in" has a geographic focus. Rather, Plaintiffs' fundamental contention is that the statute's use of the present tense embraces an alien who is in the process of

10. The Court recognizes that the rule against surplusage "is not absolute." *Lamie v. U.S. Tr.*, 540 U.S. 526, 536, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). A court need not apply the rule when its application would be "at the expense of [the statute's] more natural reading, the structure of the [statutory provision], and the structure of the Act." *Tima v. AG, United States*, 903 F.3d 272, 278 (3d Cir. 2018). Defendants appear to argue against application of the rule and insist that Section 1158(a)(1)'s phrases are "not surplusage" but together "ensure that any alien within the United States may apply for asylum[.]" (ECF No. 238 at 4.) For reasons the will become clear, the Court does not agree with Defendants' arguments regarding the full scope of the provisions. And the Court cannot find that application of the rule against surplusage contravenes Section 1158(a)(1)'s natural reading as identifying two different classes of aliens who may apply for asylum, one of which includes aliens who are not physically in the United States but are in the process of doing so.

arriving in the United States. (*Id.* at 7.) According to Plaintiffs, the "natural meaning" of "arrives in," as used in the statute, encompasses "someone who is in the process of 'arriv[ing] in' the United States[.]" (*Id.*) Based on this reading, Plaintiffs argue that "because all Individual Plaintiffs were arriving in the United States, they are covered by" this provision. (*Id.*) The Court agrees.

[32] "Congress' use of a verb tense is significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333, 112 S.Ct. 1351, 117 L.Ed.2d 593 (1992) (collecting statutes). Although neither side raises this point, it bears noting that Congress has enacted the Dictionary Act to guide interpretation of congressional statutes. Pursuant to the Act, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise—words used in the present tense include the future as well as the present." 1 U.S.C. § 1. This provision of the Dictionary Act has been applied to the INA. *See Carrillo de Palacios v. Holder*, 651 F.3d 969, 976 (9th Cir. 2011) (citing 1 U.S.C. § 1). When accounting for the rule against surplusage, application of the Dictionary Act readily leads to the conclusion that Section 1158(a)(1)'s use of the present tense of "arrives" plainly covers an alien who may not yet be in the United States, but who is in the process of arriving in the United States through a POE.

[33] This reading is buttressed by statutory provisions that Section 1158(a)(1) expressly incorporates. Section 1158(a)(1) references the Section 1225 procedure for aliens seeking asylum at the border. 8 U.S.C. § 1158(a)(1). In relevant part, Section 1225(b)(1)(A)(ii) requires an immigration officer to refer an inadmissible alien "*who is arriving* in the United States" and who expresses a fear of persecution or "an intention to apply for asylum" for an interview with an asylum officer. 8 U.S.C. § 1225(b)(1)(A)(ii) (emphasis added). The use of the present progressive, like use of the present participle, denotes an ongoing process. *See United States v. Balint*, 201 F.3d 928, 933 (7th Cir. 2000) [U]se of the present progressive tense, formed by pairing a form of the verb 'to be' and the present participle, or '-ing' form of an action verb, generally indicates continuing action."); *Laube v. Allen*, 506 F. Supp. 2d 969, 980 (M.D. Ala. 2007) (observing that a statute's use of the present participle "denotes action that is continuing or progressing"); *cf. Khakhn v. Holder*, 371 Fed. App'x 933, 937 (10th Cir. 2010) (finding use of the present participle phrase "applying for adjustment" in section 1104(g) of the LIFE Act as "unambiguous" that an alien who "is no longer applying for adjustment of status under the LIFE Act" cannot prevent reinstatement of a prior deportation order). Section 1225(b)(1)(A)(ii) therefore reinforces the conclusion that Congress intended to authorize aliens in the process of arriving into the United States to apply for asylum under Section 1158(a)(1). *See E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 844 (N.D. Cal. 2018) (observing that "[a]sylum is a protection granted to foreign nationals already in the United States *or at the border* who meet the international law definition of a 'refugee.' " (emphasis added)).

[34] Although Defendants focus on the "geographic nexus" that Section 1158(a)(1) creates with the United States, they ignore its use of the present tense. In fact, Defendants' opening briefing expressly rewrites the statutory provision into the past tense to seek dismissal of the New Individual Plaintiffs' claims: "[n]one of the Extraterritorial Plaintiffs alleges he or she was 'physically present in' the United States or *had 'arrive[d] in' the United States* when subjected to Defendants' alleged conduct."

(ECF No. 192-1 at 8 (brackets in original and emphasis added).) In reply, Defendants similarly argue for a past tense revision. (ECF No. 238 at 2 (purporting to argue about the meaning of the statute's "present simple tense" yet citing *Matter of F-P-R*, 24 I. & N. Dec. 681, 683 (BIA 2008) for the proposition that " 'last *arrival* in' at 8 C.F.R. § 1208.4(a)(2)(ii)...mean[s] the alien's most recent coming or crossing into the United States *after having traveled* from somewhere outside of the country." (emphasis added)).) Defendants' argument must fail because it invites the Court to do what it cannot: "[w]e are not at liberty to rewrite the words chosen by Congress." *United States v. Vargas-Amaya*, 389 F.3d 901, 906 (9th Cir. 2004).

Were the statute's text not enough, as *Amici* Immigration Law Professors observe, there is relevant legislative history on Congress's intent in adopting the term "arriving alien," as reflected in a statement by Representative Lamar Smith, Chairman of the House Judiciary Committee's Subcommittee on Immigration and Claims. (ECF No. 221-1 at 11.) In particular, Representative Smith observed that the term "was selected specifically by Congress in order to provide a flexible concept that would include all aliens who are in the process of physical entry past our borders[.] .... 'Arrival' in this context should not be considered ephemeral or instantaneous but, consistent with common usage, as a process. An alien apprehended at any stage of this process, whether attempting to enter, at the point of entry, or just having made entry, should be considered an 'arriving alien' for the various purposes in which that term is used in the newly revised provisions of the INA." *Implementation of Title III of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 105th Cong. 17–18 (1997). Despite Defendants' attempt to dismiss this legislative history, (ECF No. 238 at 6), it confirms the propriety of the Court's conclusion that the statute's use of the present tense encompasses aliens in the process of arriving. *See Daniel v. Nat'l Park Serv.*, 891 F.3d 762, (9th Cir. 2018) ("[T]he legislative history 'confirms what we have concluded from the text alone.' " (quoting *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 460, 132 S.Ct. 1702, 182 L.Ed.2d 720 (2012))).

(b) Presumption Against Extraterritoriality

Faced with the statute's text, Defendants turn to the statutory canon of the presumption against extraterritoriality to argue that "the right codified at section 1158(a)(1)" simply cannot extend "to persons outside the United States borders" because this would be "in direct contravention of Supreme Court precedent and in violation of the presumption against extraterritoriality." (ECF No. 238 at 3 (citing *Sale*, 509 U.S. at 173–74, 113 S.Ct. 2549; *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) ("It is a longstanding principal of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." (internal quotation marks omitted)).) The Court does not find Defendants' argument persuasive.

[35, 36] The presumption against extraterritoriality is what its name suggests—a presumption. Application of the presumption is a two-step process, which may reveal that Congress has rebutted the presumption for an entire statutory provision or that the presumption is displaced in the context of a particular case's facts. Under the first step, a court considers "whether the presumption against extraterritoriality has been rebutted—that is,

whether the statute gives a clear, affirmative indication that it applies extraterritorially." *RJR Nabisco, Inc. v. European Cmty.*, —— U.S. ——, 136 S. Ct. 2090, 2101, 195 L.Ed.2d 476 (2016). Second, if the statute does not clearly indicate an intent that it applies extraterritorially, the court must consider "whether the case involves a domestic application of the statute . . . by looking to the statute's 'focus.' " *Id.* at 2101. "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Id.*

Defendants fail to actually apply the framework to Section 1158. The Court will not undertake the task of doing Defendants' work for them, particularly when Defendants effectively seek to rely on the presumption as a bar to application of Section 1158 to the New Individual Plaintiffs. This is not how the presumption works.

[37, 38] In any event, the Court finds that the presumption is rebutted in this case. First, as Plaintiffs contend (ECF No. 210 at 8–9), "[i]mmigration statutes, by their very nature, pertain to activity at or near international borders. It is natural to expect that Congress intends for laws that regulate conduct that occurs near international borders to apply to some activity that takes place on the foreign side of those borders." *United States v. Villanueva*, 408 F.3d 193, 199 (5th Cir. 2005). A reading of Section 1158(a)(1), when placed into context, shows that Congress intended the statute to apply to asylum seekers in the process of arriving. The Court concludes that the statute's language sufficiently displaces the presumption. *See RJR Nabisco, Inc.*, 136 S. Ct. at 2102 (observing that "[w]hile the presumption can be overcome only by a clear indication of extraterritorial effect, an express statement of extraterritoriality is not essential. 'Assuredly context can be consulted as well.' " (quoting *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 265, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010))). Even if the Court proceeded to the second step of the extraterritoriality analysis, the factual allegations of this case concern the conduct of U.S. officials acting from within the United States or from areas over which the U.S. exercises sovereignty, whether the Court looks at the alleged Turnback Policy or the alleged acts of individual CBP officers standing on the U.S. side of the international bridge between Mexico and the United States. As the Court has discussed, Section 1158(a)(1) incorporates Section 1225, which in turns places a focus on immigration officers who process arriving aliens. Thus, even if the New Individual Plaintiffs had not crossed into the United States when they were attempting admission and expressed to CBP officers an intent to seek asylum in the United States, they have alleged conduct occurring in the United States that is a focus of the relevant statutory provisions when viewed in context. Thus, this case involves a permissible territorial application of Section 1158.

(c) 8 U.S.C. § 1157(c) Refugee Admission Process

[39] Finally, for the first time in reply, Defendants point to 8 U.S.C. § 1157(c) to argue that this Court should not read Section 1158(a)(1) to encompass aliens who are not yet in the United States. (ECF No. 238 at 3–4, 16.) According to Defendants, under Section 1157(c), "a process already exists for accepting applications for refugee status from persons outside the United

States." (ECF No. 238 at 3–4, 16.) Defendants argue that "to adopt Plaintiffs' interpretation of Section 1158 would render section 1157 redundant." (*Id.* at 4.) The Court does not share Defendants' view.

Even a cursory review of Section 1157 shows that the statute establishes a fundamentally different and separate scheme for admission of refugees into the United States in the case of "humanitarian concerns" or "national interest." 8 U.S.C. § 1157(a)(1). The number of admissions is limited to "such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest." 8 U.S.C. § 1157(a)(2). Section 1157(c) permits the Attorney General, subject to the numerical limitation, to "admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible . . . as an immigrant." 8 U.S.C. § 1157(c)(1). Notably, Section 1157 does not refer to the asylum procedures set forth in Section 1158(a)(1), nor does Section 1157 concern Section 1225's focus on inspection of arriving aliens. These textual differences blunt the force of Defendants' argument that reading Section 1158(a)(1) in the manner the Court has would improperly render Section 1157 redundant, particularly in this case. No New Individual Plaintiff seeks relief under Section 1157. In contrast, their allegations plausibly show that they were arriving aliens and thus may avail themselves of the procedural protections available under Sections 1158 and 1225. Accordingly, the Court rejects Defendants' Section 1157(c) argument.

* * *

In sum, the Court concludes that Section 1158(a)(1)'s plain language, properly construed, embraces any New Individual Plaintiffs whose allegations show that they were in the process of arriving in the United States at the time of the challenged conduct. With this construction in mind, the Court turns to the statutory provisions pursuant to which the New Individual Plaintiffs seek to compel Section 706(1) relief.

(2) 8 U.S.C. § 1225

The core of the New Individual Plaintiffs' Section 706(1) APA claims lies in certain mandatory duties that 8 U.S.C. § 1225 imposes on an immigration officer. As a threshold matter, Plaintiffs' opposition to Defendants' motion to dismiss is silent on dismissal of the New Individual Plaintiffs' Section 706(1) claims insofar as the claims are premised on 8 U.S.C. § 1225(b)(2)(A), a provision that requires detention of aliens not otherwise covered under 8 U.S.C. § 1225(b)(1) and who have not shown that they are entitled to admission clearly and beyond a doubt. (*Compare* ECF No. 192-1 at 9–10 *with* ECF No. 210 at 5–9.) Thus, the Court construes Defendants' motion to dismiss as unopposed insofar as Defendants seek dismissal of Plaintiffs' Section 706(1) claims. The Court limits its analysis to the statutory and regulatory duties to inspect and refer asylum seekers under 8 U.S.C. § 1225(a)(3), 8 U.S.C. § 1225(b)(1)(A)(ii), and 8 C.F.R. § 235.3(b)(4). Many of the previously articulated statutory construction principles applied to Section 1158(a)(1) carry over and lead the Court to a similar interpretation of these provisions.

(a) Statutory Duty to Inspect

[40] Section 1225 establishes that "[a]ll aliens . . . who are applicants for admission or *otherwise seeking admission* or readmission to or transit through the United States shall be inspected by immigration officers." 8 U.S.C. § 1225(a)(3) (emphasis

added). Section 1225(a)(3) provides a stronger textual argument that the duty to inspect applies to aliens who may not yet be in the territorial United States. Referring to the statute, albeit in passing, the Ninth Circuit has observed that "[a]ll applicants for admission, whether they are at the border or already physically present inside the country, must 'be inspected by immigration officers' who will determine their admissibility." *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1118 (9th Cir. 2007) (quoting 8 U.S.C. § 1225(a)(3)). This interpretation makes sense because Section 1225(a)(3)'s duty to inspect reaches beyond "applicants for admission" to encompass aliens who are "otherwise seeking admission." 8 U.S.C. § 1225(a)(3).

Defendants fail to explain how, as a textual matter, Section 1225(a)(3)'s use of the phrase "otherwise seeking admission ... to ... the United States" does not include aliens who may be located outside the United States, but who are in the process of seeking admission to the United States. Instead, Defendants contend that the New Individual Plaintiffs were not seeking admission "in the manner prescribed by statute and regulation." (ECF No. 192-1 at 8 (citing 8 U.S.C. § 1225(a)(1), 8 C.F.R. § 235.1(a).) Defendants point to a regulation, which provides that "[a]pplication to lawfully enter the United States shall be made in person to an immigration officer at a U.S. port-of-entry when the port is open for inspection, or as otherwise designated in this section." 8 C.F.R. § 235.1(a). All New Individual Plaintiffs, however, allege that they sought admission to the United States by presenting him or herself to a CBP officer at a U.S. POE. (SAC ¶¶ 29–35, 154–56, 162, 165–67, 174–75, 181, 185, 187–88, 193, 199.) Plaintiffs do not allege that the POE was not open, but rather that CBP officers told them that the POE purportedly did not have "capacity" to accept applications from asylum seekers. (*Id.* ¶¶ 83, 85–86, 93–94, 95–97, 98–102, 103–05, 153–202.) These allegations plausibly show that these Plaintiffs were seeking admission into the United States. Defendants' challenge to any Section 706(1) claims premised on the duty to inspect therefore fails.

(b) Statutory and Regulatory Duties to Refer

[41] Section 1225(b)(1)(A)(ii) provides that:

> If an immigration officer determines that *an alien* (other than an alien described in subparagraph (F)) *who is arriving in the United States* or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).
>
> 8 U.S.C. § 1225(b)(1)(A)(ii) (emphasis added).

Unlike Section 1225(a)(1), Section 1225(b)(1)(A)(ii) uses the present progressive phrase "to be arriving." This phrase plainly encompasses aliens who are in the process of arriving in the United States. As the Court has discussed, Defendants' challenge to the New Individual Plaintiffs' Section 706(1) claims largely turns on rewriting the statute into the past tense. Properly applying the statute's use of the phrase alien "who is arriving in the United States" to the allegations of the New Individual Plaintiffs blunts Defendants' argument. This is equally true for the four New Individual Plaintiffs who allege that they were crossing the international bridge to the physical POE and were stopped midway on the bridge, yet who told the CBP

officers that they wanted to seek asylum in the United States.

[42] The plain language of DHS's own implementing regulations sweeps more broadly. 8 C.F.R. § 235.3(b)(4) imposes an analogous regulatory duty on the inspecting officer not to proceed further with removal of an alien subject to the expedited removal provisions if the alien indicates an intention to apply for asylum, expresses a fear of persecution or torture, or expresses a fear of return to his or her country. 8 C.F.R. § 235.3(b)(4). Two additional regulations directly bear on the scope of 8 C.F.R. § 235.3(b)(4). By regulation, the expedited removal provisions of the INA apply to "arriving aliens, as defined in 8 C.F.R. 1.2." 8 C.F.R. § 235.3(b)(1)(i). 8 C.F.R. § 1.2 in turn defines "arriving alien" to mean, in relevant part, "an applicant for admission coming or *attempting to come into the United States at a port-of-entry*[.]" 8 C.F.R. § 1.2 (emphasis added). "A regulation should be construed to give effect to the natural and plain meaning of its words." *Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n*, 366 F.3d 692, 698 (9th Cir. 2004) (quoting *Crown Pacific v. Occupational Safety & Health Review Comm'n*, 197 F.3d 1036, 1038 (9th Cir. 1999)). Here, by including aliens "attempting to come into the United States at a [POE]," the regulation is broader than 8 U.S.C. § 1225(a)(1)'s definition of "applicant for admission." And these regulations indicate that DHS—contrary to Defendants' current position in this litigation—interprets the statutory obligations under Section 1225 to apply to aliens who have not yet come into the United States, but who are "attempting to" do so. As the Court has already determined, the New Individual Plaintiffs were in the process of seeking admission into the United States or otherwise attempting to do so. Their allegations plainly show that they expressed an intent to seek asylum in the United States to a CBP officer. Thus, the Court concludes that the New Individual Plaintiffs have stated a claim for relief under the mandatory duties reflected in 8 U.S.C. § 1225(b)(1)(A)(ii) and 8 C.F.R. § 235.3(b)(4).

C. Plaintiffs' Section 706(2) APA Claims

Under Section 706(2) of the APA, a reviewing court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without observance of procedure required by law." 5 U.S.C. § 706(2)(A)–(D).

Plaintiffs assert Section 706(2) APA claims based on three sets of allegations. (SAC ¶¶ 270–82.) First, Plaintiffs challenge the alleged Turnback Policy and "sanctioning of CBP's unlawful widespread pattern or practice of denying and unreasonably delaying asylum seekers' access to the asylum process" under Sections 706(2)(C) and 706(2)(D). (*Id.* ¶¶ 272, 274.) Plaintiff allege that the Turnback Policy is a final agency action under 5 U.S.C. § 704. (*Id.* ¶ 274.) Second, Plaintiffs challenge the alleged turnbacks of Individual Plaintiffs and class members "at POEs or along the U.S.-Mexico border without following the procedures mandated by the INA and its implementing regulations" as unlawful conduct by CBP officials. (*Id.* ¶ 273.) Plaintiffs allege that each instance when Defendants directly or constructively deny Class Plaintiffs or purported class members access to the asylum process constitutes a final agency action under 5 U.S.C. § 704. (*Id.* ¶ 275.) Third, like the original complaint, Plaintiffs allege that Defendants have a

pattern and practice of unlawfully turning back asylum seekers at POEs.

Defendants raise three arguments for dismissal of Plaintiffs' Section 706(2) claims. First, Defendants argue that Plaintiffs fail to identify final agency action to state APA claims for either the alleged Turnback Policy, the alleged widespread pattern or practice of denying access to the asylum process, or any individual turnbacks. Second, Defendants challenge the Section 706(2) claims of New Individual Plaintiffs allegedly in Mexico at the time of their injuries. Defendants argue that "metering is lawful" based on the Executive's "inherent power" to control the Nation's foreign affairs and two statutory provisions that Defendants contend "authorize CBP officers to keep the [POEs] from being overwhelmed by an unsafe number of pedestrians at a given time." (ECF No. 192-1 at 9–12 (relying on 8 U.S.C. § 1103(a)(3) and 6 U.S.C. § 202(2), (8).) Tucked into Defendants' "metering is lawful" argument is Defendants' third argument that the asserted breadth of Defendants' authority under the same two statutory provisions makes Defendants' conduct unreviewable under the APA. The Court addresses the arguments and rejects them all.

1. Final Agency Action

The APA limits judicial review to agency action in the form of "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). An agency action must be "reviewable by statute" or be a "final agency action for which there is no other adequate remedy[.]" 5 U.S.C. § 704; *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1171 (9th Cir. 2017).

[43–45] Two conditions must be satisfied for an agency action to be final: (1) "the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature" and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *United States Army Corps of Engineers v. Hawkes Co.*, —— U.S. ——, 136 S. Ct. 1807, 1813, 195 L.Ed.2d 77 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997)). "In determining whether an agency's action is final, we look to whether [a] the action amounts to a definitive statement of the agency's position or [b] has a direct and immediate effect on the day-to-day operations of the subject party, or [c] if immediate compliance with the terms is expected." *Or. Nat. Desert Ass'n v. United States Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (internal quotations and citations omitted). The focus is "on the practical and legal effects of the agency action." *Id.*

[46, 47] "[A]gency action . . . need not be in writing to be final and judicially reviewable" pursuant to the APA. *Al Otro Lado, Inc.*, 327 F. Supp. 3d at 1319 (quoting *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015)). An unwritten policy can still satisfy the APA's pragmatic final agency action requirement. *See Venetian Casino Resort LLC v. EEOC*, 530 F.3d 925, 929 (D.C. Cir. 2008) (reviewing challenge to an agency's "decision . . . to adopt [an unwritten] policy of disclosing confidential information without notice" because such a policy was "surely a consummation of the agency's decisionmaking process" that impacted the plaintiff's rights); *R.I.L.-R*, 80 F. Supp. 3d at 174–176 (determining that plaintiffs had shown a reviewable unwritten "DHS policy direct[ing] ICE officers to consider deterrence of mass migration as a factor in their custody determinations" as underlying the plaintiffs' detention). "[A] contrary rule

'would allow an agency to shield its decisions from judicial review simply by refusing to put those decisions in writing.' " *R.I.L.-R*, 80 F. Supp. 3d at 184 (quoting *Grand Canyon Tr. v. Pub. Serv. Co. of N.M.*, 283 F. Supp. 2d 1249, 1252 (D.N.M. 2003)); *see also Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 138 (D.D.C. 2018) ("Despite Defendants' assertions to the contrary, agency action need not be in writing to be judicially reviewable as a final action.").

[48] There are, of course, limitations on whether challenged agency action is properly characterized as a policy, even if the policy is alleged to be unwritten. A plaintiff may not simply attach a policy label to disparate agency practices or conduct. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990); *Bark v. U.S. Forest Serv.*, 37 F. Supp. 3d 41, 50 (D.D.C. 2014) (concluding that although the plaintiffs "have attached a [policy] label to their own amorphous description of the [agency's] practices," "a final agency action requires more."); *Lightfoot v. District of Columbia*, 273 F.R.D. 314, 326 (D.D.C. 2011) ("The question is not whether a constellation of disparate but equally suspect practices may be distilled from the varying experiences of the class; rather, Plaintiffs must first identify the 'policy or custom' they contend violates [the law] and then establish that the 'policy or custom' is common to the class.").

The parties dispute whether Plaintiffs have shown the existence of final agency action for their Section 706(2) claims. Insofar as Plaintiffs seek to state Section 706(2) claims for individual turnbacks, the Court has already advised Plaintiffs that individual turnbacks—which fundamentally concern alleged failures by CBP officers to discharge certain mandatory statutory duties—are appropriately considered under Section 706(1). *See Al Otro Lado, Inc.*, 327 F. Supp. 3d at 1309 (citing *Rosario v. United States Citizenship & Immigration Servs*, No. C15-0813JLR, 2017 WL 3034447, at *7 n.6 (W.D. Wash. July 18, 2017); *Leigh v. Salazar*, No. 3:13-cv-00006-MMD-VPC, 2014 WL 4700016, at *4 (D. Nev. Sept. 22, 2014) (construing a Section 706(2) claim regarding an agency's alleged failure to act as in fact a Section 706(1) claim)). This admonition applies equally to individual turnbacks that allegedly occurred because of the Turnback Policy. Thus, the Court limits its present analysis to whether the Turnback Policy and the alleged pattern or practice of illegal tactics by CBP officers constitute final agency action sufficient for Plaintiffs to state an APA claim.

a. Alleged Turnback Policy

[49] In the wake of the Court's dismissal of Plaintiffs' previous Section 706(2) claims, Plaintiffs have revised their factual allegations and their Section 706(2) policy claim. Plaintiffs disavow a policy of categorical denials of access to the asylum system. (ECF No. 210 at 10–11.) Instead, Plaintiffs contend that "Defendants, high-level agency officials, have adopted a policy mandating that CBP officers at POEs drastically restrict the flow of asylum seekers at POEs along the U.S.-Mexico border by turning them back to Mexico when they present themselves for inspection, based on the false claims of 'capacity constraints.' " (*Id.*) Plaintiffs have sufficiently alleged the existence of such a policy that constitutes a final agency action.

Plaintiffs allege that the Turnback Policy originated in 2016, was formalized in 2018 as a culmination of the agency's decision-making process, and is being actively implemented along the border. (SAC ¶¶ 48–83 (explaining the initiation and development of the Turnback Policy, based on publicly available materials and limited

discovery from CBP).) Plaintiffs point to various instances of U.S. government officials' acknowledgement of a policy concerning the ability of noncitizens to access asylum when they present themselves at the U.S-Mexico border. The SAC cites a DHS Office of Inspector General report indicating that DHS has embraced a policy to limit access to the asylum process. (SAC ¶¶ 70–71.) The SAC identifies statements from President Trump, former U.S. Attorney General Jeff Sessions, then-DHS Secretary Kirstjen Nielsen, then-Commissioner McAleenan, and other CBP employees, all of which are plausibly read to show the existence of the alleged Turnback Policy. (SAC ¶¶ 60–66, 68–69, 71, 75.) The SAC otherwise contains extensive allegations of alleged turnbacks of asylum seekers by CBP officers at POEs along U.S.-Mexico border based on assertions of lack of capacity, all of which plausibly point to the existence of an unwritten policy. (*See* SAC ¶¶ 49, 75, 77–78, 83–201.)

Defendants' arguments that Plaintiffs fail to establish a final agency action miss the mark. For one, despite arguing that Plaintiffs have simply attached a "policy" label to Defendants' alleged conduct, Defendants' briefing leaves the distinct impression that Defendants concede the existence of a policy from which Plaintiffs' alleged injuries flow. Whereas Plaintiffs refer to this policy as the "Turnback Policy," Defendants refer to the challenged conduct as one of "metering." (ECF No. 192-1 at 11–15; ECF No. 238 at 9–12.) Second, Defendants recycle an argument that they raised in their first motion to dismiss Plaintiffs' Section 706(2) claims. Defendants argue once more that Plaintiffs have not plausibly alleged a policy of categorical denials of asylum at POEs along the U.S-Mexico border. (ECF No. 192-1 at 16, 30.) The Court previously dismissed Plaintiffs' Section 706(2) claims on this basis. But, as Plaintiffs expressly argue in opposition (ECF No. 210 at 10–11), they do not claim that the Turnback Policy is a policy to categorically deny asylum seekers entry into the United States. Instead, Plaintiffs allege this is a policy aimed at deterring or limiting asylum seekers from seeking asylum in the United States. Defendants' argument therefore lacks force based on the current pleadings. Third, Defendants challenge Plaintiffs' reliance on statements by U.S. government officials as premised on a "limited selection of Defendants' own statements and communications[.]" (ECF No. 192-1 at 16–17.) Defendants' argument is ostensibly based on the notion that there are other statements by U.S. government officials that would defeat or undermine Plaintiffs' claims regarding the Turnback Policy. Such a merits challenge is inappropriate at this stage. Accordingly, the Court concludes that Plaintiffs have adequately identified a final agency action in the form of the Turnback Policy.

b. Alleged Pattern and Practice

[50] Defendants move to dismiss Plaintiffs' Section 706(2) claims insofar as the claims concern the allegations that Defendants have "sanctioned" a practice and pattern of denying access to the asylum procedure in the United States. Defendants contend that "alleged misrepresentations, threats, intimidation, verbal and physical abuse, coercion, 'unreasonable delays,' and racially discriminatory denial of access" are not final agency action because they "are not plausibly attributable to a DHS or CBP Policy." (ECF No. 238 at 8.) In previously dismissing Plaintiffs' Section 706(2) claims, the Court observed that allegations regarding this conduct could not state a Section 706(2) claim because Plaintiffs failed to connect the conduct to any "unwritten policy" of Defendants. *Al Otro Lado*, 327 F. Supp. 3d at 1319. The Court, however, does not find that this previous

conclusion controls here. Plaintiffs expressly allege that the pattern and practice of unlawful tactics and the Turnback Policy "are designed" together to serve the Trump Administration's "broader goal" of deterring asylum seekers from accessing the asylum process and the allegations show both co-existing. (SAC ¶¶2, 4, 48, 51–60, 84–106.) Plaintiffs' allegations regarding a "sanctioned" pattern and practice of CBP officers using certain tactics to deny access to the asylum process dovetail with Plaintiffs' allegations that the Turnback Policy is based on false assertions of lack of capacity. Accordingly, the Court finds that Plaintiffs' allegations of an alleged pattern and practice are directly linked with the alleged Turnback Policy such that it is not proper to dismiss Plaintiffs' Section 706(2) claims as to the alleged pattern and practice.

2. Asserted Unreviewable Agency Discretion

[51] Defendants point to 8 U.S.C. § 1103(a)(1) and 6 U.S.C. § 202 as "especially authoriz[ing] CBP officers to keep the ports from being overwhelmed by an unsafe number of pedestrians at a given time," thus requiring dismissal of Plaintiffs' Section 706(2) claims. (ECF No. 192-1 at 13–14.) Defendants argue that the New Individual Plaintiffs "make no attempt . . . to square the breadth of Defendants' authority to meter under these statutes with the APA's prohibition on judicial review of agency action 'committed to agency discretion by law.' " (ECF No. 192-1 at 14 (quoting 5 U.S.C. § 701(a)(2)).) Because the APA precludes review of "agency action . . . committed to agency discretion by law," 5 U.S.C. § 701(a)(2), the Court must consider this argument before addressing the merits of Plaintiffs' claim that the alleged Turnback Policy is unlawful.

Section 1103 establishes the powers and duties of the Secretary of Homeland Security. As a general matter, "[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens[.]" 8 U.S.C. § 1103(a)(1). Defendants point to Section 1103(a)(3) in particular, which provides that the Secretary "shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and *perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter*." 8 U.S.C. § 1103(a)(3) (emphasis added). 6 U.S.C. § 202 in turn provides, in relevant part, that "[t]he Secretary shall be responsible for" "[s]ecuring the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States, including managing and coordinating those functions transferred to the Department [of Homeland Security] at ports of entry." 6 U.S.C. § 202(2). "In carrying out" this responsibility, the Secretary is responsible for "ensuring the speedy, orderly, and efficient flow of lawful traffic and commerce." 6 U.S.C. § 202(8). According to Defendants, Section 1103(a) and 202 are so broad, that they do not offer any standard against which the challenged conduct may be evaluated under the APA. (ECF No. 192-1 at 14–15.)

[52–54] "[A]t the outset, there is reason to be skeptical of [Defendants'] position[.]" *Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, —— U.S. ——, 139 S. Ct. 361, 370, 202 L.Ed.2d 269 (2018) (Roberts, C.J.). There exists a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986); *see also Mach Mining, LLC v.*

EEOC, —— U.S. ——, 135 S. Ct. 1645, 1652–53, 191 L.Ed.2d 607 (2015) ("[L]egal lapses and violations occur, and especially so when they have no consequence. That is why this Court has so long applied a strong presumption favoring judicial review of administrative action."). "The presumption may be rebutted only if the relevant statute precludes review, 5 U.S.C. § 701(a)(1), or if the action is 'committed to agency discretion by law,' § 701(a)(2)." *Weyerhaeuser Co.*, 139 S. Ct. at 370. The exception in Section 701(a)(2) is read "quite narrowly, restricting to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Id.* (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191, 113 S.Ct. 2024, 124 L.Ed.2d 101 (1993)); *see also Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 494 (9th Cir. 2018) (noting only "rare" agency actions fit this "narrow" committed-to-agency-discretion exception to judicial reviewability). Defendants have failed to show that judicial review is precluded under the relevant statutes.

Sections 1158 and 1225 cannot be nullified by general statutory provisions regarding the Secretary's authority unless Congress clearly intended so. *See BNSF Ry. Co. v. Cal. Dep't of Tax & Fee Admin.*, 904 F.3d 755, 766 (9th Cir. 2018) ("[W]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987))). Congress has already determined how immigration officers are to "manage the flow" of arriving aliens who express to an immigration officer an intention to apply for asylum or a fear of persecution. Section 1225 imposes mandatory obligations to inspect all aliens who are applicants for admission or otherwise seeking admission and further imposes certain screening duties for asylum seekers. Notably, 8 U.S.C. § 1103(a)(1) expressly charges the Secretary with the enforcement of "all other laws relating to the immigration," which certainly includes the provisions at issue in this case.

In the face of these specific statutes, Defendants endeavor to argue that any constraints on their authority under 8 U.S.C. § 1158(a)(1) and 8 U.S.C. § 1225 are not at issue in this case and thus these statutory provisions do not bear on the Secretary's asserted exercise of discretionary authority under 8 U.S.C. § 1103(a)(3) and 6 U.S.C. § 202(2). Defendants first contend that because the New Individual Plaintiffs were not in the United States at the time of their alleged injuries, Plaintiffs' argument that "Sections 1158 and 1225 limit the scope of the Secretary's authority under 8 U.S.C. § 1103(a)(3) and 6 U.S.C. § 202" "has no force." (ECF No. 238 at 9.) Insofar as Defendants raise this argument against the Turnback Policy, this argument fails because, at a minimum, Plaintiff Al Otro Lado—a domestic Plaintiff—joins the Individual Plaintiffs in challenging Defendants' conduct. The argument otherwise fails because the Court has rejected Defendants' underlying premise regarding the scope of Sections 1158 and 1225 in relation to the New Individual Plaintiffs.

Defendants further argue that the interpretative canon that specific statutes limit general statutes "does not apply here, because the processes mandated by Section 1225 do not implicate the authority conferred by Sections 1103(a)(3) and 202." (ECF No. 238 at 10.) This argument makes no sense. There is no logical way to treat the Secretary's asserted authority and charge to secure the border as mutually exclusive from the procedures Section 1225 mandates. Section 202(2) expressly

refers to "ports." 6 U.S.C. § 202(2). Both Sections 1185(a)(1) and 1225 refer to aliens who arrive in the United States, including at a "port of arrival." Defendants elsewhere argue that applications for admission must be made at ports of entry. 8 C.F.R. § 235.1(a) ("[a]pplication to lawfully enter the United States shall be made in person to a U.S. immigration officer at a U.S. port-of-entry."); (ECF No. 192-1 at 9 (citing 8 C.F.R. § 235.1(a)). Thus, the relevant INA provisions governing the duties of immigration officers with respect to aliens who seek admission at POEs plainly bear on how the Secretary may exercise whatever authority the Secretary has to manage POEs. Defendants conspicuously do not argue that these provisions do not provide a means to assess the legality of Defendants' conduct.

[55] Accordingly, the Court rejects Defendants' argument that Plaintiffs' Section 706(2) claims are unreviewable on the asserted basis of discretion committed to the agency. Whatever authority the Secretary may possess pursuant to the general grants of authority in Sections 1103(a)(1) and 202(2) over the "flow of traffic" across the border, Congress's general allowance for the Secretary to "perform such other acts as [she] deems necessary for carrying out" her authority to administer and enforce the INA, 8 U.S.C. § 1103(a)(3), cannot entail the authority to rewrite specific congressional mandates or to pretend that such mandates do not exist. "The power of executing the laws ... does not include a power to revise clear statutory terms that turn out not to work in practice," and it is thus a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014).

3. The Unlawfulness of the Alleged Turnback Policy

[56] The core of Plaintiffs' Section 706(2) claims is that the alleged Turnback Policy is "in excess of statutory jurisdiction, authority, or limitations" and "without observance of procedure required by law." (SAC ¶¶ 271–72 (citing 5 U.S.C. § 706(2)(C), (D)).) In particular, Plaintiffs claim that the alleged Turnback Policy contravenes the congressionally-established procedure set forth in 8 U.S.C. § 1158(a)(1) and 8 U.S.C. § 1225.

Plaintiffs offer two principal theories why the alleged policy violates the procedures that Congress established in these provisions. First, Plaintiffs contend that Defendants' alleged conduct acting pursuant to the Turnback Policy is *ultra vires* because it "ignore[s] the mandatory procedures to inspect and process asylum seekers that Congress has put in place." (ECF No. 210 at 17.) Second, Plaintiffs contend that the alleged Turnback Policy is unlawful because it is "impermissibly aimed at deterrence" and "based on false claims of lack of capacity." (*Id.* at 20.) Although Plaintiffs treat these theories as distinct bases to find the alleged Turnback Policy unlawful, (*id.* at 16–22), the Court finds that they cannot be disentangled from each other. Construing them together, the Court concludes that Plaintiffs have sufficiently alleged that the Turnback Policy is unlawful.[11]

As an initial matter, Defendants resist application of 8 U.S.C. § 1158(a)(1) and 8 U.S.C. § 1225 to assess the legality of the

11. Because the Court concludes that these theories are together sufficient for Plaintiffs to state Section 706(2) claims, the Court declines to address Plaintiffs' alternative and third argument that the alleged Turnback Policy is unlawful because it unreasonably delays the processing of asylum seekers. (ECF No. 210 at 22–23.)

alleged Turnback Policy. Defendants reiterate their argument that the challenged conduct is entirely lawful under 8 U.S.C. § 1103(a)(3) and 6 U.S.C. § 202 because 8 U.S.C. § 1158(a)(1) and 8 U.S.C. § 1225 have "no force as to the Extraterritorial Plaintiffs and the putative class members they seek to represent" who, according to Defendants, "do not allege that they were ever present in the United States." (ECF No. 238 at 9.) These arguments falter at this juncture for reasons the Court has already discussed. 8 U.S.C. § 1158(a)(1) and 8 U.S.C. § 1225 qualify the authority set forth in 8 U.S.C. § 1103(a)(3) and 6 U.S.C. § 202.

Next, relying on Sections 1103(a)(3) and 202(2), Defendants contend that there are valid reasons why CBP officers cannot unwaveringly adhere to the procedures set forth in 8 U.S.C. § 1158(a)(1) and 8 U.S.C. § 1225. According to Defendants, "port management is a complex task[.]" (ECF No. 192-1 at 13.) Defendants contend that "CBP necessarily could not 'secure' or 'manage' a port if, in addition to its other mission responsibilities, *any* alien without appropriate travel documents could cross the border whenever she chooses and immediately trigger Defendants' statutory duties to 'inspect[ ],' 'refer,' or 'detain[ ]' her under section 1225." (*Id.* (emphasis in original).) Defendants argue the Sections 1103(a)(3) and 202(2) authorize CBP officers "to permit an alien without appropriate travel documentation to cross the border *only if the port has the capacity to safely and humanely process her application for admission and hold her for further proceedings*," (ECF No. 192-1 at 13 (emphasis added)), and "especially authorize CBP officers to keep ports from being overwhelmed by an unsafe number of pedestrians entering at any time," (*id*). Consistent with this view about their authority over "port management," Defendants urge the Court to conclude that the alleged conduct does not occur *ultra vires*, exceed the scope of their authority, or without observance of the procedure required by law. (Id.)

The Court acknowledges that it is entirely possible that there may exist potentially legitimate factors that prevent CBP officers from immediately discharging the mandatory duties set forth in 8 U.S.C. § 1158(a)(1) and 8 U.S.C. § 1225. Even Plaintiffs acknowledge as much. (ECF No. 210 at 21.) And the Court acknowledges that federal agencies and the individuals who lead them can face co-existing obligations that Congress has chosen to place on the agency, obligations that may at times be viewed as competing with each other and competing for the resources an agency has.

The problem with Defendants' reliance on Sections 1103(a)(3) and 202(2) is that Plaintiffs allege that the asserted concerns over capacity are merely a pretext to avoid discharging the duties set forth in 8 U.S.C. § 1158(a)(1) and 8 U.S.C. § 1225 and deter asylum seekers from seeking asylum in the United States. Plaintiffs offer numerous factual allegations on this point. (SAC ¶¶ 4–6, 48, 61, 66, 72–73, 76–78, 109, 111, 274.) And, contrary to Defendants' suggestion regarding complex port management, Plaintiffs contend that Defendants' Turnback Policy "screen[s] out asylum seekers from other applications for admission approaching POEs and send[s] them back to an uncertain fate in Mexico[.]" (ECF No. 210 at 17.) In other words, the purported exercise of authority under Sections 1103(a)(3) and 202(2) specifically targets asylum seekers—not any other aliens who may be crossing into the United States through POEs.

In the face of these allegations, Defendants challenge the sufficiency of Plaintiffs' deterrence allegations as a factual

matter by largely relying on materials outside of the pleadings. (ECF No. 192-1 at 15; ECF No. 238 at 10.) Indeed, in their opening brief, Defendants argue that "[t]he record before the Court shows clearly that the Secretary and her designees have deemed it necessary to manage the flow of pedestrian traffic when port resources are strained." (ECF No. 192-1 at 15 (citing Exs. 1–6).) There is no "record" before the Court on a Rule 12(b)(6) motion, but rather the Court is limited to a review of the pleadings and any documents attached to them. *United States v. Ritchie*, 342 F.3d 903, 907–09 (9th Cir. 2003). Defendants' reliance on non-pleadings materials underscores that Defendants' arguments about the truthfulness of Plaintiffs' deterrence allegations are fundamentally merits arguments that the Court cannot resolve at this stage.[12]

Assuming the truth of Plaintiffs' deterrence allegations, the remaining issue is whether an alleged motive to deter asylum seekers from seeking asylum in the United States is unlawful. Plaintiffs argue that it is. Plaintiffs' fundamental contention is that "[t]he plain language and intent of the INA's asylum provision unambiguously preclude Defendants from adopting a policy or otherwise engaging in a practice of denying individuals access to the U.S. asylum process at POEs, even if Defendants prevent those asylum seekers from physically crossing the U.S.-Mexico border." (ECF No. 210 at 17.) On this issue, Defendants argue that Plaintiffs offer nothing more than a "legal conclusion." (ECF No. 238 at 11.) The Court, however, finds nothing conclusory about Plaintiffs' assertions of illegality.

Congress has enacted a scheme that mandates inspection of all aliens seeking admission to the United States and mandates referral to an asylum officer of asylum seekers who present themselves at a POE and indicate their intention to apply for asylum or a fear of persecution. 8 U.S.C. § 1225(a)(3); 8 U.S.C. § 1225(b)(1)(A)(i). Although this statutory scheme treats asylum seekers differently, it does so only in the sense that such aliens are to be promptly identified and their asylum claims are to be appropriately considered. As Plaintiffs and *Amici* Immigration Law Professors observe (ECF No. 210 at 19; ECF No. 221-1 at 5–6), the "uniform asylum policy" driving the 1980 Refugee Act, an act which replaced the previous *ad hoc* refugee and asylum system, was "[a] fundamental belief that the granting of asylum is inherently a humanitarian act distinct from the normal operation and administration of the immigration process." Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30674-01, 30675 (July 27, 1990) (to be codified at 8 CFR Parts 3, 103, 208, 236, 242, and 253) (emphasis added); *see also E. Bay Sanctuary Covenant*, 932 F.3d at 753–54, 2018 WL 8807133, at *3 (observing that "[i]n 1980, Congress codified our obligation to receive persons who are 'unable or unwilling to return to' their home countries 'because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.' (quoting 8 U.S.C. §§ 1101(a)(42), 1158(b)(1))). Congress's intent to prescribe a uniform asylum procedure remains reflected in the current asylum procedure. 8 U.S.C. § 1158; 8 U.S.C. § 1225; *see also E. Bay Sanctuary Covenant*, 932 F.3d at 753–54, 2018 WL 8807133, at *3.

Turning back prospective asylum applicants pursuant to an alleged executive poli-

12. For this reason, the Court also rejects Defendants' attempt to direct the Court to factual assertions made in a declaration filed in a different case. (ECF No. 192-1 at 5, 13.)

cy that seeks to deter asylum seekers through false assertions of lack of capacity is plausibly inconsistent with and violative of the scheme Congress enacted. This conclusion follows from a comparison of Section 1157 and Section 1158. Although Defendants have elsewhere pointed to Section 1157 as a purported limitation on the extraterritorial scope of 8 U.S.C. § 1158(a)(1), Defendants overlook a key distinction between Sections 1157 and 1158 that cuts against the lawfulness of adopting a policy to deter asylum seekers. Section 1157 expressly authorizes the President to set numerical limits for aliens who may be admitted as refugees into the United States on an annual basis. 8 U.S.C. § 1157(a)(2). Neither Section 1158(a)(1), nor Section 1225(b), however, establishes numerical limits on the total number of aliens who may seek asylum pursuant to the asylum procedure these statutes establish. *See* 8 U.S.C. § 1158; 8 U.S.C. § 1225. Pretextual assertions of "lack of capacity" to turn away asylum seekers who seek access to a POE and express an intent to apply for asylum directly to a CBP officer suggest the existence of an unlawful *de facto* numerical limit on the number of asylum applicants that finds no support in Section 1158 or Section 1225. The imposition of such a limit, through false assertions of lack of capacity, surely violates the scheme Congress enacted, particularly when contrasted with the separate scheme in Section 1157. *See Util. Air Regulatory Grp.*, 573 U.S. at 327, 134 S.Ct. 2427 ("The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice.").

Defendants nevertheless question that even if "any alleged metering is 'motivated by deterrence,' such an aim would not be inappropriate." (ECF No. 238 at 11–12 n.8.) Most curiously, Defendants support this assertion by citing "Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934 (Nov. 9, 2018)," a rule for which the Ninth Circuit upheld a preliminary injunction barring its enforcement. *See E. Bay Sanctuary Covenant v. Trump*, 18-17274, 932 F.3d 742, 772–75, 2018 WL 8807133, at *19–20 (9th Cir. Dec. 7, 2018), *stay denied by*, *Trump v. E. Bay Sanctuary Covenant*, —— U.S. ——, 139 S. Ct. 782, 202 L.Ed.2d 510 (2018).

In *East Bay Sanctuary Covenant*, the Ninth Circuit affirmed a preliminary injunction barring implementation of a Rule promulgated by the Secretary of DHS and the Attorney General. The Rule provided that "[f]or applications filed after November 9, 2018, an alien shall be ineligible for asylum if the alien is subject to a presidential proclamation or other presidential order suspending or limiting the entry of aliens along the southern border with Mexico that is issued pursuant to [§ 1182(f)]." 83 Fed. Reg. 55,952 (to be codified at 8 C.F.R. § 208.13(c)(3) (DHS) and 8 C.F.R. § 1208.13(c)(3) (DOJ)). The Rule coincided with a presidential proclamation suspending the "entry of any alien into the United States across the international boundary between the United States and Mexico," but exempting from that suspension "any alien who enters the United States at a port of entry and properly presents for inspection." Addressing Mass Migration Through the Southern Border of the United States, 83 Fed. Reg. 57,661, 57,663 (Nov. 9, 2018).

In relevant part, the *East Bay Sanctuary Covenant* majority found the Rule likely to be unlawful under Section 706(2)(A) because the Rule "is inconsistent with § 1158(a)(1)." *E. Bay Sanctuary Cov-*

enant, 932 F.3d at 771–72, 2018 WL 8807133 at *18. Although the majority noted that "[r]ather than restricting who may apply for asylum, the rule of decision facially conditions only who is eligible to receive asylum," the majority found this to be a distinction without a difference. *Id.* The majority concluded that: "the technical differences between applying for and eligibility for asylum are of no consequence to a refugee when the bottom line—no possibility of asylum—is the same." *Id.* The majority acknowledged that "[w]e are acutely aware of the crisis in the enforcement of our immigration laws," but concluded that "the Attorney General may not abandon [a congressional] scheme because he thinks it is not working well.... but continued inaction by Congress is not a sufficient basis under our Constitution for the Executive to rewrite our immigration laws." *Id.* at 774, 2018 WL 8807133, at *20.

The key lesson of *East Bay Sanctuary Covenant* is that the Executive cannot "amend the INA"—specifically Section 1158—through executive action to establish a procedure at variance with the scheme Congress chose. *Id.* at 1250. Much like the challenged rule in *East Bay Sanctuary Covenant*, Defendants' alleged Turnback Policy directly concerns the statutory scheme for asylum seekers that Congress has established. The Turnback Policy directly concerns the Section 1225(b)(1) aspect of this procedure for aliens seeking admission to the United States. As Plaintiffs persuasively argue, there is no room for deterrence under the scheme Congress has enacted. An alleged policy that is premised on and implements such a motive contravenes the clear purpose, intent, and text of the statutory scheme that enables aliens arriving at POEs, including those in the process of doing so, to apply for asylum. Accordingly, the Court concludes that Plaintiffs have stated Section 706(2) claims premised on the unlawfulness of the alleged Turnback Policy.

III. The New Individual Plaintiffs' Fifth Amendment Due Process Claims

The Fifth Amendment's Due Process Clause provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Individual Plaintiffs assert a protected Fifth Amendment due process interest in the various provisions of the INA that allows aliens to seek asylum in the United States. (SAC ¶¶ 225–26, 283–93.) Specifically, the Individual Plaintiffs allege that they possess "the right to be processed at a POE and granted meaningful access to the asylum process" under 8 U.S.C. §§ 1158(a)(1), 1225(a)(3), 1225(b)(1)(A)(ii), 1225(b)(1)(B), and 8 C.F.R. § 235.3(b)(4). Defendants' motion to dismiss presents two issues. First, the Court must revisit the propriety of judicial review of Plaintiffs' constitutional claims independently of the APA. Second, the Court must turn to the merits of Defendants' dismissal arguments, in which Defendants contend that the New Individual Plaintiffs seek to impermissibly apply the Constitution extraterritorially and, alternatively, the New Individual Plaintiffs were not denied any process that these Plaintiffs claim was due. The Court addresses each issue in turn.

A. Non-APA Judicial Review of Constitutional Claims

[57] In its prior dismissal order, the Court determined that "[w]hile a right to seek judicial review of agency action may be created by a separate statutory or constitutional provision, once created it becomes subject to the judicial review provisions of the APA unless explicitly excluded." *Al Otro Lado*, 327 F. Supp. 3d

at 1316. The parties dispute what the Court's prior ruling should mean for the INA and Fifth Amendment Due Process Clause claims that Plaintiffs raise independently of the APA. Plaintiffs request that, to the extent the Court believes it resolved the issue of reviewability of these claims in its prior dismissal order, the Court should revise its previous order pursuant to Rule 54(b) to clarify that Plaintiffs' INA and Fifth Amendment due process claims may be reviewed even if Plaintiffs cannot state APA claims. (ECF No. 210 at 26.) Defendants argue that Plaintiffs "offer no reason to depart from the correct application of the APA to this case" and expressly argue that the Court "should also reject Plaintiffs' request to adjudicate their freestanding INA claims under the concept of 'nonstatutory review' instead of the APA." (ECF No. 238 at 18.)

As an initial matter, the Court clarifies that its prior statement regarding the scope of judicial review flowed from the nature of the parties' prior dismissal briefing. Defendants did not move to dismiss Plaintiffs' constitutional claims on the merits, but rather limited their merits briefing to the sufficiency of Plaintiffs' APA claims. Plaintiffs in turn presented arguments regarding their APA claims, yet in doing so, relied on case law regarding liability under 42 U.S.C. § 1983. Faced with this briefing, the Court's prior dismissal analysis necessarily turned on the APA's strictures.

The present motion to dismiss briefing alters the calculus. The parties have briefed the merits of Plaintiffs' constitutional due process claims, implicitly assuming that the Court can and should review those claims independently of the APA's strictures. Although Defendants argue that Plaintiffs cannot raise freestanding INA claims independently of the APA's strictures, Defendants conspicuously do not make a similar argument with respect to Plaintiffs' Fifth Amendment Due Process claims in their opening brief. (*Compare* ECF No. 192-1 at 18–22 (dismissal arguments regarding Plaintiffs' due process claims) and ECF No. 238 at 15 *with* ECF No. 192-1 at 23 (arguing that "Extraterritorial Plaintiffs' INA claims must be evaluated under the APA, as the Court described, or not at all.").)[13]

Guided by more recent precedent, the Court finds it necessary to clarify the propriety of judicial review independently of the APA's strictures. The Court's prior dismissal order observed that, at times, courts have resolved only APA claims concerning agency action, even when a plaintiff asserts constitutional claims premised on statutory provisions that underlie the APA claims. *See Graham v. Fed. Emergency Mgmt. Agency*, 149 F.3d 997, 1001 n.2 (9th Cir. 1998) ("declin[ing] to address the plaintiffs' Fifth Amendment claim and affirm[ing] the district court's denial of this claim" because "plaintiffs' due process claim is premised on their assertion that they 'have a statutory entitlement to the [individual and family grant] disaster assistance program' " and thus "they may obtain all the relief they request under the provisions of the APA."); *Al Otro Lado Inc.*, 327 F. Supp. 3d at 1316 (relying on *Graham*).

13. Defendants argue for the first time in their reply brief that even if the Plaintiffs state procedural due process claims, review of these claims must proceed under the APA. (ECF No. 238 at 15.) The apparent reason for this argument is the assumption that if Plaintiffs fail to state a claim in accordance with the APA's strictures (*i.e.*, final agency action, identification of discrete agency action for Section 706(1) claims, *etc.*), then this Court cannot address the merits of Plaintiffs' constitutional claims. This argument underscores for the Court that non-APA review of Plaintiffs' constitutional claims is appropriate.

Recently, the Ninth Circuit has made clear that although "the APA is the general mechanism by which to challenge final agency action," "this does not mean that the APA forecloses other causes of action." *Sierra Club v. Trump*, 929 F.3d 670, 699 (9th Cir. 2019). And relying on *Navajo Nation v. Department of the Interior*, 876 F.3d 1144 (9th Cir. 2017)—a case that figured prominently in the Court's prior determination that the APA waives the United States' sovereign immunity for any claims for nonmonetary relief, whether asserted under the APA or not—*Sierra Club* instructs that *Navajo Nation* as well as an earlier Ninth Circuit decision "clearly contemplate that claims challenging agency actions—particularly constitutional claims—may exist wholly apart from the APA.' " *Sierra Club*, 929 F.3d at 699 (also relying on *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989) for this proposition). Thus, the Court concludes that review of the New Individual Plaintiffs' constitutional claims, independently of their APA claims, is appropriate.

B. The New Individual Plaintiffs State Due Process Claims

[58–61] The New Individual Plaintiffs' claims, like those of the other Individual Plaintiffs, are fundamentally procedural due process claims. "The requirements of procedural due process apply to the deprivation of interests encompassed by [the Due Process Clause's] protection of liberty and property." *Bd. of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). "To assert a procedural due process claim under the Fifth Amendment, [a plaintiff] must first establish a constitutionally protected interest." *Stanley v. Gonzales*, 476 F.3d 653, 660 (9th Cir. 2007); *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998) (noting that "[t]he threshold question" in a procedural due process claim is whether the plaintiff has a constitutionally protectible interest). "[T]he plaintiff must have more than a unilateral expectation of it; instead, she must have a legitimate claim of entitlement." *Serra v. Lappin*, 600 F.3d 1191, 1196 (9th Cir. 2010). If the plaintiff shows the existence of a constitutionally protected interest, the plaintiff must further establish "a denial of adequate procedural protections." *Foss*, 161 F.3d at 588.

[62] Defendants do not contest that if any New Individual Plaintiff sufficiently alleges that he or she was in the United States, such a New Individual Plaintiff may assert a Fifth Amendment Due Process Clause claim against Defendants' alleged conduct. Indeed, "[i]t is well established that aliens legally within the United States may challenge the constitutionality of federal and state actions." *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 994 (9th Cir. 2012). Thus, to the extent any New Individual Plaintiffs sufficiently plead that they were in the United States at the time of their alleged injuries, Defendants' argument, by its own terms, does not apply.

With respect to the remaining New Individual Plaintiffs, Defendants raise two arguments for why they fail to state Fifth Amendment Due Process Clause claims. Defendants first argue that these New Individual Plaintiffs possess no protected interests under the Due Process Clause in the INA statutory and regulatory provisions in this case because "the Fifth Amendment does not apply to aliens outside the United States[.]" (ECF No. 192-1 at 18.) Second, Defendants argue that "[e]ven assuming *arguendo* that the Fifth Amendment applie[s] to [these] Plaintiffs while they were outside the United States, they still fail to state a cognizable Fifth Amendment claim." (*Id.* at 21.)

1. The Fifth Amendment Applies

[63] Defendants' principal challenge to the New Individual Plaintiffs' Fifth Amendment Due Process Clause claims is that "the Fifth Amendment does not apply to aliens outside the United States, particularly where they do not allege they have any previous voluntary connection to the United States." (ECF No. 192-1 at 18; ECF No. 238 at 14–15.) Defendants' challenge raises a threshold issue about the proper scope and application of the Constitution.

As an initial matter, the Court rejects Defendants' formalistic, territorial argument that the Due Process "Clause's reference to 'person[s],' while broad, does not include non-resident aliens outside the United States." (ECF No. 192-1 at 19 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 770, 70 S.Ct. 936, 94 L.Ed. 1255 (1950)).) Defendants' reliance on *Eisentrager* is understandable because there is language in the decision that places a constitutional premium on territorial presence in the United States, suggesting that such presence is the only basis for a noncitizen to receive constitutional protection that a federal court in turn has the power to enforce. *See Eisentrager*, 339 U.S. at 771, 70 S.Ct. 936 ("[I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."); *id.* at 777–78, 70 S.Ct. 936 ("[T]hese prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.").

The Supreme Court, however, squarely rejected bright-line rules regarding the extraterritorial application of the Constitution in *Boumediene v. Bush*, 553 U.S. 723, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008). In *Boumediene*, the Supreme Court permitted alien plaintiffs who the U.S. government had designated as enemy combatants and who were detained at the United States Naval Station in Guantanamo, Cuba to seek habeas relief. In doing so, the Supreme Court rejected the government's proposed bright-line rule that the plaintiffs were not entitled to seek habeas relief as aliens who had committed acts outside the United States as a "formal sovereignty-based test." *Id.* at 764, 128 S.Ct. 2229. The Supreme Court stated that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* To resolve such questions, the Supreme Court directed the federal courts to examine the " 'particular circumstances, the practical necessities, and the possible alternatives which Congress had before it' and, in particular, whether judicial enforcement of the provision would be 'impracticable and anomalous.' " *Id.* at 759, 128 S.Ct. 2229 (quoting *inter alia*, *Reid v. Covert*, 354 U.S. 1, 74–75, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) (Harlan, J., concurring)).

Defendants rely heavily on *United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990), and *Ibrahim v. Department of Homeland Security*, 669 F.3d 983 (9th Cir. 2012), to argue that the New Individual Plaintiffs must nevertheless allege a "prior significant voluntary connection" with the United States to receive protection under the Fifth Amendment Due Process Clause. The Court briefly discusses these cases and then explains why they do not foreclose the New Individual Plaintiffs' claims.

In *Verdugo-Urquidez*, the Supreme Court addressed the question "whether the Fourth Amendment applies to the search and seizure by United States agents of

property that is owned by a nonresident alien and located in a foreign country." 494 U.S. at 261, 110 S.Ct. 1056. The Court held that the "nonresident alien" plaintiff in that case had "no previous significant voluntary connection with the United States" and therefore had no right to assert a Fourth Amendment challenge to the searches and seizures of his property by United States agents in Mexico. *Id.* at 271, 110 S.Ct. 1056 (emphasis added). In *Ibrahim*, the Ninth Circuit expressly relied on *Verdugo-Urquidez* to permit a Malaysian citizen who was precluded from entering the U.S., who had previously been in the U.S. for four years on a student visa and who alleged that she was mistakenly placed on a No-Fly List and other terrorist watchlists, to raise Fourth and Fifth Amendment claims against the federal government. The Ninth Circuit expressly observed that "the border of the United States is not a clear line that separates aliens who may bring constitutional challenges from those who may not." *Ibrahim*, 669 F.3d at 995 (collecting cases including *Boumediene*). The Ninth Circuit held that, "[u]nder *Boumediene* and *Verdugo*, we hold that Ibrahim has 'significant voluntary connection' with the United States. She voluntarily established a connection to the United States during her four years at Stanford University while she pursued her Ph.D. She voluntarily departed from the United States to present the results of her research at a Stanford-sponsored conference. The purpose of her trip was to further, not to sever, her connection to the United States, and she intended her stay abroad to be brief." *Id.* at 997. Defendants contend that because the New Individual Plaintiffs lack a "previous voluntary significant connection" with the United States, they have no protected due process interests.

The fundamental problem with Defendants' reliance on the "previous voluntary significant connection" test set forth in *Verdugo-Urquidez* and applied in *Ibrahim* is that the test does not constitute a ceiling on the application of the Constitution to aliens. Plaintiffs direct this Court to the Ninth Circuit's recent decision in *Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018), a case in which the panel majority relied on *Boumediene* to conclude that an alien located outside the United States could press a Fourth Amendment claim against a U.S. border officer who, standing on the U.S. side of the border, allegedly shot and killed a Mexican teenager located on the Mexican side of the border. The *Rodriguez* majority underscored that "[n]either citizenship nor voluntary submission to American law is a prerequisite for constitutional rights[,]" rather, "citizenship is just one of several non-dispositive factors to consider." 899 F.3d at 729. The *Rodriguez* majority determined that *Verdugo-Urquidez*'s "voluntary significant connection" test did not apply in the circumstances of the case because "unlike the American agents in *Verdugo-Urquidez*, who acted on Mexican soil, Swartz [the defendant U.S. border officer] acted on American soil" and "[j]ust as Mexican law controls what people do there, American law controls what people do here." *Id.* at 731 (brackets added). The *Rodriguez* majority underscored that "[t]he practical concerns in *Verdugo-Urquidez* about regulating conduct on Mexican soil also do not apply here." *Id.*

Defendants passingly refer to *Boumediene* only once in their opening brief and do not acknowledge *Rodriguez*. (ECF No. 192-1 at 19–20 (observing that *Ibrahim* cites *Boumediene*); *id.* at 18–22 (full argument regarding extraterritorial application without reference to *Rodriguez*.) Faced with Plaintiffs' opposition brief, Defendants attempt to limit the scope and application of *Boumediene* in this case. Defen-

dants first contend that "*Boumediene* is the only case extending a constitutional right to 'noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty.' " (ECF No. 238 at 13 (quoting *Boumediene*, 553 U.S. at 770, 128 S.Ct. 2229).) Defendants then argue that "this Court must follow" "pre-*Boumediene* law holding that the Due Process Clause does not extend to aliens without property or presence in the sovereign territory of the United States[.]" (*Id.*)

The Court rejects both of Defendants' arguments. For one, *Rodriguez* alone renders Defendants' first argument factually erroneous. Defendants' erroneous argument appears to stem from Defendants' attempt to dismiss *Rodriguez* as irrelevant in a footnote. (ECF No. 238 at 14 n.9 (stating that "[i]f any Ninth Circuit case applies here, it is *Ibrahim*, not *Rodriguez*.").) The Court does not understand Defendants' dismissive argument. *Rodriguez* is as much binding precedent on this Court as is *Ibrahim*. And *Rodriguez*, applying *Boumediene*, indicates that *Verdugo-Urquidez*'s "previous voluntary significant connection" test—and, by extension, *Ibrahim*'s application of that test—do not alone control the question of constitutional protection for aliens, particularly when the challenged conduct concerns the conduct of U.S. officers acting on U.S. soil. *Rodriguez*, 899 F.3d at 731. Second, and more critically, Defendants' attempt to limit *Boumediene* simply ignores *Boumediene*'s analysis. *Boumediene* expressly rejected a reading of *Eisentrager* that would establish a "formalistic, sovereignty-based test" and expressly narrowed *Eisentrager*'s reach, observing that "the United States lacked both *de jure* sovereignty and plenary control" over the area where the petitioner prisoners were located and "[n]othing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus." *Boumediene*, 553 U.S. at 763–64, 128 S.Ct. 2229. Thus, both *Boumediene* and *Rodriguez* apply here.

Appropriately relying on both *Boumediene* and *Rodriguez*, Plaintiffs persuasively argue that there is nothing " 'impracticable [or] anomalous' in applying elementary due process protection at the U.S. border." (ECF No. 210 at 25.) For one, as an objective matter, the New Individual Plaintiffs' allegations do not show conduct occurring wholly in foreign territory. Defendants attempt to argue that "[t]he United States does not have *de jure* or *de facto* sovereignty over Mexican border towns[.]" (ECF No. 238 at 14.) Insofar as Plaintiffs' constitutional claims concern the Turnback Policy, allegedly formed by high-level federal officials, Defendants' argument falters on its own terms because surely such a policy was not developed in Mexican border towns. (*See* SAC ¶ 287 (referring to Turnback Policy as violation procedural due process rights); *id.* ¶¶ 50–60).) Insofar as the New Individual Plaintiffs' constitutional claims concern individual turnbacks, all New Individual Plaintiffs offer allegations regarding conduct of CBP officers who presumably were located on U.S. soil.

The allegations of the four New Individual Plaintiffs who were stopped in the middle of the international bridge between Mexico and the United States and denied access by the CBP officers on the U.S. side of the bridge also concerns conduct occurring on territory subject to U.S. sovereign authority. (SAC ¶¶ 29–31, 154, 162, 173–74.) Defendants cite an 1886 U.S.-Mexico treaty, (ECF No. 238 at 14), which expressly provides that "[i]f any international bridge have been or shall be built across either of the rivers named, *the*

point on such bridge exactly over the middle of the main channel as herein determined shall be marked by a suitable monument, which shall denote the dividing line for all the purposes of such bridge, notwithstanding any change in the channel which may thereafter supervene." Convention Between the United States of America and the United States of Mexico Touching the International Boundary Line Where It Follows the Bed of the Rio Grande and the Rio Colorado, U.S.-Mex., arts. I, IV, Nov. 12, 1884, 24 Stat. 1011, 1886 WL 15138, at *2. New Individual Plaintiffs Roberto Doe, Maria Doe, and Juan and Úrsula Doe allege that they "sought access to the asylum process by presenting [themselves]" at the Hidalgo, Texas POE and Laredo, Texas POE and "encountered CBP officials in the middle of the bridge" between Mexico and the U.S. POE and "told them" they "wanted to seek asylum in the United States." (SAC ¶¶ 29–31, 154–55, 162, 174.) Pursuant to the very treaty on which Defendants rely, these allegations plausibly show conduct by CBP officers occurring on the U.S. side of the international bridge subject to U.S. sovereignty.

Second, as Plaintiffs argue, "the practical necessities" also warrant application of the Due Process Clause in this case. (ECF No. 210 at 25–26.) The New Individual Plaintiffs' claims concern alleged denials of procedural due process by U.S. immigration officers upon whom Congress has placed certain statutory obligations, all in furtherance of the asylum protections Congress has also chosen to extend to certain "arriving aliens" that express an intent to apply for asylum or fear of persecution. And their claims concern adoption of an alleged policy that aims to impede access to the statutorily-mandated asylum procedure. The lesson of *Boumediene* is that the political branches do not enjoy the prerogative to "switch the Constitution on or off at will[.]" *Boumediene*, 553 U.S. at 765, 128 S.Ct. 2229. Appropriately applying *Boumediene* and *Rodriguez*, the Court rejects Defendants' threshold argument that none of the New Individual Plaintiffs can even avail themselves of the Fifth Amendment in this case.

2. Plaintiffs Have Plausibly Alleged Denials of Procedural Due Process

[64–66] For the reasons set forth in the Court's statutory analysis, the Court can swiftly reject Defendants' second dismissal argument. Defendants concede that "[w]here plaintiffs premise their procedural due process challenge on having a protected interest in a statutory entitlement, 'the protections of the Due Process Clause ... extend only as far as the plaintiffs' statutory rights.' " (ECF No. 192-1 at 21 (quoting *Graham v. Fed. Emergency Mgmt. Agency*, 149 F.3d 997, 1001 & n.2 (9th Cir. 1998)).) This concession all but forecloses dismissal of the New Individual Plaintiffs' due process claims at this juncture. Congress has the power to prescribe the terms and conditions upon which aliens may come to this country. *Kleindienst v. Mandel*, 408 U.S. 753, 766, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972). "In the enforcement of [congressional] policies, the Executive Branch of the Government must respect the procedural safeguards of due process[.]" *Id.* at 767, 92 S.Ct. 2576. Here, as the Court has discussed in its construction of the relevant statutory provisions, Congress has plainly established procedural protections for aliens like the New Individual Plaintiffs in this case, who allege that they were in the process of arriving to the United States and expressed an intent to seek asylum. The New Individual Plaintiffs have plausibly alleged that immigration officers failed to discharge their mandatory duties under the relevant provisions. Consequently, the Court concludes that the New Individual Plaintiffs have

stated procedural process claims and the Court denies Defendants' motion to dismiss these claims.

IV. ATS Claims

The ATS provides in full that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. All Individual Plaintiffs and Al Otro Lado seek to raise ATS claims for Defendants' alleged "violation of the non-*refoulement* doctrine." (SAC ¶¶ 294–303.) Plaintiffs specifically allege that:

> CBP officials have systematically denied, or unreasonably delayed, access to the asylum process by Class Plaintiffs, and the asylum seekers they represent, in violation of customary international law reflected in treaties which the United States has ratified and implemented: namely, the specific, universal and obligatory norm of non-*refoulement*, which has also achieved the status of a *jus cogens* norm, and which forbids a country from returning or expelling an individual to a country where he or she has a well-founded fear of persecution and/or torture . . .

(*Id.* ¶ 295.) Plaintiffs contend that Defendants' alleged violations have caused them harm by forcing them to return to Mexico or other countries where they face threats of further persecution. (*Id.* ¶ 296.) Al Otro Lado also raises ATS claims for these alleged violations on the ground that its core mission is harmed through resource diversion. (*Id.* ¶ 300.)

[67] As a preliminary matter, Defendants argue that Plaintiffs' "non-*refoulement* claims are [not] actionable as presented" based on the Court's prior ruling that "Plaintiffs 'may not' seek judicial review of Defendants' conduct 'independently' of the APA's judicial review framework." (ECF No. 192-1 at 23.) Defendants misstate the Court's prior ruling, which did not speak to the Court's jurisdiction over Plaintiffs' ATS claims. The ATS is a "strictly jurisdictional statute" in its own right that "creates no new causes of action." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713, 742, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004); *Tobar v. United States*, 639 F.3d 1191, 1196 (9th Cir. 2011) (noting the ATS "has been interpreted as a jurisdiction statute only"). Thus, independently of the APA, the relevant issue is whether Plaintiffs can state claims under the ATS over which the Court has jurisdiction.

A. No Jurisdiction Exists for Al Otro Lado's ATS Claims

[68] Insofar as Defendants move to dismiss ATS claims that Organizational Plaintiff Al Otro Lado raises, (ECF No. 192-1 at 28 (citing SAC ¶¶ 294–303)), the Court finds that such claims must be dismissed for lack of subject matter jurisdiction because"Al Otro Lado is corporation." (ECF No. 238 at 20.) Although the fact that Al Lado Lado is a corporation does not preclude Al Otro Lado's assertion of APA claims, its status as a corporation has jurisdictional consequences under the ATS.

[69] Under its plain language, the ATS provides for federal jurisdiction only over civil actions "by an alien." 28 U.S.C. § 1350. Thus, irrespective of the substantive cause of action that underlies an asserted ATS claim, a federal court lacks jurisdiction under the ATS over claims asserted by anyone or anything other than an alien. *See Serra v. Lappin*, 600 F.3d 1191, 1198 (9th Cir. 2010) ("The ATS admits no cause of action by non-aliens."); *Yousuf v. Samantar*, 552 F.3d 371, 375 n.1 (4th Cir. 2009) ("To the extent that any of the claims under the ATS are being asserted by plaintiffs who are American citizens,

federal subject-matter jurisdiction may be lacking."); *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) (same); *Sikhs for Justice Inc. v. Indian Nat'l Cong. Party*, 17 F. Supp. 3d 334, 345 (S.D.N.Y. 2014) ("[J]urisdiction is inapplicable because Plaintiff Sikhs is not an 'alien' under the ATS[.]"); *S.K. Innovation, Inc. v. Finpol*, 854 F. Supp. 2d 99, 113 (D.D.C. 2012) ("[T]he American corporate Plaintiffs, as non-aliens, lack standing to bring claims under the ATS"); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 661 (S.D.N.Y. 2006) (concluding that an institutional plaintiff that is a United States corporation "is not an alien and may not bring suit under the ATS."), *aff'd*, 582 F.3d 244 (2d Cir. 2009). Al Otro Lado is concededly not an alien. Accordingly, the Court grants Defendants' motion to dismiss Organizational Plaintiff Al Otro Lado's ATS claims lack of jurisdiction.

B. The Individual Plaintiffs' ATS Claims

Defendants initially moved to dismiss the ATS claims of only the New Individual Plaintiffs and Al Otro Lado. (ECF No. 192-1 at 22–25.) In reply, Defendants extend the scope of their motion to dismiss Plaintiffs' ATS claims to encompass the Original Individual Plaintiffs as well. (ECF No. 238 at 16–18.) To resolve Defendants' present motion, the Court will not venture beyond Defendants' actual arguments. Reviewing these arguments, the Court finds that Defendants have failed to show that the ATS claims must be dismissed at this juncture.

1. The Asserted Law of Nations Norm

[70] Defendants first argue that (1) the ATS "has no bearing in this case" because Plaintiffs "have not brought a civil action for a tort[.]" (ECF No. 192-1 at 25, ECF No. 238 at 16–17.) Defendants point to the ATS's use of the word "tort" and argue that Plaintiffs have no ATS claim here because they have not sued for a "tort." (ECF No. 192-1 at 25, ECF No. 238 at 16–17.) Defendants' argument misconstrues the ATS.

[71–73] By its terms, the ATS "enable[s] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa*, 542 U.S. at 712, 124 S.Ct. 2739. For this reason, it should not be disputed that "[t]he ATS 'grants jurisdiction over two types of claims: those for violations of a treaty of the United States, and those for violations of the law of nations.' " *Aragon v. Ku*, 277 F. Supp. 3d 1055, 1064 (D. Minn. 2017) (quoting 14A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3661.2 (4th ed., Apr. 2017 Update)); *see also Al-Tamimi*, 916 F.3d at 11 (recognizing that "[a]n ATS claim . . . incorporates the law of nations"). When a plaintiff seeks to plead an ATS claim based on an alleged violation of the law of nations, the plaintiff must identify an international norm that is "specific, universal, and obligatory." *Sosa*, 542 U.S. at 732, 124 S.Ct. 2739. As a general matter, "[c]ourts ascertain customary international law 'by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.' " *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714–15 (9th Cir. 1992) (quoting *United States v. Smith*, 18 U.S. 153, 160–61, 5 Wheat. 153, 5 L.Ed. 57 (1820)).

[74] Plaintiffs allege that the duty of non-*refoulement* is a *jus cogens* norm recognized by the law of nations. (SAC ¶¶ 227–35.)[14] And, in opposition to dismissal, Plaintiffs elaborate on these allegations

14. "As defined in the Vienna Convention on the Law of Treaties, a *jus cogens* norm, also

under the applicable standard, locating the asserted *jus cogens* norm in (1) a range of fundamental international treaties, including Article 33 of the Convention on the Status of Refugees and its Protocol ("Refugee Convention"), Article 13 of the International Covenant on Civil and Political Rights ("ICCPR"), and Article 3 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment ("CAT"); (2) statements by international law bodies, including the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR); and (3) international law commentators. (ECF No. 210 at 27–30.) Defendants simply fail to grapple with Plaintiffs' allegations or arguments on whether non-*refoulement* is a norm that is recognized by the law of nations.[15]

The only somewhat applicable argument Defendants raise is that "even if the Extraterritorial Plaintiffs had raised tort claims, Defendants' alleged conduct does not come close to the type of egregious 'violations of the law of nations' even potentially within the ATS's grant of jurisdiction." (ECF No. 192-1 at 25 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) as "allowing wrongful death claim to proceed against Paraguayan police supervisor alleged to have 'deliberate[ly] tortured' an individual in Paraguay 'under color of official authority' "). The inquiry under the ATS, however, does not turn on subjective assertions about whether the challenged conduct is "egregious" or not. The Court can only understand Defendants' current briefing to concede, at this stage, the core contention underlying Plaintiffs' ATS claims that there exists a recognized duty of non-*refoulement* that qualifies as an international law norm under the law of nations.

2. The INA Does Not "Preempt" Plaintiffs' ATS Claims

[75] Defendants' second argument is that the existence of a "comprehensive and

known as a 'peremptory norm' of international law, 'is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.' " *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (quoting Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679). Courts determine whether a *jus cogens* norm exists by looking to the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law, but courts must make the additional determination "whether the international community recognizes the norm as one 'from which no derogation is permitted.' " *Id.* (quoting *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988)).

15. None of Defendants' dismissal arguments grapples with the Plaintiffs' fundamental contention that non-refoulement is a *jus cogens* norm whose violation is actionable. Defendants initially moved to dismiss the "non-*refoulement* claims" of the New Individual Plaintiffs allegedly in Mexico at the time of their alleged injuries on three grounds. First, Defendants argued that each of the treaties the SAC identifies is not independently enforceable and separately analyzed each treaty. (ECF No. 192-1 at 23–24.) Second, Defendants argued that the Refugee Act of 1980 does not provide Plaintiffs with any independent cause of action in this Court because the Act only allows claims to be adjudicated defensively before an immigration judge or affirmatively before USCIS. (*Id.* at 24.) These arguments elide the ATS claims that Plaintiffs have actually pleaded. Plaintiffs' opposition brief expressly observes that Defendants' opening brief fundamentally misconstrues Plaintiffs' ATS claims. (ECF No. 210 at 27.) And the SAC is fairly clear in alleging Plaintiffs' theory that the duty of non-*refoulement* is a *jus cogens* norm whose violation is actionable—not that each individual treaty cited in the SAC is a separate basis for Plaintiffs' ATS claims.

exclusive scheme of legislation" under the INA "preempt[s] the enforcement of a freestanding international law norm of non-*refoulement* in this Court." (ECF No. 238 at 17–18.) Curiously, Defendants raise this argument while arguing in the same breath that the New Individual Plaintiffs fall outside the scope of the relevant INA provisions in this case. If this latter argument is to be credited, then there is no comprehensive and exclusive scheme under which these Plaintiffs could seek relief and Defendants' argument collapses.

In any event, the Court has already rejected Defendants' argument. The Court expressly stated in the prior dismissal order, "[t]o the extent that Defendants contend that the ATS claims must be dismissed because a remedy is available under domestic law, the Court rejects that argument. 'Contrary to defendants' argument, there is no absolute preclusion of international law claims by the availability of domestic remedies for the same alleged harm.' " *Al Otro Lado Inc.*, 327 F. Supp. 3d at 1307 n.10 (quoting *Hawa Abdi Jama v. United States INS*, 22 F. Supp. 2d 353, 364 (D.N.J. 1998)). Defendants' latest assertion of their prior argument under a "preemption" label overlooks *Jama*'s express recognition that "there is nothing in the [ATS] which limits its applications to situations where there is no relief available under domestic law" and *Jama*'s conclusion that "[t]here is no reason why plaintiffs cannot seek relief on alternative grounds." *Jama*, 22 F. Supp. 2d at 364. Defendants otherwise direct the Court to cases in which federal courts rejected an alien's attempt to rely on international law norms to seek immigration relief and, in doing so, stated that "[w]here a controlling executive or legislative act does exist, customary international law is inapplicable." *Cortez-Gastelum v. Holder*, 526 Fed. App'x 747 (9th Cir. 2013); *Galo-Garcia v. INS*, 86 F.3d 916, 918 (9th Cir. 1996). Defendants' reliance on this caselaw underscores for the Court that, at a minimum, Plaintiffs may plead their ATS claims as alternative claims in the event that their INA-based claims fail. *See* Fed. R. Civ. P. 8(a)(3) ("A pleading that states a claim for relief must contain . . . a demand for the relief sought, which may include relief in the alternative or different types of relief."); Fed. R. Civ. P. 8(d)(3) ("A party may state as many separate claims . . . as it has, regardless of consistency."). Thus, the Court rejects Defendants' "preemption" argument.

* * *

[76] Nevertheless, the Court observes that Plaintiffs do not cite a single case in which another federal court has recognized that the duty of non-*refoulement* is actionable through a federal court's ATS jurisdiction. The paucity of such caselaw should at least give this Court pause on whether it is appropriate to recognize the particular ATS cause of action the Individual Plaintiffs raise in this case. Having reviewed Defendants' present dismissal arguments, however, the Court cannot conclude that it lacks jurisdiction over the Individual Plaintiffs' ATS claims. Because the ATS is a jurisdictional statute, Defendants are not foreclosed from challenging the Plaintiffs' ATS claims at a later stage. *See* Fed. R. Civ. P. 12(h)(3) (recognizing that subject matter jurisdiction can be assessed "at any time"); *see also Baloco v. Drummond Co.*, 767 F.3d 1229, 1234 (11th Cir. 2014) (affirming dismissal of ATS claims under Rule 12(b)(1)); *Best Med. Belg., Inc. v. Kingdom of Belg.*, 913 F. Supp. 2d 230, 236 (E.D. Va. 2012) ("The [ATS] is jurisdictional in nature and also subject to challenge by a Rule 12(b)(1) motion."); *In re Chiquita Brands Int'l, Inc.*, 792 F. Supp. 2d 1301, 1354 (S.D. Fla. 2011) (observing that "a

complaint that fails to sufficiently plead the elements of an ATS claim is analyzed under Rule 12(b)(1)").

CONCLUSION & ORDER

For the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' motion to dismiss the SAC. The Court **GRANTS** Defendants' motion as follows:

1. The Court **DISMISSES WITHOUT LEAVE TO AMEND** the Section 706(1) claims of the New Individual Plaintiffs for alleged failures to take agency action required by 8 U.S.C. § 1225(b)(2)(A).

2. The Court **DISMISSES WITH PREJUDICE** Organizational Plaintiff Al Otro Lado's ATS claim for lack of subject matter jurisdiction.

The Court otherwise **DENIES** Defendants' motion to dismiss the SAC. Defendants **SHALL ANSWER** the SAC **no later than August 16, 2019**. Given the length of time this case has been pending at the motion to dismiss stage, the Court will not grant extensions of the deadline.

The court **WITHDRAWS** the previously docketed July 29, 2019 order (ECF no. 278) and **REPLACES** it with this Amended Order. Because the Amended Order is substantively the same, the Court does not alter any deadlines.

IT IS SO ORDERED.

B & L PRODUCTIONS, INC. d/b/a Crossroads of the West et al., Plaintiffs,

v.

22ND DISTRICT AGRICULTURAL ASSOCIATION et al., Defendants.

Case No.: 3:19-CV-134-CAB-NLS

United States District Court, S.D. California.

Signed 06/25/2019

Background: Operator of gun show and individuals and entities that participated in the show brought action against district agricultural association, association's president and vice-president, and Secretary of the California Department of Food & Agriculture, alleging that a one-year moratorium on gun show events to study potential safety concerns violated First and Fourteenth Amendments, and seeking declaratory relief, injunctive relief, and damages. Defendants filed motion to dismiss, and plaintiffs filed motion for summary judgment.

Holdings: The District Court, Cathy Ann Bencivengo, J., held that:

(1) president and vice-president were entitled to qualified immunity;

(2) secretary was entitled to sovereign immunity;

(3) summary judgment would be denied to permit further discovery;

(4) moratorium was content-based regulation subject to strict scrutiny;

(5) association was unlikely to show compelling state interest supporting moratorium, thus supporting injunction;

(6) moratorium was not narrowly tailored; and

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

AL OTRO LADO, INC., a California corporation; ABIGAIL DOE, BEATRICE DOE, CAROLINA DOE, DINORA DOE, INGRID DOE, ROBERTO DOE, MARIA DOE, JUAN DOE, ÚRSULA DOE, VICTORIA DOE, BIANCA DOE, EMILIANA DOE, AND CÉSAR DOE individually and on behalf of all others similarly situated,

Plaintiffs,

v.

KIRSTJEN M. NIELSEN, Secretary, United States Department of Homeland Security, in her official capacity; KEVIN K. MCALEENAN, Commissioner, United States Customs

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

Honorable Cynthia A. Bashant

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF FOR:

(1) VIOLATION OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. § 1101, *ET SEQ.*

(2) VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 551, *ET SEQ.*

and Border Protection, in his official capacity; TODD C. OWEN, Executive Assistant Commissioner, Office of Field Operations, United States Customs and Border Protection, in his official capacity; and DOES 1-25, inclusive,

Defendants.

(3) VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION (PROCEDURAL DUE PROCESS)

(4) VIOLATION OF THE *NON-REFOULEMENT* DOCTRINE

CLASS ACTION

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I. INTRODUCTION

Plaintiff Al Otro Lado, Inc. ("Al Otro Lado"), a non-profit legal services organization, and Plaintiffs Abigail Doe, Beatrice Doe, Carolina Doe, Dinora Doe, Ingrid Doe, Roberto Doe, Maria Doe, Juan Doe, Úrsula Doe, Victoria Doe, Bianca Doe, Emiliana Doe, and César Doe ("Class Plaintiffs"), acting on their own behalf and on behalf of all similarly situated individuals, allege as follows:

1. Class Plaintiffs are noncitizens who have fled grave harm in their countries to seek protection in the United States. All of them sought to access the U.S. asylum process by presenting themselves at official ports of entry ("POEs," or individually, "POE") along the U.S.-Mexico border, but were denied such access by or at the instruction of U.S. Customs and Border Protection ("CBP") officials pursuant to a policy initiated by Defendants or practices effectively ratified by Defendants in contravention of U.S. and international law.

2. Since 2016 and continuing to this day, CBP has engaged in an unlawful, widespread pattern and practice of denying asylum seekers access to the asylum process at POEs on the U.S.-Mexico border through a variety of illegal tactics. These tactics include lying; using threats, intimidation and coercion; employing verbal abuse and applying physical force; physically obstructing access to the POE building; imposing unreasonable delays before granting access to the asylum process; denying outright access to the asylum process; and denying access to the asylum process in a racially discriminatory manner. Since the presidential election, CBP officials have, for example, misinformed asylum seekers that they could not apply for asylum because "Donald Trump just signed new laws saying there is no asylum for anyone," coerced asylum seekers into signing forms abandoning their asylum claims by threatening to take their children away, threatened to deport asylum seekers back to their home countries (where they face persecution) if they persisted in their attempts to seek asylum, and even forcefully removed asylum seekers from POEs. In March 2018, four Guatemalan asylum

seekers at an El Paso POE, were denied access to the asylum process after CBP officials told them that "Guatemalans make us sick." As recently as September 2018, CBP denied access to an asylum seeker who was four months pregnant and a victim of sexual violence. These practices all violate U.S. law, which requires that asylum seekers "shall" have access to the asylum process.

3. In addition, beginning around 2016, high-level CBP officials, under the direction or with the knowledge or authorization of the named Defendants (the "Defendants"), adopted a formal policy to restrict access to the asylum process at POEs by mandating that lower-level officials directly or constructively turn back asylum seekers at the border (the "Turnback Policy") contrary to U.S. law. In accordance with the Turnback Policy, CBP officials have used and are continuing to use various methods to unlawfully deny asylum seekers access to the asylum process based on purported—but ultimately untrue—assertions that there is a lack of "capacity" to process them. These methods include coordinating with Mexican immigration authorities and other third parties to implement a "metering," or waitlist, system that creates unreasonable and life-threatening delays in processing asylum seekers; instructing asylum seekers to wait on the bridge, in the pre-inspection area, or at a shelter until there is adequate space at the POE; or simply asserting to asylum seekers that they cannot be processed because the POE is "full" or "at capacity." On information and belief, the claims of a lack of capacity are false.

4. Both Defendants' widespread practice of denying access to the asylum process and their formal Turnback Policy are designed to serve the Trump administration's broader, publicly proclaimed goal of deterring individuals from seeking access to the asylum process. Rather than changing existing law, the Administration is simply not following it. The Turnback Policy also reflects the Trump administration's significant antipathy to the fundamental humanitarian

principles embodied in asylum laws, as well as to the Central and South American populations seeking access to the asylum process in the United States.

5. In the spring of 2018, and in response to the anticipated arrival of a sizeable number of asylum seekers who had traveled together on the dangerous journey North in a so-called "caravan," high-level Trump administration officials publicly and unambiguously proclaimed the existence of their policy to intentionally restrict access to the asylum process at POEs in violation of U.S. law. Attorney General Jefferson B. Sessions pledged that asylum seekers would not "stampede" our borders and announced a related "Zero Tolerance" policy to prosecute all who enter the country unlawfully, and thereby to separate them from their children (the very threat a number of Plaintiffs received when attempting to seek asylum). Around the same time, United States Department of Homeland Security ("DHS") Secretary Kirstjen Nielsen characterized the asylum process—mandated by U.S. statute and international law—as a legal "loophole" and publicly announced a "metering" process designed to restrict—and to constructively deny—access to the asylum process through unreasonable and dangerous delay.

6. Indeed, President Trump offered a public, full-throated and racially-discriminatory defense of his administration's aggressive implementation of the Turnback Policy and the related, widespread CBP practice of denying access to the asylum process, by referring to asylum seekers as "criminals" and "animals" seeking to "infest" and "invade" the United States, and by specifically stating, via tweet, that the United States "must bring them back from where they came" and must "escort them back without going through years of legal maneuvering."

7. Soon afterward, CBP officials implemented the Turnback Policy through a tactic of asserting a "lack of capacity" to process asylum-seekers and by coordinating with Mexican officials to prevent or delay asylum seekers from reaching inspection points at POEs, even as CBP officials knew or should have known of the dangerous conditions of rampant crime and violence by gangs and

cartels on the Mexican side of the border. The unreasonable delays imposed on asylum seekers—which are done pursuant to the Trump administration's broader goal of deterring future asylum seekers from presenting at the border at all—also amount to a constructive denial of access to the asylum process.

8. As detailed more fully below, the Turnback Policy comes from high-level U.S. government officials and is having the intended effect of severely restricting—and constructively denying—access to the asylum process at POEs. Indeed, an October 2018 report by DHS's Office of Inspector General ("OIG") concluded that CBP has been "regulating the flow of asylum-seekers at ports of entry," and that by limiting the volume of asylum seekers entering at POEs, the government has prompted some individuals "who would otherwise seek legal entry into the United States to cross the border illegally."[1]

9. Many desperate asylum seekers, faced with the consequences of the Turnback Policy and unlawful CBP practices, have felt compelled to enter the United States outside of POEs, often by swimming across the Rio Grande or paying smugglers exorbitant sums to transport them, to reach safety as quickly as possible.

10. On information and belief, CBP's conduct pursuant to the Turnback Policy and other unlawful practices were and continue to be performed at the instigation, under the control or authority of, or with the direction, knowledge, consent or acquiescence of Defendants. By refusing to follow the law, Defendants have caused, and will continue to cause, Class Plaintiffs and Al Otro Lado concrete and demonstrable injuries and irreparable harm.

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[1] U.S. Dep't of Homeland Sec., Office of the Inspector Gen., OIG-18-84, *Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* 5-6 (2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf [hereinafter *OIG Report*].

11. Each of the Class Plaintiffs has been subject to Defendants' pattern and practice of denying access to the asylum process and/or to the Turnback Policy.

12. Defendants have deprived Class Plaintiffs and similarly situated individuals of their statutory and international-law rights to apply for asylum, violated their due process rights under the Fifth Amendment to the United States Constitution, and violated the United States' obligations under international law to uphold the principle of *non-refoulement*. Defendants' Turnback Policy and other unlawful practices also constitute unlawful agency action that should be set aside and enjoined pursuant to the Administrative Procedure Act, 5 U.S.C. § 706. Each Class Plaintiff has attempted to access the asylum process and would seek to do so again, but for Defendants' systematic, illegal Turnback Policy and other unlawful practices at issue in this action, which have impeded their access.

13. Defendants have caused injury to Plaintiff Al Otro Lado by frustrating its ability to advance and maintain its central institutional mission and forcing the organization to divert substantial portions of its limited time and resources away from its various programs in Los Angeles, California, and Tijuana, Mexico, to counteract the effects of the Turnback Policy and Defendants' other unlawful practices.

14. Despite persistent advocacy by Al Otro Lado and other advocates, and despite Class Plaintiffs' desperate need and right to seek asylum without delay in the United States, CBP shows no signs of abating its illegal policy and practices. Accordingly, Al Otro Lado and Class Plaintiffs require the intervention of this Court to declare that Defendants' conduct violates U.S. and international law, to enjoin Defendants from continuing to violate the law, and to order Defendants to implement procedures to ensure effective compliance with the law, including, without limitation, oversight and accountability in the inspection and processing of

asylum seekers. Absent the Court's intervention, CBP's unlawful conduct will continue to imperil the lives and safety of countless vulnerable asylum seekers.

II. JURISDICTION AND VENUE

15. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1346, and 1350. Defendants have waived sovereign immunity for purposes of this suit pursuant to 5 U.S.C. § 702. The Court has authority to grant declaratory relief under 28 U.S.C. §§ 2201 and 2202.

16. Venue is proper in this district under 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to the claim occurred at or in the vicinity of the San Ysidro POE. All Defendants are sued in their official capacity.

III. PARTIES

A. Plaintiffs

17. Plaintiff Al Otro Lado is a non-profit, non-partisan organization incorporated in California and established in 2014. Al Otro Lado is a legal services organization serving indigent deportees, migrants, refugees and their families, principally in Los Angeles, California, and Tijuana, Mexico. Al Otro Lado's mission is to coordinate and to provide screening, advocacy, and legal representation for individuals in asylum and other immigration proceedings, to seek redress for civil rights violations, and to provide assistance with other legal and social service needs. Defendants have frustrated Al Otro Lado's mission and have forced Al Otro Lado to divert significant resources away from its other programs to counteract CBP's illegal practice of turning back asylum seekers at POEs.

18. Through its Border Rights Project in Tijuana, Mexico, Al Otro Lado assists individuals seeking protection from persecution in the United States. In response to CBP's unlawful policy and practices, Al Otro Lado has had to expend significant organizational time and resources and alter entirely its previously used

large-scale clinic model. For example, Al Otro Lado previously held large-scale, mass-advisal legal clinics in Tijuana that provided a general overview on asylum laws and procedures. This type of assistance (similar to the Legal Orientation Program of the Executive Office for Immigration Review) only was workable when CBP allowed asylum seekers into the United States in accordance with the law.

19. Since 2016, however, CBP's illegal conduct has compelled Al Otro Lado to expend significant time and resources to send representatives to Tijuana from Los Angeles multiple times per month for extended periods to provide more individualized assistance and coordination of legal and social services, including individual screenings and in-depth trainings to educate volunteer attorneys and asylum seekers regarding CBP's unlawful policy and practices and potential strategies to pursue asylum in the face of CBP's tactics. Whereas Al Otro Lado previously was able to accommodate several dozen attorneys and over 100 clients at a time in its large-scale clinics, Al Otro Lado has been forced to transition to an individualized representation model where attorneys are required to work with asylum seekers one-on-one and provide direct representation. Al Otro Lado has expended (and continues to expend) significantly more resources recruiting, training and mentoring pro bono attorneys to help counteract CBP's unlawful policy and practices. Nevertheless, even asylum seekers provided with such individualized pro bono representation are being turned back by CBP in violation of the law.

20. Al Otro Lado also has spent time and resources advocating that CBP provide asylum seekers with access to the asylum process and cease using unlawful tactics to circumvent its legal obligations. For example, Al Otro Lado representatives have filed numerous complaints with the U.S. government detailing examples of CBP's unlawful policy and practices depriving asylum seekers of access to the asylum process.

21. Such diversion of Al Otro Lado's time and resources negatively impacts its other programs. For example, Al Otro Lado has not been able to pursue funding for or otherwise advance the following programs: (1) its Deportee Reintegration Program through which Al Otro Lado assists deportees who struggle to survive in Tijuana, many of whom have no Mexican identity documents or health coverage, and may not even speak Spanish; and (2) its Cross-Border Family Support Program through which Al Otro Lado assists families with cross-border custody issues, and helps connect family members residing in the United States to social, legal, medical and mental health services. Al Otro Lado has all but ceased its programmatic work with deportees and families separated by deportation due to the diversion of resources caused by CBP's unlawful actions.

22. In addition, the constraints on Al Otro Lado's limited time and resources have negatively impacted its operations in Los Angeles, including delaying the opening and expansion of its Los Angeles office through which it coordinates "Wraparound" services for low-income immigrants in Los Angeles. The increased need for on-the-ground support in Tijuana has impacted Al Otro Lado's ability to satisfy its clinical obligations for low-income immigrants at the Wellness Center, located on the grounds of the Los Angeles County+USC Medical Center, and to conduct outreach to provide free legal assistance to homeless individuals in Los Angeles to allow them to better access permanent supportive housing, employment and educational opportunities.

23. Al Otro Lado continues to be harmed by Defendants because CBP's illegal conduct at or in the vicinity of the border frustrates its organizational mission and forces Al Otro Lado to divert resources from its other objectives. If Al Otro Lado had not been compelled to divert resources to address CBP's unlawful conduct at the U.S.-Mexico border, it would have directed these resources toward its other programs to further the advancement of its core mission.

24. Plaintiff Abigail Doe is a female native and citizen of Mexico. She is the mother of two children under the age of ten.[2] Abigail and her family have been targeted and threatened with death or severe harm in Mexico by a large drug cartel that had previously targeted her husband, leaving her certain she would not be protected by local officials. Abigail fled with her two children to Tijuana, where they presented themselves at the San Ysidro POE. On behalf of herself and her children, Abigail expressed her fear of returning to Mexico and her desire to seek asylum in the United States. CBP officials coerced Abigail into recanting her fear and signing a form withdrawing her application for admission to the United States. As a result of this coercion, the form falsely states that Abigail does not have a credible fear of returning to Mexico. As a result of Defendants' conduct, Abigail and her children were unable to access the asylum process and were forced to return to Tijuana, where at the time the initial Complaint was filed, they remained in fear for their lives. Following the filing of the initial Complaint in this case, Defendants made arrangements to facilitate the entry of Abigail and her children into the United States.

25. Plaintiff Beatrice Doe is a female native and citizen of Mexico. She is the mother of three children under the age of sixteen. Beatrice and her family have been targeted and threatened with death or severe harm in Mexico by a dangerous drug cartel; she was also subject to severe domestic violence. Beatrice fled with her children and her nephew to Tijuana, where they presented themselves once at the Otay Mesa POE and twice at the San Ysidro POE. On behalf of herself and her children, Beatrice expressed her fear of returning to Mexico and her desire to seek asylum in the United States. CBP officials coerced Beatrice into recanting her fear and signing a form withdrawing her application for admission to the United States. As a result of this coercion, the form falsely states that Beatrice and her children

[2] The ages listed for children of Abigail Doe, Beatrice Doe, Carolina Doe, and Dinora Doe are as they were at the time the initial Complaint was filed.

have no fear of returning to Mexico. As a result of Defendants' conduct, Beatrice and her children were unable to access the asylum process and were forced to return to Tijuana, where at the time the initial Complaint was filed, they remained in fear for their lives. While she was sheltered in Tijuana, her abusive spouse located her and coerced her and her children to return home with him.

26. Plaintiff Carolina Doe is a female native and citizen of Mexico. She is the mother of three children. Carolina's brother-in-law was kidnapped and dismembered by a dangerous drug cartel in Mexico, and after the murder, her family also was targeted and threatened with death or severe harm. Carolina fled with her children to Tijuana, where they presented themselves at the San Ysidro, POE. On behalf of herself and her children, Carolina expressed her fear of returning to Mexico and her desire to seek asylum in the United States. CBP officials coerced Carolina into recanting her fear on video and signing a form withdrawing her application for admission to the United States. As a result of this coercion, the form falsely states that Carolina and her children have no fear of returning to Mexico. As a result of Defendants' conduct, Carolina and her children were unable to access the asylum process and were forced to return to Tijuana, where at the time the initial Complaint was filed, they remained in fear for their lives. Following the filing of the initial Complaint in this case, Defendants made arrangements to facilitate the entry of Carolina and her children into the United States.

27. Plaintiff Dinora Doe is a female native and citizen of Honduras. Dinora and her eighteen-year-old daughter have been targeted, threatened with death or severe harm, and repeatedly raped by MS-13 gang members. Dinora fled with her daughter to Tijuana, where they presented themselves at the Otay Mesa, POE on three occasions. Dinora expressed her fear of returning to Honduras and her desire to seek asylum in the United States. CBP officials misinformed Dinora about her rights under U.S. law and denied her the opportunity to access the

asylum process. As a result of Defendants' conduct, Dinora and her daughter were forced to return to Tijuana, where at the time the initial Complaint was filed, they remained in fear for their lives. Following the filing of the initial Complaint in this case, Defendants made arrangements to facilitate the entry of Dinora and her daughter into the United States.

28. Plaintiff Ingrid Doe is a female native and citizen of Honduras. At the time the initial Complaint was filed, she had two children and was pregnant with her third child. Ingrid's mother and three siblings were murdered by 18th Street gang members in Honduras. After the murders, 18th Street gang members threatened to kill Ingrid. Ingrid and her children were also subject to severe domestic violence. Ingrid fled with her children to Tijuana, where they presented themselves at the Otay Mesa POE and at the San Ysidro POE. On behalf of herself and her children, Ingrid expressed her fear of returning to Honduras and her desire to seek asylum in the United States. CBP officials misinformed Ingrid about her rights under U.S. law and denied her the opportunity to access the asylum process. As a result of Defendants' conduct, Ingrid and her children were forced to return to Tijuana, where at the time the initial Complaint was filed, they remained in fear for their lives. Following the filing of the initial Complaint in this case, Defendants made arrangements to facilitate the entry of Ingrid and her children into the United States.

29. Plaintiff Roberto Doe is a male native and citizen of Nicaragua. Fearing for his life and the lives of his family members, Roberto fled Nicaragua due to threats of violence from the Nicaraguan government and paramilitaries allied with the government. Roberto sought access to the asylum process by presenting himself at the Hidalgo, Texas POE. When he encountered CBP officials in the middle of the bridge, he told them that he wanted to seek asylum in the United States. CBP officials denied Roberto access to the asylum process by telling him the POE was full and that he could not enter. Mexican officials then

escorted Roberto back to Mexico. At the time of the filing of the First Amended Complaint, Roberto desired to return immediately to the Hidalgo POE to seek asylum, but based on his experiences and the experiences of others with CBP's practices at the U.S.-Mexico border, he understood that he would likely be turned away again. After the filing of the First Amended Complaint, Roberto did return to the Hidalgo POE, where Mexican officials detained him as he was walking onto the international bridge to seek access to the asylum process in the United States. Roberto remains in the custody of the Mexican government. On information and belief, his *refoulement* to Nicaragua is imminent. He can no longer remain in Mexico and has no place else to turn for safety but the United States.

30. Plaintiff Maria Doe is a female native and citizen of Guatemala and a permanent resident of Mexico. She was married to a Mexican citizen, with whom she has two children who were both born in Mexico. Since Maria left her husband, who was abusive and is involved with cartels, two different cartels have been tracking and threatening her. Maria and her children fled and sought access to the asylum process by presenting themselves at the Laredo, Texas POE. When Maria encountered CBP officials in the middle of the bridge, she told them that she and her children wanted to seek asylum in the United States. CBP officials told them to wait on the Mexican side of the bridge. There, two Mexican officials told Maria that U.S. officials would not let her and her children cross the bridge, but that they could help her if she paid a bribe. Having no money to pay the bribe, Maria traveled with her children to Reynosa, Mexico. There, accompanied by an American lawyer, they sought access to the asylum process by presenting themselves at the Hidalgo POE. On the Mexican side of the bridge leading to the Hidalgo POE, a Mexican official threatened to destroy Maria's identity documents if she and her children did not leave the bridge. Two weeks later, Maria and her children, accompanied by the same American lawyer, again sought access to the asylum process by presenting themselves at the Hidalgo POE. When Maria

encountered CBP agents at the middle of the bridge, she told them that she and her children wanted to seek asylum in the United States. Mexican officials then forced Maria and her children off the bridge. Although Maria and her lawyer repeatedly told CBP officials that she and her children wanted to seek asylum in the United States, the CBP officials denied Maria and her children access to the asylum process. At the time the First Amended Complaint was filed, Maria and her children desired to return immediately to a POE to seek asylum, but based on their experience and the experiences of others with CBP's practices at the U.S.-Mexico border, she understood that they would likely be turned away again. Maria and her children remained in Mexico, where their lives were in danger. They could no longer remain in Mexico and had no place else to turn for safety but the United States. Following the filing of the First Amended Complaint in this case, Defendants made arrangements to facilitate the entry of Maria and her children into the United States.

31. Plaintiff Juan Doe is a male native and citizen of Honduras. Plaintiff Úrsula Doe is a female native and citizen of Honduras. Juan and Úrsula are husband and wife and together have two children, twin thirteen-year-old boys. They fled Honduras with their sons after receiving death threats from gangs. Juan, Úrsula, and their children sought access to the asylum process by presenting themselves at the Laredo POE. When Juan, Úrsula, and their children reached the middle of the bridge to the POE, CBP officials denied them access to the asylum process by telling them the POE was closed and that they could not enter. Juan, Úrsula, and their children subsequently tried to seek access to the asylum process by presenting themselves at the Hidalgo POE, but Mexican officials stopped them just as they were entering the pedestrian walkway on the Reynosa bridge and threatened to deport them to Honduras if they did not leave. At the time the First Amended Complaint was filed, Juan, Úrsula, and their children desired to return immediately to the Hidalgo POE to seek asylum, but based on their experience and

the experiences of others with CBP's practices at the U.S.-Mexico border, they understood that they would likely be turned away again. At that time, Juan, Úrsula, and their children resided in Reynosa, Mexico, where they remained in fear for their lives. They could no longer remain in Mexico and had no place else to turn for safety but the United States. Following the filing of the First Amended Complaint in this case, Defendants made arrangements to facilitate the entry of Juan, Úrsula, and their children into the United States.

32. Plaintiff Victoria Doe is a sixteen-year old female native and citizen of Honduras. Victoria has been threatened with severe harm and death by members of the 18th Street gang for refusing to become the girlfriend of one of the gang's leaders. Fearing for her life, Victoria fled to Mexico where she gave birth to her son. Victoria and her son sought access to the asylum process by presenting themselves at the San Ysidro POE. When Victoria expressed her desire to seek asylum in the United States, CBP officers denied her access to the asylum process by stating that she could not apply for asylum at that time and telling her to speak to a Mexican official without providing any additional information. At the time the First Amended Complaint was filed, Victoria desired to return immediately to the San Ysidro POE to seek asylum on behalf of herself and her son, but based on her experience and the experience of others with CBP's practices at the U.S.-Mexico border, she understood that she would likely be turned away again. At that time, Victoria and her son were residing in a shelter in Tijuana, but could no longer remain in Mexico because of threats from gangs who continued to target them in Mexico. They had no place else to turn for safety but the United States. Following the filing of the First Amended Complaint in this case, Defendants made arrangements to facilitate the entry of Victoria and her child into the United States.

33. Plaintiff Bianca Doe is a transgender woman who is a native and citizen of Honduras. Bianca has been subjected to extreme and persistent physical and sexual assault, as well as discrimination and ongoing threats of violence in

Honduras and Mexico City, where she subsequently moved, because she is a transgender woman. Fearing for her safety based on numerous threats and harassment, including at the hands of Mexican police, Bianca fled to Tijuana and sought access to the asylum process by presenting herself at the San Ysidro POE. CBP officers denied Bianca access to the asylum process by stating that she could not apply at that time because they were at capacity. Bianca returned to the POE the next day. She was given a piece of paper with the number "919," placed on a waiting list, and told that she would have to wait several weeks to proceed to the POE. Feeling desperate and unsafe, Bianca attempted to enter the United States without inspection by climbing a fence on a beach in Tijuana. Once over the fence, a U.S. Border Patrol officer stopped Bianca, who expressed her desire to seek asylum in the United States. The U.S. Border Patrol officer told Bianca that there was no capacity in U.S. detention centers and threatened to call Mexican police if Bianca did not climb the fence back into Mexico. Terrified, Bianca returned to Mexico. Bianca subsequently sought access to the asylum process by again presenting herself at the San Ysidro POE. She was told, once again, that CBP had no capacity for asylum seekers. At the time the First Amended Complaint was filed, Bianca desired like to return immediately to the San Ysidro POE to seek asylum, but based on her experience and the experience of others with CBP's practice at the U.S.-Mexico border, she understood that she would likely be turned away again. At that time, Bianca was residing in a shelter in Tijuana where she feared further violence as a transgender woman. She could no longer remain in Mexico and had no place else to turn for safety but the United States. Following the filing of the First Amended Complaint in this case, Defendants made arrangements to facilitate Bianca's entry into the United States.

34. Plaintiff Emiliana Doe is a transgender woman and a native and citizen of Honduras. Emiliana was subjected to multiple sexual and physical assaults, kidnapping, discrimination, as well as threats of severe harm and violence

in Honduras because she is a transgender woman. Fearing for her life, she made an arduous and dangerous journey to Mexico, where she was raped repeatedly and threatened with death. After arriving in Tijuana, Emiliana sought access to the asylum process by presenting herself at the San Ysidro POE and stating her intention to apply for asylum in the United States. She was given a piece of paper with the number "1014" on it, placed on a waiting list, and told to return in six weeks. Feeling desperate and unsafe, Emiliana returned to the POE just a few weeks later. CBP officers denied Emiliana access to the asylum process by telling her that there was no capacity for asylum seekers and instructing her to wait for Mexican officials. At the time the First Amended Complaint was filed, Emiliana desired like to return immediately to the San Ysidro POE to seek asylum, but based on her past experience with CBP's practice at the U.S.-Mexico border, she understood that she would likely be turned away again. At that time, Emiliana was residing in a hotel in Tijuana where she feared further violence as a transgender woman. She suffers from serious health issues caused by a stroke two years ago, could no longer remain in Mexico, and had no place else to turn for safety but the United States. Following the filing of the First Amended Complaint in this case, Defendants made arrangements to facilitate Emiliana's entry into the United States.

35. Plaintiff César Doe is an eighteen-year old male native and citizen of Honduras. César has been threatened numerous times with severe harm and death and kidnapped by members of the 18th Street gang. Fearing for his life, César fled Honduras and traveled to Tijuana. César sought access to the asylum process by presenting himself at the San Ysidro POE, but was intercepted by individuals belonging to "Grupo Beta." César was told he would be placed on a waitlist, but instead was detained for twelve days by Mexican immigration under threat of deportation to Honduras. After an individual at a local shelter secured César's release from detention, he returned to the San Ysidro POE and was placed on a waitlist. After a few weeks, César again sought access to the asylum process by

presenting himself at the San Ysidro POE, but CBP officers refused to accept him. A few weeks later, he returned to the San Ysidro POE, but members of Grupo Beta intercepted him and threatened to call Mexican immigration officials and child protective services. A staff member from Plaintiff Al Otro Lado intervened and escorted César back to the shelter. At the time the First Amended Complaint was filed, César desired to return immediately to the San Ysidro POE to seek asylum, but based on his experience and the experiences of others with CBP's practices at the U.S.-Mexico border, he understood that he would likely be turned away again. At that time, César wass residing in a shelter in Tijuana, could no longer remain in Mexico because of crime, violence and threats from gangs, and had no place else to turn for safety but the United States. Following the filing of the First Amended Complaint in this case, Defendants made arrangements to facilitate César's entry into the United States.

B. Defendants

36. Defendant Kirstjen Nielsen is the Secretary of DHS. In this capacity, she is charged with enforcing and administering U.S. immigration laws. She oversees each of the component agencies within DHS, including CBP, and has ultimate authority over all CBP policies, procedures and practices. She is responsible for ensuring that all CBP officials perform their duties in accordance with the Constitution and all relevant laws.

37. Defendant Kevin K. McAleenan is the Commissioner of CBP. In this capacity, he has direct authority over all CBP policies, procedures and practices, and is responsible for ensuring that all CBP interactions with asylum seekers are performed in accordance with the Constitution and all relevant laws. Defendant McAleenan oversees a staff of more than 60,000 employees, manages a budget of more than $13 billion, and exercises authority over all CBP operations.

38. Defendant Todd C. Owen is the Executive Assistant Commissioner of CBP's Office of Field Operations ("OFO"). OFO is the largest component of CBP

and is responsible for border security, including immigration and travel through U.S. POEs. Defendant Owen exercises authority over 20 major field offices and 328 POEs. Defendant Owen oversees a staff of more than 29,000 employees, including more than 24,000 CBP officials and specialists, and manages a budget of more than $5.2 billion. Defendant Owen is responsible for ensuring that all OFO officials perform their duties in accordance with the Constitution and all relevant laws.

39. Does 1 through 25, inclusive, are sued herein under fictitious names inasmuch as their true names and capacities are presently unknown to Al Otro Lado and Class Plaintiffs. Al Otro Lado and Class Plaintiffs will amend this complaint to designate the true names and capacities of these parties when the same have been ascertained. Al Otro Lado and Class Plaintiffs are informed and believe, and on that basis allege, that Does 1 through 25, inclusive, were agents or alter egos of Defendants, or are otherwise responsible for all of the acts hereinafter alleged. Al Otro Lado and Class Plaintiffs are informed and believe, and on that basis allege, that the actions of Does 1 through 25, inclusive, as alleged herein, were duly ratified by Defendants, with each Doe acting as the agent or alter ego of Defendants, within the scope, course, and authority of the agency. Defendants and Does 1 through 25, inclusive, are collectively referred to herein as "Defendants."

IV. FACTUAL BACKGROUND

A. Humanitarian Crisis South of the U.S.-Mexico Border

40. In recent years, children and adults have fled horrendous persecution in their home countries and arrived at POEs along the U.S.-Mexico border to seek protection in the United States through the asylum process. While asylum seekers travel to the U.S.-Mexico border from all across the world, including from Haiti, Cuba, Venezuela and Iraq, the vast majority of these individuals come from Guatemala, Honduras and El Salvador, an area often termed Central America's "Northern Triangle."

41. The Northern Triangle governments are known for corruption,[3] including having corrupt police forces filled with gang-related members.[4] Furthermore, the "penetration of the state by criminal groups" is responsible, at least in part, for the fact that as many as 95% of crimes go unpunished in those countries.[5]

42. The "pervasive and systematic levels of violence" associated with the increasing reach and power of gangs in the Northern Triangle have been well documented.[6] Those fleeing the Northern Triangle cite "violence [from] criminal armed groups, including assaults, extortion, and disappearances or murder of family

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[3] *See* Christina Eguizábal et al., Woodrow Wilson Center Reports on the Americas No. 34, *Crime and Violence in Central America's Northern Triangle: How U.S. Policy Reponses are Helping, Hurting, and Can be Improved* 2 (2015), https://www.wilsoncenter.org/sites/default/files/FINAL%20PDF_CARSI%20REPORT_0.pdf+; *see also* U.S. Dep't of State, Bureau of Democracy, Human Rights & Labor, *Country Reports on Human Rights Practices for 2017*, https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper (noting "widespread government corruption" is a significant human rights issue in El Salvador, Guatemala, and Honduras).

[4] "Over the past five years, at least 435 members of the [Salvadoran] armed forces were fired for being gang members or having ties to gangs . . . Another 39 aspiring police officers were expelled from the National Public Security Academy over the same period, of which 25 'belonged to' the Mara Salvatrucha, or MS13, while 13 were from the Barrio 18 gang. Nine more active police officers were also dismissed for alleged gang ties over the five years." Mimi Yagoub, *480 Gang Members Infiltrated El Salvador Security Forces: Report*, InSight Crime (Feb. 22, 2016), https://www.insightcrime.org/news/brief/did-480-gang-members-infiltrate-el-salvador-security-forces/ (citation omitted).

[5] Eguizábal et al., *supra* note 3, at 2.

[6] UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* 15 (2015), http://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html [hereinafter *Women on the Run*]; *see also* Int'l Crisis Grp., Latin America Report No. 64, *El Salvador's Politics of Perpetual Violence* 8–11 (2017), https://d2071andvip0wj.cloudfront.net/064-el-salvador-s-politics-of-perpetual-violence.pdf.

members,"[7] as reasons for their flight. These armed groups operate with impunity due to their influence and control over the governments of Northern Triangle countries, which have repeatedly proven to be unable or unwilling to protect their citizens.[8] The degree of violence suffered by people in the Northern Triangle has been compared to that experienced in war zones.[9]

43. In addition, Central American women and children often flee severe domestic violence and sexual abuse.[10] Women report prolonged instances of physical, sexual, and psychological domestic violence, and most of their accounts demonstrate that the authorities in their home countries were either unable or

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[7] *Women on the Run*, *supra* note 6, at 15; *see* Refugees Int'l, *Closing Off Asylum at the U.S.-Mexico Border* 7 (2018), https://static1.squarespace.com/static/506c8ea1e4b01d9450dd53f5/t/5b86d0a188251bbfd495ca3b/1535561890743/U.S.-Mexico+Border+Report+-+August+2018+-+FINAL.pdf [hereinafter *Closing Off Asylum*]; Int'l Crisis Grp., Latin America Report No. 62, *Mafia of the Poor: Gang Violence and Extortion in Central America* 2 (2017), https://d2071andvip0wj.cloudfront.net/062-mafia-of-the-poor_0.pdf.

[8] *Women on the Run*, *supra* note 6, at 16 (finding that citizens of Northern Triangle countries are "murdered with impunity"); *id.* at 23 (finding that 69% of women interviewed tried relocating within their own countries at least once before fleeing and indicating that 10% "stated that the police or other authorities were the direct source of their harm"); *Closing off Asylum*, *supra* note 7, at 7 ("[T]here is considerable evidence that officials in each of the Northern Triangle countries have extremely limited capacity – and in many cases limited will – to protect those at grave risk.").

[9] Médecins Sans Frontières (Doctors Without Borders), *Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis* 6 (2017), https://www.msf.org/sites/msf.org/files/msf_forced-to-flee-central-americas-northern-triangle_e.pdf [hereinafter *Forced to Flee*].

[10] Kids in Need of Def. & Human Rights Ctr. Fray Matías de Córdova, *Childhood Cut Short: Sexual and Gender-based Violence Against Central American Migrant and Refugee Children* 12-20 (2017), https://supportkind.org/wp-content/uploads/2017/06/Childhood-Cut-Short-KIND-SGBV-Report_June2017.pdf [hereinafter *Childhood Cut Short*] (describing sexual and gender-based violence against children and young women in the Northern Triangle).

unwilling to provide meaningful assistance.[11] Abusive partners are often members or associates of criminal armed groups.[12] Abusers frequently threaten women with harm to their parents, siblings or children if they try to leave.[13] Some women who fled their countries have heard from family members back home that their abusers continue to look for them.[14] In addition, "[s]exual harassment and the threat of sexual violence by gangs shapes the everyday lives of women and girls," in the Northern Triangle, and experts estimate that rape and torture of girls is "extremely widespread."[15]

44. After fleeing their home countries, children and adults face an arduous and dangerous journey to the United States.[16] The situation along the popular migration routes to the United States has been termed a "humanitarian crisis" because of the extraordinary violence faced by those making the journey.[17] In

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[11] *Women on the Run*, *supra* note 6, at 25. The women interviewed described repeated rapes and sexual assaults as well as violent physical abuse that included: "beatings with hands, a baseball bat and other weapons; kicking; threats to do bodily harm with knives; and repeatedly being thrown against walls and the ground." *Id*.

[12] *Id*.

[13] *Id.* at 27.

[14] *Id.*

[15] *Childhood Cut Short*, *supra* note 10, at 17.

[16] *See Women on the Run*, *supra* note 6, at 43-45 (describing extortion, sexual violence, and physical violence); *see also* Rodrigo Dominguez Villegas, *Central American Migrants and "La Bestia": The Route, Dangers, and Government Responses*, Migration Info. Source (Sept. 10, 2014), https://www.migrationpolicy.org/article/central-american-migrants-and-%E2%80%9Cla-bestia%E2%80%9D-route-dangers-and-government-responses (listing "injury or death from unsafe travelling conditions, gang violence, sexual assault, extortion, kidnapping, and recruitment by organized crime" as dangers faced on the journey to the United States).

[17] *See* Eguizábal et al., *supra* note 3, at 3.

2015 and 2016, 68% of migrants from the Northern Triangle region experienced violence, including sexual assault, on their journeys through Central America and Mexico.[18] Mexico has faced a drastic rise in criminal activity since the early 2000s that is attributed to cartels and has been accompanied by increases in violence and corruption.[19] The rate of violence continues to rise; 2017 was the deadliest year on record in Mexico.[20] Although the northern half of Mexico was often considered the most dangerous, recent reports reveal an increase in violence in the central and southern states of Mexico, particularly in Guerrero, Michoacán, and the State of Mexico.[21] The U.S. State Department currently advises "no travel"—its highest

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[18] *See Forced to Flee*, *supra* note 9, at 11. Close to half (44%) of the migrants reported being hit, 40% said they had been pushed, grabbed or asphyxiated, and 7% said they had been shot. *Id.* Nearly one-third (31.4%) of women and 17.2% of men surveyed during that same time period had been sexually abused during their journeys. *Id.* at 12.

[19] Dominic Joseph Pera, *Drugs Violence and Public [In]Security: Mexico's Federal Police and Human Rights Abuse*, 2–4, 7 (Justice in Mex. Working Paper Ser. Vol. 14, No. 1, 2015), https://justiceinmexico.org/wp-content/uploads/2015/12/151204_PERA_DOMINIC_DrugViolenceandPublicInsecurity_FINAL.pdf; *see* U.S. Dep't of State, Bureau of Democracy, Human Rights & Labor, *Country Reports on Human Rights Practices for 2017 (Mexico)*, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2017 &dlid=277345.

[20] Human Rights First, *Mexico: Still Not Safe for Refugees and Migrants* 1 (2018), https://www.humanrightsfirst.org/sites/default/files/Mexico_Not_Safe.pdf [hereinafter *Mexico: Still Not Safe*].

[21] *See, e.g.*, U.S. Dep't of State, Bureau of Diplomatic Sec., *Mexico 2015 Crime and Safety Report: Mexico City*, https://www.osac.gov/pages/ContentReportDetails.aspx?cid=17114 (reporting that a "common practice is for gangs to charge 'protection fees' or add their own tax to products and services with the threat of violence for those who fail to pay"); *see also* Human Rights First, *Dangerous Territory: Mexico Still Not Safe for Refugees* 4 (2017), http://www.humanrightsfirst.org/sites/default/files/HRF-Mexico-Asylum-System-rep.pdf [hereinafter *Dangerous Territory*] ("Human rights monitors stressed that there is a large presence of transnational gangs in southern Mexico, which have easy access to those fleeing gang persecution in the Northern Triangle.") (citations omitted).

level of travel warning, which also applies in active war zones like Syria, Afghanistan, and Yemen—to five Mexican states due to high crime rates.[22] Human rights groups report that since mid-2017, "the dangers facing refugees and migrants in Mexico have escalated."[23] Perpetrators of violence against migrants "include[] members of gangs and other criminal organizations, as well as members of the Mexican security forces."[24] Along with the increase in violence and organized criminal activity, it is well documented that the police and armed forces operate with impunity in Mexico, leaving victims unable to resort to the government for protection.[25] Indeed, "[i]n some regions of Mexico the state has become so closely identified with criminal gangs and drug cartels that these criminal organizations do not need to corrupt the state—they essentially 'are' part of the state."[26] Thus, the initial mistrust and inability to rely upon government

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[22] U.S. Dep't of State, Bureau of Consular Affairs, *Mexico Travel Advisory* (Aug. 22, 2018), https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html [hereinafter *Mexico Travel Advisory*].

[23] *Mexico: Still Not Safe*, *supra* note 20, at 1; *see also Dangerous Territory*, *supra* note 21, at 3 ("Human rights monitors report an increase in kidnappings, disappearances, and executions of migrants and refugees in recent years.").

[24] *Forced to Flee*, *supra* note 9, at 5; *see also Closing Off Asylum*, *supra* note 7, at 9 (explaining that when crossing Mexico, migrants suffer "abuses at the hands of organized crime, exploitative smugglers, and predatory state security and police").

[25] *See* Pera, *supra* note 19, at 4 ("Drug trafficking organizations have infiltrated government positions in many areas, and their influence over state personnel has dramatic implications."); Ximena Suárez et al., Wash. Office on Latin Am., *Access to Justice for Migrants in Mexico: A Right That Exists Only on the Books*, 24-27, 30–31 (2017), https://www.wola.org/wp-content/uploads/2017/07/Access-to-Justice-for-Migrants_July-2017.pdf [hereinafter *Access to Justice*] (documenting Mexican authorities' unwillingness to investigate crimes against migrants).

[26] *Access to Justice*, *supra* note 25, at 30-31; Alberto Díaz-Cayeros et al., *Caught in the Crossfire: The Geography of Extortion and Police Corruption in Mexico*,

authorities for protection that leads many to flee their home countries accompanies them along their journeys through Mexico.[27]

45. Furthermore, migrants seeking international protection have a small chance of receiving it in Mexico. Amnesty International reports that "the Mexican government is routinely failing in its obligations under international law to protect those who are in need of international protection, as well as repeatedly violating the *non-refoulement* principle."[28]

46. In addition, Mexico's northern border region is particularly plagued with crime and violence, presenting renewed dangers for asylum seekers just as they approach their destination.[29] The state of Tamaulipas, which borders South

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3-4 (Stanford Ctr. for Int'l Dev., Working Paper No. 545, 2015), https://globalpoverty.stanford.edu/sites/default/files/publications/545wp_0.pdf.

[27] *See, e.g.*, Villegas, *supra* note 16 (referencing documentation of "the abuse of power by various Mexican authorities, including agents from the National Migration Institute, municipal governments, and state police" against individuals traveling to the U.S. border).

[28] Amnesty Int'l, *Overlooked, Under-Protected, Mexico's Deadly* Refoulement *of Central Americans Seeking Asylum* 2 (2018), https://www.amnesty.org/download/Documents/AMR4176022018ENGLISH.PDF; *see id.* at 8-20 (describing the multiple layers of institutional failure leaving refugees and asylum seekers vulnerable to *refoulement* in Mexico); *accord* Francisca Vigaud-Walsh et al., Refugees Int'l, *Putting Lives at Risk: Protection Failures Affecting Hondurans and Salvadorans Deported from the United States and Mexico* 11-12 (2018), https://static1.squarespace.com/static/506c8ea1e4b01d9450dd53f5/t/5a849f81c830250842098d87/1518641035445/Northern+Triangle+-+Refugees+International.pdf; *Dangerous Territory*, *supra* note 21, at 4-9.

[29] *See Mexico Travel Advisory*, *supra* note 22 (reporting violent crime and an increase in homicide in the state of Baja California (encompassing border towns Tijuana and Mexicali) compared to 2016; widespread violent crime and gang activity in the state of Chihuahua (encompassing border town Ciudad Juarez); widespread violent crime and limited law enforcement capacity to prevent and respond to crime in the state of Coahuila (particularly in the northern part of the state); that the state of Sonora (encompassing border town Nogales) is a key region in the international and human trafficking trades; and common violent crime, including homicide, armed robbery, carjacking, kidnapping, extortion, and sexual assault in the state of Tamaulipas (encompassing border towns

Texas cities including Laredo, McAllen, and Brownsville, is on the U.S. State Department's "no travel" list.[30] Most of Mexico's other border states, including Sonora, Chihuahua, Coahuila, and Nuevo León, are classified at Level 3, "Reconsider Travel," due to the prevalence of violent crime and gang activity.[31] The most pervasive problems migrants face in Mexico's northern border states include disappearances, kidnappings, rape, trafficking, extortion, execution and sexual and labor exploitation by state and non-state actors.[32] Recently, the situation at the border has worsened: smugglers have increased their prices, cartel members have increased their surveillance and control of areas around border crossings, and the number of migrants kidnapped and held for ransom has increased.[33] Even migrants in the immediate vicinity of a POE are at risk of violence and exploitation.[34] Those who seek refuge in shelters may be in particular danger.

Matamoros, Nuevo Laredo, and Reynosa), where law enforcement capacity to respond to violence is limited throughout the state).

[30] *Id.*

[31] *Id.*

[32] B. Shaw Drake et al., Human Rights First, *Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers* 16 (2017), https://www.humanrightsfirst.org/ sites/default/files/hrf-crossing-the-line-report.pdf [hereinafter *Crossing the Line*].

[33] *Id.*

[34] Josiah Heyman & Jeremy Slack, *Blockading Asylum Seekers at Ports of Entry at the US-Mexico Border Puts Them at Increased Risk of Exploitation, Violence, and Death*, Ctr. for Migration Stud. (June 25, 2018), http://cmsny.org/publications/heyman-slack-asylum-poe/#_ednref11.pdf ("When asylum-seekers are turned away by US authorities, they return to areas around the Mexican-side POEs. These are characteristically busy zones of businesses, restaurants, bars, discos, drug sellers, hustlers, and commercial sex work, although each border port has its own characteristics. They are areas that increase the vulnerability and exploitability of non-Mexican migrants with little knowledge and few resources.").

Some shelters are infiltrated by organized crime, while others have been the sites of recent vandalism, burglary, threats, and kidnapping.[35]

47. By turning back individuals who seek to access the asylum process by presenting themselves at POEs on the U.S.-Mexico border, Defendants are forcing them to return to the dangerous conditions that drove them to flee their countries in the first place.[36]

B. Defendants' Policy and Widespread Practices of Denying Asylum Seekers Access to the Asylum Process

48. Starting in 2016 and continuing to the present, CBP officials, at or under the direction or with the knowledge and acquiescence or authorization of Defendants, have systematically restricted the number of asylum seekers who can access the U.S. asylum process through POEs along the U.S.-Mexico border.[37]

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[35] *Id.*; Wash. Office on Latin Am. et al., *Situation of Impunity and Violence In Mexico's Norther Border Region* 2-4 (Mar. 2017), https://www.wola.org/wp-content/uploads/2017/04/Situation-of-Impunity-and-Violence-in-Mexicos-northern-border-LAWG-WOLA-KBI.pdf.

[36] *Crossing the Line*, *supra* note 32, at 16; *see also* B. Shaw Drake, Human Rights First, *Violations at the Border: The El Paso Sector* 2–3 (2017), https://www.humanrightsfirst.org/resource/violations-border-el-paso-sector (explaining the risks facing asylum seekers who are turned back at U.S. POEs, including being deported back to their home countries where they face persecution).

[37] There is anecdotal evidence that CBP officials began unlawfully dissuading asylum seekers from pursuing their claims or flatly refusing them entry to the United States even prior to 2016. *See* Sara Campos & Joan Friedland, Am. Immigration Council, *Mexican and Central American Asylum and Credible Fear Claims: Background and Context* 10 (2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_and_credible_fear_claims_final_0.pdf (reporting that Mexican asylum seekers arriving in El Paso "expressed a fear of persecution [but] were told by CBP that the U.S. doesn't give Mexicans asylum, and they [we]re turned back"); *see also* U.S. Comm'n on Int'l Religious Freedom, *Report on Asylum Seekers in Expedited Removal: Volume I: Findings & Recommendations* 54 (2005), https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf [hereinafter *2005 USCIRF Report*] (reporting that two groups of asylum seekers

That has been accomplished both through the Turnback Policy that seeks to restrict access to the asylum process and also through widespread practices across the U.S.-Mexico border also designed to deny access to the asylum process.

49. Al Otro Lado and Class Plaintiffs, as well as numerous non-governmental organizations[38] and news outlets,[39] have documented thousands of cases in which CBP officials have arbitrarily denied and/or unreasonably delayed access to the asylum process to individuals seeking asylum by presenting

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who arrived at the San Ysidro POE were "improperly refused entry to the United States for . . . lacking proper documentation and [were] 'pushed back' . . . without [being] refer[red] . . . to secondary inspection" and without a "record of the primary inspection" being created); *see also* Human Rights Watch, *"You Don't Have Rights Here": US Border Screening and Returns of Central Americans to Risk of Serious Harm* 2, 8 (2014), https://www.hrw.org/sites/default/files/reports/us1014_web_0.pdf [hereinafter *"You Don't Have Rights Here"*] (concluding that the "cursory screening [conducted by CBP officials] is failing to effectively identify [asylum seekers]" and reporting that some "border officials acknowledged hearing [non-citizens'] expressions of fear but pressured them to abandon their claims").

[38] *See, e.g.*, *Crossing the Line*, *supra* note 32; Amnesty Int'l, *Facing Walls: USA and Mexico's Violation of the Rights of Asylum Seekers* 19–22 (2017), https://www.amnestyusa.org/wp-content/uploads/2017/06/USA-Mexico-Facing-Walls-REPORT-ENG.pdf [hereinafter *Facing Walls*]; *"You Don't Have Rights Here"*, *supra* note 37, at 2, 4.

[39] Joshua Partlow, *U.S. Border Officials Are Illegally Turning Away Asylum Seekers, Critics Say*, Wash. Post (Jan. 16, 2017), https://www.washingtonpost.com/world/the_americas/us-border-officials-are-illegally-turning-away-asylum-seekers-critics-say/2017/01/16/f7f5c54a-c6d0-11e6-acda-59924caa2450_story.html?noredirect=on&utm_term=.ed5c3100d451; Caitlin Dickerson & Miriam Jordan, *'No Asylum Here': Some Say U.S. Border Agents Rejected Them*, N.Y. Times (May 3, 2017), https://www.nytimes.com/2017/05/03/us/ asylum-border-customs.html; Rafael Carranza, *Are Asylum Seekers Being Turned Away at the Border?*, USA Today (May 4, 2017, 10:55 PM), https://www.azcentral.com/story/news/politics/immigration/2017/05/05/asylum-seekers-being-turned-away-border/309398001/.

themselves at POEs along the U.S.-Mexico border.[40] The Turnback Policy and CBP's other widespread, unlawful practices have been documented at POEs spanning the length of the U.S.-Mexico border, including POEs in San Ysidro, California; Otay Mesa, California; Tecate, California; Calexico, California; San Luis, Arizona; Nogales, Arizona; El Paso, Texas; Del Rio, Texas; Eagle Pass, Texas; Laredo, Texas; Roma, Texas; Hidalgo, Texas; Los Indios, Texas; and Brownsville, Texas.

1. Initiation of the Turnback Policy

50. Internal CBP documents reveal that CBP officials at the highest levels mandated turnbacks at POEs along the U.S.-Mexico border.[41]

51. Evidence of a Turnback Policy, at least regarding the San Ysidro POE, exists starting in May 2016. In an email dated May 29, 2016, the Watch Commander at the San Ysidro POE notes that "[t]he Asylee line in the pedestrian building is not being used at this time, there is a line staged on the Mexican side." In an email sent roughly a month later, the same individual reiterated that "[i]t's even more important that when the traffic is free-flowing that the limit line officers ask for and check documents to ensure that groups that may be seeking asylum are directed to remain in the waiting area on the Mexican side."

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[40] Amnesty Int'l, *USA: 'You Don't Have Any Rights Here': Illegal Pushbacks, Arbitrary Detention & Ill-Treatment of Asylum-Seekers in the United States* 17 (2018), https://www.amnesty.org/download/Documents/AMR5191012018ENGLISH.PDF [hereinafter *You Don't Have Any Rights Here*] ("While there are no official statistics on how many people CBP has illegally turned away without processing their asylum requests, Amnesty International has received numerous secondary reports from NGOs indicating that CBP has forced thousands of asylum-seekers to wait in Mexico – including families with children, mostly from Central America.").

[41] These documents, produced during the limited discovery that took place while this case was pending in the U.S. District Court for the Central District of California, relate exclusively to POEs under the responsibility of the Laredo Field Office and the San Ysidro POE. Additional discovery could reveal further details regarding the contours of the Turnback Policy.

52. CBP's collaboration with the Mexican government to turn back asylum seekers at the San Ysidro POE was formalized in a document issued on an unspecified date after July 15, 2016, which provides:

> In coordination with the GoM [Government of Mexico] we have identified two (2) periods throughout the day to intake asylum claims into our custody (8am and 4 pm). At each period, we intake approximately [redacted] applicants, with a daily intake total of approximately [redacted] applicants. If an applicant does not meet these intake time periods, they are requested to remain in-line in Mexico until the next intake period. . . . In order to control the flow of asylees in their area, the GoM has instituted a numerical process by giving asylum applicants numbers with intake dates in the order of their arrival. The applicants are also given the locations of humanitarian shelters in Tijuana where they receive food and shelter until their intake date. The implementation of this process was developed by the GoM.

53. On December 6, 2016, the Director of Field Operations at CBP's San Diego Field Office confirmed that the Turnback Policy remained in effect:

> Metering continues at both San Ysidro and Calexico POEs the numbers are adjusted based on space availability and ERO [ICE's Office of Enforcement and Removal Operations] movement of detainees from the ports. Mexican immigration is handling the metering process before the OTMs [Other Than Mexicans] arrive at the port of entry; no issues on our end with aliens being turned away.

54. On information and belief, other CBP Field Offices also implemented the Turnback Policy. Although certain port directors periodically suspended the Turnback Policy, they never abandoned it. Moreover, direct turnbacks of asylum seekers—via misrepresentations about the availability of asylum, intimidation, and coercion, among other tactics—continued in practice even during periods of formal suspension of the policy.

55. Evidence that a border-wide Turnback Policy was authorized at the highest levels of CBP, including by Defendant and now-Commissioner Kevin

McAleenan, exists as of November 2016. In an email communication dated November 12, 2016, the Assistant Director Field Operations for the Laredo Field Office instructed all Port Directors under his command to follow the mandate of the then-CBP Commissioner and Deputy Commissioner:

> At the request of C-1 [then CBP Commissioner R. Gil Kerlikowski] and C-2 [then CBP Deputy Commissioner Kevin McAleenan], you are to meet with your INM [Instituto Nacional de Migración, Mexico's immigration agency] counterpart and request they control the flow of aliens to the port of entry. For example, if you determine that you can only process 50 aliens at a time, you will request that INM release only 50.
>
> If INM cannot or will not control the flow, your staff is to provide the alien with a piece of paper identifying a date and time for an appointment and return then [sic] to Mexico. This is similar to what San Diego is doing. We understand the alien may express a fear of returning to Mexico and we will address as the situation dictates.[42]

56. This email directive was promptly implemented by the Laredo Field Office, which encompasses the Brownsville, Del Rio, Eagle Pass, Hidalgo, Laredo, Progreso, Rio Grande, and Roma, Texas POEs and covers nearly 400 miles of the Texas-Mexico border. According to an internal email dated November 22, 2016, "Our instructions from Service Headquarters and LFO [Laredo Field Office] is that we will only accept 'what we can handle/process'. All others will be turned back to Mexico with an appointment date/time if possible." Other email correspondence from CBP officials at the Laredo, Hidalgo and Roma POEs indicates that individuals turned back did not receive appointment notices.

57. The directive was memorialized in a memorandum from the Laredo Field Office dated January 13, 2017. The memorandum directs that "metering"

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[42] An email sent the following day clarified that this directive was to apply only to Central Americans. In practice, however, individuals of many other nationalities have also been affected.

procedures—i.e. procedures to regulate and restrict the access of asylum seekers to POEs—be implemented once case processing numbers exceed a certain (redacted) number, that such procedures are to be conducted "at the middle of the bridge," and that "all foreign nationals seeking a benefit are given an appointment window to return for processing." The Laredo Command Center is required to provide hourly updates to "local upper management," among others, who must also be notified once normal operations resume.

58. In the months that followed, asylum seekers from Central America and elsewhere continued to seek access to the U.S. asylum process by presenting themselves at POEs along the U.S.-Mexico border, but many were turned back by, at the instruction of, or with the knowledge of CBP officials.

59. On June 13, 2017, in questioning before the House Appropriations Committee, John P. Wagner, the Deputy Executive Assistant Commissioner for OFO, admitted that CBP officials were turning back asylum applicants at POEs along the U.S.-Mexico border.[43] When asked to comment on the numerous press reports that CBP officers at POEs had been "turning away individuals attempting to claim credible fear," Mr. Wagner acknowledged that CBP had indeed engaged in turnbacks, and argued the practice was justified by a lack of capacity.[44] Mr.

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[43] *Department of Homeland Security Appropriations for 2018 Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 115th Cong. 289-90 (2017) (testimony of John P. Wagner, Deputy Executive Assistant Comm'r, Office of Field Operations, Customs and Border Protection), https://www.gpo.gov/fdsys/pkg/CHRG-115hhrg27050/pdf/CHRG-115hhrg27050.pdf [hereinafter *Wagner Testimony*].

[44] Congresswoman Roybal-Allard asked:

> It is my understanding that CBP is legally required to process credible fear claims when they are presented, and it is not authorized to turn back individuals claiming fear even temporarily. In addition to commenting on those allegations, what steps can be taken or have been taken to ensure this is not occurring or continuing to occur at the ports

Wagner also stated on the record that because POEs "do not have the kind of space to hold large volumes of people," CBP "worked a process out with the Mexican authorities to be able to limit how many people a day could come across the border into [CBP's] facility to be processed."[45]

60. Following dozens of turnbacks of asylum seekers in San Ysidro in December 2017, the CBP Field Operations Director in charge of the San Ysidro POE acknowledged and defended the turnbacks, stating: "So they weren't being allowed into the port-of-entry. We said, 'we're at capacity, so wait here.' It's because of our detention space limitation, we were at capacity."[46]

2. High Level Officials' Public Confirmation and Escalation of the Turnback Policy and CBP's Aggressive Implementation

61. In late April 2018, following an arduous, widely-publicized journey, a group of several hundred asylum seekers—referred to in the press as a "caravan"—

> of entry, such as, is there training or other guidance, reminding CBP personnel how they are required to treat individuals who express fear?
>
> Mr. Wagner responded:
>
> Sure. It was a question really of the space available to process people. And our facilities were at capacity to be able to take more people in, go through the processing, and turn them over to ICE after that. And the building was full, and we could not humanely and safely and securely hold any more people in our space.
>
> The Congresswoman later clarified:
>
> "So it wasn't an issue of officers not knowing what the law was. It was more of an issue of capacity?" And Mr. Wagner responded: "It was an issue of capacity and being able to put people into the facility without being overrun or having unsafe and unsanitary conditions."

Id.

[45] *Id.*

[46] *You Don't Have Any Rights Here*, *supra* note 40, at 16.

arrived at the San Ysidro POE. As they approached the United States, President Trump posted a series of messages on Twitter warning of the dangers posed by the group, including one indicating that he had instructed DHS "not to let these large Caravans of people into our Country."[47]

62. Thereafter, the highest-ranking officials in the Department of Justice and DHS publicly and unambiguously proclaimed the existence of a Turnback Policy. CBP continued to buttress the Turnback Policy through the practices described above, including misrepresentations, threats and intimidation, verbal abuse and physical force, coercion, outright denials of access, and physically obstructing access to POEs.

63. Attorney General Sessions, refusing to acknowledge that some of the caravan members might have legitimate claims to asylum under U.S. law, characterized the caravan's arrival as "a deliberate attempt to undermine our laws and overwhelm our system."[48] Upon the caravan's arrival, CBP officials indicated—in accordance with the Turnback Policy—that they had exhausted their capacity to process individuals traveling without proper documentation.[49]

64. As the caravan was approaching the United States, Attorney General Sessions announced that all individuals who crossed the U.S.-Mexico border illegally would be criminally prosecuted.[50] Following the arrival of the caravan, he

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[47] Donald J. Trump (@realDonaldTrump) Twitter (Apr. 2, 2018, 4:02 AM) https://twitter.com/realDonaldTrump/status/980762392303980544.

[48] Press Release, U.S. Dep't of Justice, Attorney General Jeff Sessions Statement on Central America 'Caravan', (Apr. 23, 2018), https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-statement-central-american-caravan.

[49] Kirk Semple & Miriam Jordan, *Migrant Caravan of Asylum Seekers Reaches U.S. Border*, N.Y. Times (Apr. 29, 2018), https://www.nytimes.com/2018/04/29/world/americas/mexico-caravan-trump.html.

[50] Press Release, U.S. Dep't of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), https://www.justice

pronounced that "[p]eople are not going to caravan or otherwise stampede our border," and reiterated his commitment to prosecuting illegal border crossers.[51]

65. On May 15, 2018, DHS Secretary Kirstjen Nielsen likewise publicly and unambiguously confirmed the existence of the Turnback Policy, dismissing the United States' legal obligation to receive and process asylum seekers at U.S. borders as a legal "loophole":

> We are "metering," which means that if we don't have the resources to let them [asylum-seekers] in on a particular day, they are going to have to come back. They will have to wait their turn and we will process them as we can, but that's the way that the law works. Once they come into the United States, we process them. We have asked Congress to fix this loophole. It's a huge gaping hole that we need to fix because it is so abused.[52]

66. Trump himself continued to publicly pronounce the importance of the Turnback Policy, through tweets, including direct statements that promote the direct violation of the law:

- June 24, 2018: "When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."[53]

.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry.

[51] U.S. Attorney Gen. Jefferson B. Sessions, Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions.

[52] *Secretary Nielsen Talks Immigration, Relationship with Trump*, Fox News (May 15, 2018), https://video.foxnews.com/v/5785340898001/?#sp=show-clips.

[53] Donald J. Trump (@realDonaldTrump) Twitter (Apr. 24, 2018, 8:02 AM) https://twitter.com/realdonaldtrump/status/1010900865602019329?lang=en.

- June 30: "When people come into our Country illegally, we must IMMEDIATELY escort them back out without going through years of legal maneuvering."[54]

- July 5: "When people, with or without children, enter our Country, they must be told to leave without our Country being forced to endure a long and costly trial. Tell the people, 'OUT,' and they must leave, just as they would if they were standing in your front lawn."[55]

67. Meanwhile, CBP officials continue to turn back asylum seekers who seek access to the U.S. asylum process by presenting themselves at POEs. Predictably, the Turnback Policy has caused and continues to cause many asylum seekers, desperate to avoid danger on the Mexican side of the border, to seek to enter the United States outside POEs and thereafter be arrested and prosecuted for unlawful entry and in many cases forcibly separated from their children.

68. In recent months, Commissioner McAleenan and other high-level CBP officials have openly acknowledged that the Turnback Policy remains in effect, and that the United States is actively collaborating with Mexico to reduce the flow of asylum seekers.[56]

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[54] Donald J. Trump (@realDonaldTrump) Twitter (June 30, 2018, 12:44 PM) https://twitter.com/realdonaldtrump/status/1013146187510243328?lang=en.

[55] Donald J. Trump (@realDonaldTrump) Twitter (July 5, 2018, 7:08 AM) https://twitter.com/realDonaldTrump/status/1014873774003556354; Donald J. Trump (@realDonaldTrump) Twitter (July 5, 2018, 7:16 AM) https://twitter.com/realDonaldTrump/status/1014875575557804034.

[56] *See, e.g.,* CBP Comm'r Kevin McAleenan, Statement on Operations at San Ysidro Port of Entry (April 29, 2018), https://www.cbp.gov/newsroom/speeches-and-statements/statement-commissioner-kevin-mcaleenan-operations-san-ysidro-port (explaining that "individuals [without appropriate entry documentation] may need to wait in Mexico as CBP officers work to process those already within our facilities"); Molly Hennessy-Fiske, *Border Protection Commissioner Talks 'Zero Tolerance,' Family Separations and How To Discourage Immigration*, L.A. Times (June 11, 2018) http://www.latimes.com/

69. A high-level CBP officer reiterated the contours of the Turnback Policy in a meeting with immigrant rights groups in El Paso on June 27, 2018 and confirmed that it was being applied border-wide.[57]

70. Notably, a September 27, 2018 report from the OIG ("OIG Report"), attached as Exhibit A, references the policy under which CBP systematically restricts access to the asylum process at POEs and confirms the policy was directed by DHS. The OIG Report states the existence of a "CBP guidance" which indicates that "[w]hen the ports of entry are full . . . [CBP] officers should inform individuals that the port is currently at capacity and that they will be permitted to enter once there is sufficient space and resources to process them."[58] Although this "guidance" states that CBP officers "may not discourage individuals from waiting to be processed," some officers in El Paso informed OIG investigators that they advise asylum seekers to "return later."[59] Also, according to the report, while "[u]nder the Zero Tolerance Policy, the Government encouraged asylum-seekers to come to U.S. ports of entry[,] . . .[a]t the same time, CBP reported that overcrowding at the ports of entry caused them to limit the flow of people that could enter."[60] The report elaborates that "CBP was regulating the flow of asylum-seekers at ports of entry through 'metering,' a practice CBP has utilized at least as far back as 2016 to regulate the flow of individuals at ports of entry."[61]

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nation/la-na-border-patrol-immigration-20180611-htmlstory.html ("We're not denying people approaching the U.S. border without documents. We're asking them to come back when we have the capacity to manage them.").

[57] *You Don't Have Any Rights Here*, *supra* note 40, at 17.

[58] *OIG Report*, *supra* note 1, at 6.

[59] *Id.* at 7.

[60] *Id.* at 5.

[61] *Id.* at 5-6; *see id.* at 6-7 (describing CBP's "metering" practice at POEs, explaining that "CBP officers stand at the international line out in the middle of

71. DHS's response to the OIG Report confirms that CBP has engaged in "queue management practices . . . directed by [Defendant Nielsen].[62] The response also confirms that "CBP's processes and policies at ports of entry may require some individuals who do not have travel documents to wait at the International Boundary prior to entering the United States."[63]

72. In addition, officials from the Mexican immigration agency, *Instituto Nacional de Migración* ("INM"), have confirmed the existence of an agreement with CBP under which INM assists with the Turnback Policy by hindering asylum seekers' access to POEs. For example, as reported in the Amnesty International report released on October 11, 2018, the INM head delegate in the Mexican state of Baja California reportedly expressed doubt about CBP's claims of capacity constraints and "voiced his frustration that [CBP was] making INM do [its] dirty work."[64] The INM delegate stated:

> [T]hat CBP requested INM to remove . . . 20 asylum-seekers from the turnstiles [at the San Ysidro POE], as well as the rest of the [April 2018] caravan members from the plaza at El Chaparral, where they were camping on the Mexican side of the port-of-entry. Implicit in the CBP request, the INM delegate said, was that such detentions could result in INM deporting those asylum-seekers who were not legally present in Mexico.[65]

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the footbridges," checking pedestrians' travel documents, and preventing asylum-seekers from crossing the international line until space is "available . . . to hold the individual while being processed").

[62] *Id*. at 19-20.

[63] *Id.* at 20.

[64] *You Don't Have Any Rights Here*, *supra* note 40, at 23.

[65] *Id*. at 23.

73. Later, on June 14, 2018, a senior Mexican immigration official in Sonora reportedly stated that US officials had requested INM to detain and check the papers of the asylum-seekers whom CBP was pushing back to the Mexican side of the Nogales border crossing. The INM official relayed also that he understood the request by US authorities implicitly to be for INM to deport asylum-seekers without legal status in Mexico to their home countries from which they had fled.[66]

74. Also in June 2018, Mexican immigration officials told human rights researchers that "CBP officers were calling Mexican immigration to collect any individuals at the border line, including asylum seekers, who attempted to approach the port of entry to request protection and did not have visas or other documentation." As a result, asylum seekers were physically prevented from reaching the POE to request protection.[67]

75. Statements from on-the-ground CBP officials further confirm the continued existence of a high-level Turnback Policy. In El Paso, a CBP official

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[66] *Id*. at 21; see also *id.* at 22 ("On the Mexico side of the bridges in July 2018, three Mexican immigration officials informed [a] US immigration lawyer . . . that they were screening asylum-seekers and preventing their access to US ports-of-entry upon the request of CBP. One of the Mexican officials told her: 'Yes, it's a collaborative program that we're doing with the Americans.' The immigration officials were detaining non-Mexicans who lacked valid Mexican transit visas, and threatened them with deportation if they returned to the bridge. At the mid-point of the bridge, CBP again screened those who were able to pass through the Mexican immigration filter, and forced them to wait on the half of the bridge closer to Mexico. According to [the U.S. immigration lawyer], the Mexican immigration officers informed her that when asylum seekers crossed onto the bridge without valid Mexican travel documents, CBP officers called on Mexican immigration officials to remove them from the bridge.").

[67] Human Rights First, *Zero-Tolerance Criminal Prosecutions: Punishing Asylum Seekers and Separating Families* 8 (2018), https://www.humanrightsfirst.org/resource/zero-tolerance-criminal-prosecutions-punishing-asylum-seekers-and-separating-families [hereinafter *Zero-Tolerance Criminal Prosecutions*].

blocking asylum seekers' path to the POE on the bridge explained that he was "following directions. And this is not even local directions."[68] On a separate occasion, CBP officials in El Paso, including supervisors, told a non-profit worker that they were turning back asylum seekers because they "ha[d] orders not to let anybody in," that "this is a policy across the border," and that "[i]t's an order from [U.S. Attorney General Jeff] Sessions."[69]

76. Recent official government statements acknowledging the policy assert a "lack of capacity" to process the flow of asylum seekers at the southern border. In fact, and in accordance with a central goal of the Turnback Policy to deter future asylum seekers from presenting themselves at the U.S. border, CBP's own statistics indicate that there has not been a particular surge in numbers of asylum seekers coming to POEs. From January through September 2018, the number of people without legal status attempting to enter the United States from Mexico, including asylum seekers, has stayed at roughly the same level as over the previous five years. During those five years, U.S. authorities regularly processed asylum seekers without the delays that CBP has imposed in 2018.[70] Based on available statistics, Amnesty International has characterized the "supposedly unmanageable number of asylum claims" as "a fiction."[71]

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[68] Robert Moore, *Border Agents Are Using a New Weapon Against Asylum Seekers*, Tex. Monthly (June 2, 2018), https://www.texasmonthly.com/politics/immigrant-advocates-question-legality-of-latest-federal-tactics/.

[69] Declaration of Taylor Levy in Support of the State of Wash. at 8, Washington v Trump, No. 18-939-MJP (W.D. Wash. July 2, 2018), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/motion%20declarations%201-33.pdf.

[70] *Southwest Border Migration FY2018*, U.S. Customs & Border Protection, https://www.cbp.gov/newsroom/stats/sw-border-migration (last visited Oct. 10, 2018).

[71] *You Don't Have Any Rights Here*, *supra* note 40, at 14.

77. In fact, there is substantial evidence that calls into question the claims of a lack of capacity. There is evidence to suggest such claims are false and instead are designed to effectuate the broader policy goal of restricting access to the asylum process, according to governmental and non-governmental sources. In early 2018, senior CBP and ICE officials in San Ysidro, California, stated in interviews that "CBP has only actually reached its detention capacity a couple times per year and during 'a very short period' in 2017."[72] The OIG Report notes that while CBP justifies the official "metering" policy by citing a lack of capacity to process asylum seekers, "the OIG team did not observe severe overcrowding at the ports of entry it visited."[73] Human rights researchers visiting seven POEs in Texas in June 2018 reported that "[t]he processing rooms visible in the ports of entry . . . appeared to be largely empty."[74] CBP's "capacity" excuse appears to be a cover for a "deliberate slowdown" of the rate at which the agency receives asylum seekers at POEs.[75]

78. On October 10, 2018, CBP rejected thirty-two asylum seekers including small children and pregnant women at the Córdoba International Bridge

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[72] *Id*. at 15 (citing an interview with ICE's Assistant Field Office Director at Otay Mesa Detention Center on May 1, 2018, and an interview with the CBP Field Officer Director in San Diego on January 5, 2018).

[73] *OIG Report*, *supra* note 1, at 8.

[74] *Zero-Tolerance Criminal Prosecutions*, *supra* note 67, at 9.

[75] Adam Isacson et al., Wash. Office on Latin Am., *"Come Back Later": Challenges for Asylum Seekers Waiting at Ports of Entry* 3 (2018), https://www.wola.org/wp-content/uploads/2018/08/Ports-of-Entry-Report_PDFvers-3.pdf [hereinafter *Come Back Later*]; Debbie Nathan, *Desperate Asylum-Seekers Are Being Turned Away by U.S. Border Agents Claiming There's "No Room"*, The Intercept (June 16, 2018, 8:37 AM), https://theintercept.com/ 2018/06/16/immigration-border-asylum-central-america/ (reporting that a shelter manager in the El Paso area familiar with CBP's and ICE's local processing facilities "can't imagine they are overtaxed").

between Ciudad Juarez and El Paso, Texas. CBP stopped the individuals and told them that there was no capacity to take them in, including the pregnant women who were some of the most vulnerable people in the group. However, only two or so hours later, CBP officers in the middle of the bridge received orders to let all thirty-two individuals in belying the initial assertion of a lack of capacity. Similarly, in Nogales, Arizona, recently CBP abruptly switched from processing six asylum seekers per day—citing a lack of capacity to take any more—to twenty asylum seekers per day. "The sudden change in processing capability points more to an administrative decision than to an increase in capacity which would more likely happen gradually."[76]

79. By restricting the number of individuals who can seek access to the asylum process—particularly given manifestly grave dangers asylum seekers face while waiting on the Mexican side of the border—the Turnback policy operates as a constructive denial of access to the asylum process. The denial threatens grave harm to vulnerable individuals waiting in very dangerous conditions on the Mexican side of the border.

80. In addition, an assertion of a lack of capacity is not a lawful basis to deny the non-discretionary duty to provide access to the asylum process.

81. Other U.S. government entities have raised concerns about CBP's treatment of asylum seekers. In 2016, for example, the bipartisan U.S. Commission on International Religious Freedom noted some CBP officers' "outright skepticism, if not hostility, toward asylum claims."[77]

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[76] *Come Back Later*, *supra* note 75, at 5.

[77] *See* U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* 2 (2016) (reporting that despite findings and recommendations in a 2005 study relating to primary inspection, USCIRF observers in 2016 continued to find "several examples of non-compliance with required procedures" in CBP primary inspection interviews); *see also 2005 USCIRF Report*, *supra* note 37, at 54 (finding that, in

82. Congress has also signaled concern over CBP's treatment of asylum seekers at the border. "While proposing over $58 billion in federal funding for DHS agencies, the House Appropriations Committee in July 2018 called on DHS to 'ensure that the United States is meeting its legal obligations, to include reminding field officers and agents about CBP's legal responsibilities to ensure that asylum-seekers can enter at POEs [ports-of-entry].'"[78]

83. As detailed below, Plaintiffs Bianca, Emiliana, César, Roberto, Maria, Úrsula, and Juan were each subject to the Turnback Policy when CBP officials told them there was no capacity to process them and/or that they had to wait an unreasonable or indeterminate amount of time in very dangerous conditions on the Mexican side of the border before they could access the asylum process. Plaintiffs Victoria, César, Maria, Úrsula, and Juan were each subject to the Turnback Policy when CBP officials told them to speak to a Mexican official (Victoria) or when Mexican officials intercepted them (César, Maria, Úrsula, Juan) and interfered with their ability to access the U.S. asylum process.

C. CBP Officials' Unlawful Practices Have Denied Hundreds of Asylum Seekers Access to the Asylum Process

84. Starting in or around mid-2016 and continuing to the present, CBP officials also have been engaging in other unlawful, widespread practices to deny asylum seekers access to the asylum process—independently or as a part of or incident to the Turnback Policy. These practices include the use of

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approximately half of the inspections observed, inspectors failed to read the proper advisals regarding asylum to the non-citizen and that "in 15 percent of [the] cases [ ] where an arriving [non-citizen] expressed a fear of return to the inspector, that [non-citizen] was not referred" for a credible fear interview).

[78] *You Don't Have Any Rights Here*, *supra* note 40, at 11 (citing Staff of H.R. Comm. on Appropriations, 115th Cong., Rep. on Department of Homeland Security Appropriations Bill, 2019 4, 26 (Comm. Print 2018), https://docs.house.gov/meetings/AP/AP00/20180725/108623/HMKP-115-AP00-20180725-SD004.pdf [hereinafter *Bill Report Draft*]).

misrepresentations; threats and intimidation; coercion; and verbal and physical abuse; denying outright access to the asylum process; physically obstructing access to the POE; forcing asylum seekers to wait unreasonable or indeterminate amounts of time before being processed; and racially discriminatory denials of access. Asylum seekers and advocates have experienced and/or witnessed firsthand CBP's illegal conduct.

1. Misrepresentations

85. CBP officials misinform asylum seekers with the following misrepresentations, among others: that the United States is no longer providing asylum; that President Trump signed a new law that ended asylum in the United States; that the law providing asylum to Central Americans ended; that Mexicans are no longer eligible for asylum; that the United States is no longer accepting mothers with children; that the United States got rid of the law that allowed for asylum for children; that asylum seekers cannot seek asylum at the POE, but must go to the U.S. Consulate in Mexico instead; that visas are required to cross at a POE; that asylum seekers must first speak with Mexican immigration officials before they will be allowed to enter the United States to seek asylum; that there is not "space" for additional asylum seekers to enter; that there are "too many people"; that the port is "full"; that the shelters or detention centers where asylum seekers will be held are "full"; that there are too few officials in the port to process asylum seekers; that asylum seekers must wait for people to leave before they can enter; and that by coming to the POE, asylum seekers are in a "federal zone" and therefore they must leave.

86. Class Plaintiffs Abigail, Beatrice, Dinora, Ingrid, Victoria, Bianca, Emiliana, Roberto, Úrsula, and Juan each experienced this practice. Dinora and Ingrid both were told asylum was no longer available in the United States. Abigail was told that only the Mexican government could help her. Beatrice was told that the U.S. government had no obligation to help her and that she had no right to

enter the United States. Victoria and Bianca were told they needed to speak with Mexican officials. When Bianca, Emiliana, and Roberto approached CBP officials to apply for asylum, they were told they could not apply because the ports were "full." Úrsula and Juan were told that the POE was "closed" even though it was mid-afternoon.

2. Threats and Intimidation

87. CBP officials threaten and intimidate asylum seekers in the following ways: threatening to take asylum seekers' children away from them if they did not leave the POE; threatening to separate children from parents if they did not accept voluntary departure; threatening to detain and to deport asylum seekers to their home countries if they persisted in their claims; threatening to ban asylum seekers from the United States for life if they continued to pursue asylum; threatening to bring criminal charges against asylum seekers if they refused to leave the POE; threatening to use a taser or let dogs loose if asylum seekers refused to go back to Mexico; and threatening to call Mexican immigration officers if asylum seekers did not leave the POE.

88. Class Plaintiffs Abigail, Beatrice, and Carolina each experienced this practice and were threatened that if they tried to cross and pursue their asylum claims, U.S. government officials would take their children away or separate their families. Additionally, Dinora was threatened that if she and her daughter returned to the POE, they would be deported to Honduras. Beatrice was told that if she returned to the POE, she would be put in jail for three years.

3. Verbal and Physical Abuse

89. As part of their systematic practice of denying asylum seekers arriving at POEs access to the U.S. asylum process, CBP officials also regularly resort to verbal and even physical abuse, including, for example, by: grabbing an asylum seeker's six-year-old daughter's arm and throwing her down onto the ground; holding a gun to an asylum seeker's back and forcing her out of the POE; knocking

a transgender asylum seeker to the ground and stepping on her neck; telling an asylum seeker she was scaring her five-year-old son by persisting in her request for asylum and accusing her of being a bad mother; laughing at an asylum-seeking mother and her three children and mocking the asylum seeker's thirteen-year-old son who has cerebral palsy; yelling profanities at an asylum-seeking mother and her five-year-old son, throwing her to the ground, and forcefully pressing her cheek into the pavement; making very derogatory comments about an asylum seeker's country of origin ("Fuck Honduras"); denying four asylum seekers on five consecutive days because "Guatemalans make us sick"; repeatedly and angrily yelling at asylum seekers to make them leave the POE; inquiring whether an asylum seeker was pregnant, and when the answer was negative, saying "that was good because they did not want more children in the United States"; grabbing the arms of an asylum seeker hard enough to leave bruises, bending them behind her back in order to drag her back to Mexico, and also physically dragging her child back to Mexico; grabbing another asylum seeker by the shoulders hard enough to leave bruises and dragging her out of the POE with her seven-year-old watching and yelling "leave my mommy alone!"; pushing an asylum seeker while she was holding her infant daughter; and pushing another asylum seeker while she was holding her three-year-old son. One asylum seeker reported that she sought mental health treatment to process how she was treated after being forcibly dragged out of the POE and back to Mexico with her two children.

90. Class Plaintiffs Dinora and Beatrice both experienced this practice. One CBP official pulled Dinora inside a gate at the POE to try to separate her from her daughter. Later, as CBP officials escorted Dinora and her daughter out of the POE, one of the CBP officials tried to drag Dinora by her arm. Beatrice also experienced rough treatment and cried out in pain when a CBP official forcefully searched her for drugs.

4. Coercion

91. CBP officials resort to coercion to deny asylum seekers arriving at POEs access to the U.S. asylum process, including: coercing asylum seekers into recanting their fear on video; and coercing asylum seekers into withdrawing their applications for admission to the United States.

92. Class Plaintiffs Abigail, Beatrice and Carolina each experienced this practice of coercion. Each was coerced to sign a form, written in English and not translated, which they did not understand, that stated they were voluntarily withdrawing their claims for asylum on the ground that they did not fear returning to Mexico. The forms CBP officials coerced them to sign were and still are false. At the time the initial Complaint in this case was filed, Abigail, Beatrice and Carolina still had a grave fear of persecution in Mexico.

5. Outright Denial of Access

93. In some cases, CBP officials simply turn asylum seekers away from POEs without any substantive explanation. For example, CBP officials have indicated that a particular POE is not receiving any asylum seekers; that asylum seekers should "*vete*" (go away); that asylum seekers must leave; that asylum seekers will not be allowed to enter the United States; that there is no help for asylum seekers at the POE; and that asylum seekers simply must "move aside" to allow other pedestrian traffic to pass. In other cases, CBP officials simply ignore people who indicate a desire to seek asylum, or flatly refuse to look at their identity documents.

94. Victoria and César both experienced this practice. When Victoria told a CBP official she wanted to seek asylum, the official responded that she could not do so at that time. When César tried to present himself at a POE and stated his intent to apply for asylum, CBP officials refused to let him proceed to the POE.

6. Physically Blocking Access to the POE

95. In recent months, CBP officials at numerous POEs have begun preliminarily checking pedestrian travelers' documents at makeshift or permanent

"pre-checkpoints" housed under tarps or in tents at or near the U.S.-Mexico border.[79] The CBP officials do not permit asylum seekers to walk past the pre-checkpoint to enter the POE building, forcing them to remain on the Mexican side of the border just inches away from the United States.

96. On information and belief, CBP sometimes enlists Mexican officials to act as their agents in blocking asylum seekers' access to POEs. In the Rio Grande Valley, for example, Mexican officials have intercepted asylum seekers as they were approaching turnstiles at bridge entrances on the Mexican side. Without passing through the turnstile, an asylum seeker cannot walk across the bridge to the POE to seek protection in the United States. Mexican officials also reportedly meet CBP officials in the middle of bridges to escort asylum seekers away from the border and back into Mexico, where they are often detained or deported to dangerous conditions in their home countries.

97. CBP physically blocked Roberto, Maria, Úrsula, and Juan from accessing the asylum process by stopping them at pre-checkpoints at the border and refusing to let them pass. In addition, César was intercepted by Mexican officials outside the POE and pushed into a corner to prevent him from approaching the POE. Mexican officials physically escorted Roberto and Maria away from CBP officials stationed at the border and detained them to block their

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[79] *See, e.g.*, Hannah Wiley, *Critics Say New Barriers on Border Bridge Are Meant to Deter Asylum-Seekers*, Tex. Trib. (Oct. 1, 2018), https://www.texastribune.org/2018/10/01/border-asylum-port-of-entry-texas-mexico/; Meredith Hoffman, *The Horrible Conditions Endured by Migrants Hoping to Enter the US Legally*, VICE (July 3, 2018), https://www.vice.com/en_us/article/59qny3/migrants-hoping-to-get-us-asylum-forced-to-wait-on-bridge; John Burnett, *After Traveling 2,000 Miles for Asylum, This Family's Journey Halts at a Bridge*, NPR (June 15, 2018), https://www.npr.org/2018/06/15/620310589/after-a-2-000-mile-asylum-journey-family-is-turned-away-before-reaching-u-s-soil; Molly Hennessy-Fiske, *Caught in Limbo, Central American Asylum-Seekers Are Left Waiting on a Bridge Over the Rio Grande*, L.A. Times (June 7, 2018), http://www.latimes.com/nation/la-na-asylum-seeking-families-border-bridges-20180605-story.html; Moore, *supra* note 68.

access to the POE. Mexican officials also blocked Maria, Juan, and Úrsula from reaching the POE by preventing them from walking onto the sidewalk leading to the POE. CBP officials witnessed Mexican officials block Maria's access and, when Maria's lawyer questioned them about it, CBP officials refused to intervene.

7. Waitlists and Unreasonable Delays

98. By its own admission, CBP officials force asylum seekers to wait for days, weeks or indefinitely in Mexico before allowing them to access the asylum process.

99. CBP officials process a limited number of asylum seekers per day, even when dozens are waiting. At some POEs, CBP appears to process a fixed number of asylum seekers—often two, three, or four. On some days, CBP officials do not process any asylum seekers.

100. CBP officials also routinely tell asylum seekers approaching POEs that in order to apply for asylum, they must get on a list or get a number. The lists are typically managed by Mexican immigration officials or other third parties based in Mexico. CBP officials will not permit asylum seekers to enter the United States until their number is called, which can take days, weeks or longer. Often, the people managing the lists only give out new numbers during particular hours of the day, and so are inaccessible to asylum seekers who are unable to locate them. Despite diligent efforts, some individuals have reportedly been unable to get their names on the lists due to the list managers' biases against the individuals' ethnicity, sexual orientation or gender identity.

101. As a result of these practices, asylum-seeking men, women and children wait endlessly on or near bridges leading to POEs in rain, cold, and blistering heat, without sufficient food or water and with limited bathroom access. They sleep outside for many nights in a row, sometimes for a week or more. The entire time they are waiting to be processed, the asylum seekers are at risk of harm from either persecutors that have followed them from their home countries, or from

gang violence and other criminal threats prevalent along the Mexico side of the U.S.-Mexico border.

102. Bianca, Emiliana, and César experienced this practice because they were required to get on a list in order to access the asylum process. Bianca, Emiliana, and Roberto were told they would have to wait an indeterminate and unreasonable amount of time before they could seek asylum—Bianca was told she would have to wait "multiple weeks"; Emiliana was told to come back in six weeks; Roberto was told he would have to wait for "hours, days, or weeks". In addition, Bianca, Emiliana, and Maria were merely told to stand aside and wait for an indeterminate period of time. Úrsula and Juan were told they had to "wait their turn," without any indication of what that meant.

8. Racially Discriminatory Denials of Access

103. In March 2018, CBP officials at the midpoint of the Paso Del Norte Bridge separating Ciudad Juarez, Mexico and El Paso, Texas, rejected four Guatemalan asylum seekers' requests to access the asylum process on five consecutive days because according to CBP, "Guatemalans make us sick."

104. On information and belief CBP agents racially profile individuals crossing on bridges, stopping and asking for identification documents from darker-skinned Central American-appearing individuals while allowing lighter-skinned individuals to pass.

105. César was subject to this practice. When he approached the POE to apply for asylum, he was placed in a group with only other Central Americans, away from the Africans and Mexicans, after which he was arrested, detained, and threatened with deportation.

106. All of the above-referenced tactics served to deny asylum seekers access to the U.S. asylum process.

D. Documentation from Experts and NGOs Confirms the Prevalence and Persistence of the Turnback Policy and CBP's Other Unlawful Practices

107. Non-governmental organizations and other experts working in the U.S.-Mexico border region have extensively documented the devastating consequences of CBP's unlawful Turnback Policy and other unlawful practices designed to restrict or deny access to the asylum process.

108. In June 2017, Amnesty International, a non-profit human rights organization, published a report on CBP's ongoing practice of turning back asylum seekers at the U.S.-Mexico border entitled *Facing Walls: USA and Mexico's Violations of the Rights of Asylum-Seekers*.[80] In compiling the report, Amnesty International interviewed more than 120 asylum seekers as well as approximately 25 government officials and 40 civil society organizations. The report documents numerous instances in which CBP officials denied asylum seekers access to the asylum system at five different POEs along the U.S.-Mexico border. The report details the following conduct:

a. CBP officials coerce asylum seekers into recanting their fear of persecution on videotape and threaten to deport them back to their home countries if they do not comply;

b. CBP officials tell asylum seekers that they will first have to get a "ticket" from Mexican authorities before seeking asylum;

c. CBP officials coerce asylum seekers into signing a voluntary return paper under the threat that, if they do not, then they will be deported and will never be allowed into the United States; and

[80] *See Facing Walls*, *supra* note 38.

d. CBP officials tell Mexican asylum seekers that there is no more asylum for Mexicans.

109. In October 2018, Amnesty International issued a subsequent report entitled *USA: 'You Don't Have Any Rights Here': Illegal Pushbacks, Arbitrary Detention & Ill-Treatment of Asylum-Seekers in the United States*,[81] documenting CBP's continuing practice of turnbacks at POEs in California, Arizona and Texas, and concluding that, in 2017 and 2018, the U.S. government had "intensified a systematic and dangerous *de facto* policy of illegal pushbacks against asylum seekers, in order to prevent them from requesting protection at official U.S. ports-of-entry." In addition to the conduct outlined above, the report details the following:

a. CBP used "slowdown" tactics to force asylum seekers to wait for days or weeks in Mexico before allowing them to seek protection at POEs;

b. At several POEs, CBP officials temporarily stopped receiving any asylum seekers;

c. CBP erected temporary checkpoints in the centers of international bridges to Mexico at various POEs, where CBP officers instructed pedestrians without valid Mexican travel documents to return to Mexico or called Mexican officials to remove such individuals from the bridge.

110. In August 2018, the Washington Office on Latin America ("WOLA"), a non-profit human rights research and advocacy organization, published a thorough report entitled *'Come Back Later': Challenges for Asylum Seekers Waiting at Ports of Entry*.[82] WOLA's report, based on years of documentary

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[81] *You Don't Have Any Rights Here*, *supra* note 40.

[82] *Come Back Later*, *supra* note 75.

research and a visit to the U.S.-Mexico border in June 2018, details the following developments:

a. There has recently been "a marked slow-down" in CBP's processing of asylum seekers at POEs, leading to long lines of individuals and families waiting to present themselves to seek asylum;

b. In June 2018, CBP officials at the Nogales POE had allowed a backlog of 113 people, including 48 families, who were waiting in Nogales, Mexico to present themselves to seek asylum;

c. CBP officials "have positioned themselves on the [physical] border, pre-screening people before they are allowed to enter U.S. territory and repeatedly denying asylum-seekers entry into the country, forcing them to wait days or even weeks in hot and in some areas dangerous Mexican border towns";

d. CBP officials at smaller POEs tell asylum seekers that they no longer process asylum claims at those POEs, and that the migrants must travel to larger POEs many miles away; and

e. Mexican government officials block access to the McAllen POE on the Reynosa side, and detain asylum seekers who lack the proper travel documents to be in Mexico.

111. In May 2017, Human Rights First, a respected non-governmental organization, published an exhaustive report entitled, "Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers."[83] In that report, Human Rights First details firsthand accounts of CBP officials turning back asylum seekers without referring them for further screening or immigration court proceedings at POEs across the U.S.-Mexico border. The report details the following conduct:

[83] *See Crossing the Line*, *supra* note 32.

a. CBP officials simply ignore requests by individuals to seek asylum;

b. CBP officials give false information about U.S. laws and procedures, such as saying that "the United States is not giving asylum anymore" and "[President] Trump says we don't have to let you in";

c. CBP officials mock and intimidate asylum seekers;

d. CBP officials impose a "gauntlet" and "charade" of procedures, including a "ticketing" system, to discourage asylum seekers; and

e. CBP officials coerce asylum seekers into denouncing any fear of persecution.

112. Despite the complete lack of statistics or recordkeeping on CBP's failure to comply with the law, Human Rights First's Report references more than 125 cases of CBP turning back individuals and families seeking asylum at POEs along the U.S.-Mexico border between November 2016 and April 2017. This is likely a small fraction of the number of asylum seekers who were illegally denied access to the asylum process during that period.

113. In July 2018, Human Rights First supplemented its 2017 report with an issue brief documenting researchers' visits to seven international bridges in June 2018, at Hidalgo, Texas; Brownsville, Texas; Roma, Texas; Progreso, Texas; Laredo, Texas; and El Paso, Texas. The researchers found:

a. At all seven bridges visited, "CBP installed new checkpoints at the international border line" where "agents conduct document screening ahead of the processing center" and regularly turn back asylum seekers;

b. CBP agents tell asylum seekers at the bridges that the POE is "full" or "at capacity," which leaves asylum seekers "stranded for days or weeks in dangerous or difficult conditions";

c. Asylum seekers whom CBP fails to process "face extreme heat, lack of food, water, and bathroom facilities, [and] in some areas, they also face grave dangers and risks," particularly kidnapping;

d. A shelter in Tijuana, Mexico, was broken into and set on fire "likely because a group of transgender women were seeking refuge there after being turned away several times by [CBP]"; and

e. CBP officers tell asylum seekers that they cannot cross at the Stanton Street Bridge POE in El Paso, Texas.[84]

114. From December 2016 to the present, the Women's Refugee Commission, a non-profit organization that advocates for women and children fleeing violence and persecution, has investigated and documented numerous instances in which CBP officials have turned asylum seekers away and refused to process them at various POEs along the U.S.-Mexico border, including POEs in San Ysidro and Calexico, California; Nogales and San Luis, Arizona; Santa Teresa, New Mexico; and El Paso, Laredo, and McAllen, Texas. The Women's Refugee Commission has documented the following conduct:

a. CBP officials tell asylum seekers there is no space for them;

b. CBP officials tell asylum seekers that the policies have changed and that they no longer qualify for asylum;

c. CBP officials threaten to call Mexican immigration authorities to remove asylum seekers from the POEs;

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[84] *Zero-Tolerance Criminal Prosecutions*, *supra* note 67, at 8-9.

d. CBP officials threaten asylum seekers with prolonged detention in the U.S. if they pursue their asylum claims;

e. CBP officials threaten physical force to remove asylum seekers from the POEs;

f. CBP officials forcibly remove asylum seekers from the POEs;

g. CBP officials tell asylum seekers to go away;

h. CBP officials tell asylum seekers that they must coordinate with Mexican immigration authorities in order to be processed;

i. CBP officials, in coordination with Mexican officials and agents, filter out asylum seekers who lack valid travel documents;

j. CBP officials deny asylum seekers the right to apply for asylum at certain POEs; and

k. CBP places officials, and sometimes semi-permanent structures, at the middle of international bridges to pre-screen migrants.

115. From October 2016 through the present, the Project in Dilley, which provides pro bono legal services to mothers and children detained at the South Texas Family Residential Center in Dilley, Texas, has identified more than 100 asylum-seeking mothers who were turned back by CBP officials at POEs along the U.S.-Mexico border, including POEs in San Ysidro, California; Calexico, California; San Luis, Arizona; Nogales, Arizona; El Paso, Texas; Del Rio, Texas; Eagle Pass, Texas; Laredo, Texas; Roma, Texas; McAllen, Texas; Los Indios, Texas; and Brownsville, Texas. The Project in Dilley has documented the following conduct:

a. CBP officials tell asylum seekers that asylum law is no longer in effect;

b. CBP officials tell asylum seekers that they have orders to send away everyone who is seeking asylum;

c. CBP officials tell asylum seekers that the POE is full and that they must wait to be processed, causing some asylum seekers to wait days or weeks without access to shelter, food, water, or bathrooms;

d. CBP officials threaten to deport asylum seekers to their home countries; and

e. CBP officials use physical force to remove asylum seekers from POEs, including by handcuffing them, throwing them to the ground, shoving them and dragging them out of the POEs.

116. Since December 2015, representatives of Plaintiff Al Otro Lado have accompanied more than 160 asylum seekers to the San Ysidro POE. Several representatives have witnessed firsthand and/or otherwise documented the tactics employed by CBP to prevent asylum seekers from accessing the U.S. asylum process. Al Otro Lado representatives have documented the following conduct:

a. CBP officials tell asylum seekers they have to apply for asylum at the U.S. Consulate in Mexico or the U.S. Embassy in their home countries;

b. CBP officials tell asylum seekers that they must first obtain a "ticket" from Mexican immigration in order to seek asylum;

c. CBP officials tell asylum seekers that they are not processing asylum seekers at that POE and they must go to another POE to be processed;

d. CBP officials tell asylum seekers that they cannot seek asylum at that time and must be put on a waiting list;

e. CBP officials require asylum seekers to register with migrant shelters in Mexico which control the flow of asylum seekers to the POEs;

f. CBP officials tell asylum seekers that they do not qualify for asylum;

g. CBP officials coerce asylum seekers into withdrawing their asylum claims, including by threatening that they will be deported if they do not do so;

h. CBP officials threaten asylum seekers with forced separation from their children, prolonged detention, and eventual deportation;

i. CBP officials subject asylum seekers to verbal abuse and degradation during the inspection process;

j. CBP officials ask asylum seekers to present paperwork they are not required to present; and

k. CBP officials threaten U.S. attorneys attempting to assist asylum seekers with *ultra vires* removal to Mexico.

117. On January 13, 2017, various non-governmental organizations submitted an administrative complaint to DHS' Office for Civil Rights and Civil Liberties ("CRCL") and the OIG.[85] The administrative complaint provided specific examples of CBP turning back asylum seekers at POEs along the U.S.-Mexico border and urged CRCL and OIG to conduct a prompt and thorough investigation into this illegal practice and take swift corrective action.

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[85] *See* Am. Immigration Council at al., Complaint Re: U.S. Customs and Border Protection's Systemic Denial of Entry to Asylum Seekers at Ports of Entry on U.S.-Mexico Border 1-2 (Jan. 13, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/cbp_systemic_denial_of_entry_to_asylum_seekers_advocacy_document.pdf.

118. Meanwhile, Defendants' illegal turnbacks continue. In fact, as previously noted, CBP has acknowledged its Turnback Policy in sworn testimony before Congress.[86]

E. Defendants' Policy and Practices Have Denied Each of the Class Plaintiffs Access to the Asylum Process

Plaintiff Abigail Doe

119. Abigail is a native and citizen of Mexico. She is the mother of two children under the age of ten, with whom she previously lived in Central Mexico. In May 2017, Abigail's husband disappeared after he refused to allow drug cartel members to use his tractor-trailer to transport drugs.

120. When Abigail reported her husband's disappearance to governmental authorities, members of the drug cartel abducted her, held her at gunpoint, and threatened to kill her and her children if she continued to investigate her husband's disappearance. One cartel member told Abigail that she had to leave if she wanted to live. Fearing for her life, Abigail fled to Tijuana with her children to seek asylum in the United States.

121. After arriving in Tijuana, Abigail and her children immediately sought access to the asylum process by presenting themselves at the San Ysidro POE. At the POE, Abigail informed CBP officials of her intent to apply for asylum and her fear of returning to Mexico. CBP officials repeatedly misinformed Abigail that she did not qualify for asylum. One CBP official threatened that her children would be taken away from her if they allowed her to cross the border and again misinformed her that only the Mexican government could help her.

122. CBP officials coerced Abigail into signing a document in English which she could not read and did not understand. The document stated that she did not have a fear of returning to Mexico and was withdrawing her application for

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[86] *Wagner Testimony*, *supra* note 43, at 289–90.

admission. CBP officials then instructed Abigail to say that she had agreed to accept the assistance of the Mexican government and used a video camera to record her statement. A CBP official then took Abigail and her children back to Mexico and left them to fend for themselves.

123. The statements CBP coercively obtained from Abigail were and are still false; Abigail does fear returning to and staying in Mexico and believes seeking assistance from the Mexican government would be futile.

124. Following the filing of the initial Complaint in this case, Defendants made arrangements to facilitate the entry of Abigail and her children into the United States.

Plaintiff Beatrice Doe

125. Beatrice is a native and citizen of Mexico. In May 2017, Beatrice fled her hometown in Mexico with her three children, ages seven, eleven and fifteen, and her nephew. Beatrice's nephew was targeted by the Zetas, a Mexican drug cartel that controls most of Southern Mexico, for failing to pay a fee that the Zetas demanded from all individuals who worked in the market. The Zetas threatened to kill Beatrice's nephew and to harm his family if he did not pay the fees. The cartel also pressured Beatrice's nephew to join their forces and threatened to increase the fee if he refused. On two occasions when Beatrice's nephew failed to pay the fees, the Zetas beat him up.

126. Beatrice herself suffered severe domestic violence at the hands of her husband. In May 2017, she reported his abuse to two government agencies. When Mexican government officials subsequently requested that Beatrice's husband meet with them, he responded that he would continue to do what he wanted with Beatrice and his children. Terrified, Beatrice left their house the same day.

127. Beatrice fled with her children and nephew and traveled to Tijuana in order to seek access to the asylum process in the United States. Initially, Beatrice and her family sought access to the asylum process by presenting themselves at the

Otay Mesa POE. When Beatrice expressed their intent to seek asylum, a CBP official told her that asylum-related services were not provided at that port, and directed her to go to the San Ysidro POE. Beatrice and her family then attempted twice to seek access to the asylum process at the San Ysidro POE, but CBP officials turned them away both times.

128. The first time Beatrice and her family presented themselves at the San Ysidro POE, she explained that their lives were at risk in Mexico and that she was afraid of her husband. CBP officials misinformed her that the U.S. government had no obligation to help her or her family, that they did not have a right to enter the United States because they were not born there, and that she should seek help from the Mexican government.

129. Another CBP official then threatened to take Beatrice's nephew away from her and to put her in jail if she refused to sign an English document which she did not understand. Believing that she had no other option, she signed the document. CBP officials then escorted Beatrice and her family out of the POE.

130. The statements CBP coercively obtained from Beatrice were and are still false; Beatrice and her children fear returning to and staying in Mexico.

131. The next day, Beatrice and her family returned to seek access to the asylum process by presenting themselves at the San Ysidro POE. A CBP official who recognized Beatrice from the day before misinformed her that she had no right to enter the United States or seek asylum, and that she would be put in jail for three years if she returned to the POE. After another CBP official separately threatened to transfer Beatrice's nephew to Mexican authorities and return him to Southern Mexico, CBP officials again escorted Beatrice and her family out of the San Ysidro POE.

132. Following the filing of the initial Complaint in this case, Defendants made arrangements to facilitate the entry of Beatrice and her children into the United States.

Plaintiff Carolina Doe

133. Carolina is a native and citizen of Mexico. In May 2017, Carolina fled her hometown in Mexico with her three children, ages nine, fifteen and eighteen, after her brother-in-law, a high-ranking police official, was kidnapped, tortured and killed by members of a drug trafficking cartel. His dismembered body was found in garbage bags in a cemetery. Carolina's husband witnessed the kidnapping and showed Carolina a picture of one of the men who was involved. Drug cartel members threatened Carolina's husband after the murder, and Carolina and her husband saw the van used in the kidnapping drive by their house twice. Two men followed Carolina and her daughters on her way home from work, and several men came to their home at night. Carolina was terrified and hid with her daughters in the bathroom because she feared for her life and the lives of her daughters.

134. In May 2017, Carolina fled in the middle of the night with her daughters and traveled to Tijuana in order to seek access to the asylum process in the United States. Carolina and her daughters presented themselves at the San Ysidro POE, and Carolina explained that they were afraid of returning to Mexico and wanted to seek asylum. CBP officials locked them in a room overnight at the San Ysidro POE. In the morning, a CBP official told Carolina that she would not be granted asylum and misinformed her that the protection she was seeking in the United States could be provided by the Mexican authorities. The CBP official threatened to take away Carolina's fifteen-year-old U.S. citizen daughter and put her in foster care, and told Carolina that if she did not want her daughter taken away from her, then she had to make a statement on video that she was not afraid of returning to Mexico

135. The CBP officials coerced Carolina into recanting her fear on video. Carolina initially did not respond as the CBP officials instructed her to do because the responses they told her to say were not true. Carolina was afraid and wanted to

respond that she was very scared to return to Mexico. One of the CBP officials repeated that the only way Carolina and her daughters would be able to leave voluntarily without her U.S. citizen daughter being taken away from her was if Carolina stated on video that she was not scared. Having been locked in a room overnight, Carolina was tired and scared and felt like she was in jail. The CBP officials continued to coerce her until she finally did what they told her to do, believing she had no choice.

136. The CBP officials also coerced Carolina into signing a document in English which she could not read and did not understand. The document stated that she did not have a fear of returning to Mexico and was withdrawing her application for admission. The statements CBP coercively obtained from Carolina were and are still false; Carolina does fear returning to and staying in Mexico.

137. Several days after CBP turned back Carolina and her daughters at the POE, Carolina made arrangements for her U.S. citizen daughter to cross into the United States. Following the filing of the initial Complaint in this case, Defendants made arrangements to facilitate the entry of Carolina and her other children into the United States.

Plaintiff Dinora Doe

138. Dinora is a native and citizen of Honduras. MS-13 gang members repeatedly threatened to kill Dinora and her then-seventeen-year-old daughter if they did not leave their house. After receiving the third threat, they fled to another city where they remained in hiding.

139. When Dinora and her daughter subsequently returned home, three MS-13 members held them captive for three days and repeatedly raped each of them in front of the other.

140. When Dinora and her daughter finally escaped, they fled to a shelter in Mexico. However, after being threatened by MS-13 gang members again in Mexico, they knew they had to leave.

141. On three separate occasions in August 2016, Dinora and her daughter sought access to the asylum process by presenting themselves at the Otay Mesa POE and expressing their intent to seek asylum in the United States. Each time, CBP officials turned them away

142. During Dinora's first attempt, CBP officials misinformed her that there was no asylum in the United States and escorted Dinora and her daughter outside the POE.

143. During her second attempt later the same day, one CBP official misinformed Dinora that there was no asylum available in the United States for Central Americans and that if they returned to the POE, they would be handed over to Mexican authorities and deported to Honduras.

144. During her third attempt the next morning, a CBP official misinformed Dinora that she could pass through the POE, but would have to leave her daughter behind. When Dinora insisted that she and her daughter had a right to apply for asylum, CBP officials escorted them out of the POE.

145. Following the filing of the initial Complaint in this case, Defendants made arrangements to facilitate the entry of Dinora and her daughter into the United States.

Plaintiff Ingrid Doe

146. Ingrid is a native and citizen of Honduras. At the time the initial Complaint was filed, Ingrid had two children and was pregnant with her third child.

147. 18th Street gang members murdered Ingrid's mother and three siblings. They also threatened to kill Ingrid.

148. For several years, Ingrid and her children were subject to severe abuse by her partner and the father of her son and the child that she was expecting. Ingrid's partner regularly raped Ingrid, sometimes in front of her children. He

would also burn and beat Ingrid. One day, Ingrid's partner put a gun to Ingrid's head and threatened to kill her.

149. In June 2017, Ingrid fled with her children to Tijuana, where they sought access to the asylum process by presenting themselves at the Otay Mesa POE.

150. When they arrived at the Otay Mesa POE, Ingrid approached CBP officials and expressed her intent to seek asylum. The CBP officials misinformed Ingrid that they could not help her at the Otay Mesa POE and that she must go to the San Ysidro POE.

151. Ingrid immediately went to the San Ysidro POE with her children to present herself and seek access to the asylum process. She approached several CBP officials, and expressed her intent to seek asylum. One of the officials misinformed Ingrid that there was no asylum and that she could not pass through the POE because she did not have any documents. Ingrid again stated that she wanted to seek asylum and that she could not go back to Honduras because she and her children would be killed. The CBP official responded that there was a new law in the United States that meant that there was no more asylum. Another CBP official then escorted Ingrid and her children out of the port.

152. Following the filing of the initial Complaint in this case, Defendants made arrangements to facilitate the entry of Ingrid and her children into the United States.

Plaintiff Roberto Doe

153. Roberto is a native and citizen of Nicaragua. Roberto fled Nicaragua in early September 2018 after receiving targeted threats of violence from the Nicaraguan government and paramilitaries allied with the government.

154. Roberto traveled through Mexico and arrived in Reynosa, Tamaulipas on September 29, 2018. On October 2, 2018, he sought access to the asylum process by presenting himself at the Hidalgo POE. Roberto was part of a group of

six Nicaraguan nationals and one Honduran who were waiting in line. The group approached the U.S. immigration officials who were standing at the middle point of the bridge that divides the United States from Mexico, and told the U.S. officials that they wanted to seek asylum in the United States.

155. One of the U.S. officials responded that he had to talk to his office and made a call on his radio in English. He then directed Roberto and the rest of the group to stand to one side. After that, the U.S. official informed the group that they could not enter the POE, which was "all full." The U.S. official indicated that the group might have to wait for "hours, days, or weeks" before he could seek asylum.

156. A short while later, a female U.S. official made another call, and Roberto heard her say in Spanish that someone would come and pick up some people. A few minutes later, a Mexican immigration official arrived and asked to see the group members' papers. After Roberto and the rest of the group handed over their papers, the Mexican official instructed them to come with him. One of the Nicaraguans asked the U.S. official to help them, saying that the Mexican immigration officials would deport them. The U.S. official responded that he did not care and did nothing.

157. The Mexican immigration official took Roberto and the rest of the group to the Mexican side of the bridge, where he left them in an office with Mexican immigration officials. While the group waited, various officials spoke on the phone. Roberto heard one of the officials say that they needed seven or eight spaces for the next deportation transport.

158. Eventually, the Mexican officials confiscated the asylum seekers' phones and escorted them to a small bathroom, where they were forced to wait, crowded together, for about an hour. While they were waiting, a Mexican official entered the bathroom and told them that they did not have the right to apply for asylum in the United States, and that it was a crime to try to do so. The Mexican

official indicated that he was in communication with the U.S. authorities and that if they came back to the bridge and attempted to seek asylum, the U.S. officials would turn them over to the Mexican authorities and they would be deported to Nicaragua. The Mexican officials subsequently returned their papers and directed them to leave.

159. At the time the First Amended Complaint was filed, Roberto desired to return immediately to the Hidalgo POE to seek access to the asylum process, but based on his past experience with CBP's practices at the U.S.-Mexico border, he feared that he would be turned away again and deported to Nicaragua. Defendants subsequently agreed to allow Roberto to access the asylum process if he returned to the Hidalgo POE. Roberto returned to the bridge on October 18, 2018, and as he was about to walk onto the pedestrian footbridge to walk to the POE, Mexican immigration officials detained him. Roberto has been in Mexican government custody since that date, and on information and belief, his *refoulement* to Nicaragua is imminent.

Plaintiff Maria Doe

160. Maria is a citizen of Guatemala and a permanent resident of Mexico. She was married to a Mexican man and has two children who were born in Mexico.

161. Maria lived in Chiapas, Mexico for seven years with her husband and children. Maria left her husband, who was very abusive toward her and her children, after learning that he was involved with cartels. After she left, the cartels began searching for Maria and her children. For about two years, Maria and her children searched for a safe place to live, in Guatemala and in Mexico, but the cartels invariably found them and went after them. Maria's ex-husband remains involved with cartels and continues to threaten Maria and her children.

162. In September 2018, Maria traveled with her children to Nuevo Laredo, Mexico. On September 10, 2018, Maria and her children sought access to

the asylum process by presenting themselves at the Laredo POE around 8:00 p.m. As they approached the midpoint of the bridge to the United States, CBP officials stopped Maria and her children and asked to see their identification. Maria told the U.S. officials that she wanted to seek asylum in the United States. The U.S. officials told her to wait on the Mexican side of the bridge until they called her.

163. After a few minutes, two Mexican officials walked toward her from the Mexican side of the bridge. The Mexican officials told Maria that the United States officials would not let her cross the bridge, but that they could help if she paid them $1,500 for herself and her children. Maria did not have money to pay the bribe, and instead traveled with her children to Reynosa, Mexico, to try to cross a different bridge to the United States.

164. After Maria arrived in Reynosa, she did not feel safe going to the bridge immediately. While staying at a shelter in Reynosa, Maria met an American lawyer who agreed to accompany her to the Hidalgo POE.

165. On September 19, 2018, Maria and her children, accompanied by the American lawyer, sought access to the asylum process by presenting themselves at the Hidalgo POE. They walked up to the bridge in Reynosa. They were at the turnstile at the entrance to the bridge and had only taken a few steps when a Mexican immigration official demanded to see their identification documents. After Maria gave him their documents, the Mexican official started screaming that Maria was abusing her Mexican residence by trying to cross the bridge to seek asylum. He warned her that he would rip up her identity documents if she did not leave the bridge. Although Maria and her lawyer maintained that she had the right to seek asylum, she and her children left the bridge for fear that the Mexican official would hurt them or destroy their documents and deport them to Guatemala.

166. Maria and her children returned to the shelter for two weeks before attempting to seek access to the asylum process again. On October 9, 2018, Maria and her children, again accompanied by the American lawyer, sought access to the

asylum process by presenting themselves at the Hidalgo POE for the second time. When they arrived at the middle of the bridge, Maria started to tell the U.S. officials that she sought asylum. At that moment, however, a Mexican immigration officer grabbed Maria's arm and demanded to see her papers. Maria told the Mexican officer that she was a legal resident of Mexico with two Mexican children and showed him her papers. The officer told her that the Mexican residency permit did not allow her to go to the United States, and he ordered her to go to a station on the Mexican side of the border. Although Maria and the lawyer insisted that Maria had a right to seek asylum in the United States, the Mexican official called for backup.

167. Meanwhile, the American lawyer explained to the U.S. officials standing at the bridge that Maria wanted to seek asylum and that she and her children were in danger. The U.S. officials said that what was happening had nothing to do with them.

168. The Mexican officials took Maria to an office at the foot of the bridge and separated her from her children and the lawyer. They took Maria into a small room and told her that if she came back to the Hidalgo POE, they would revoke her Mexican residency.

169. At the time the First Amended Complaint was filed, Maria feared for her life in Mexico and desired to return to a POE to seek access to the asylum process, but based on her past experiences with CBP's practices at the U.S-Mexico border, she feared that she and her children would be turned away again or deported to Guatemala. Maria and her children feared for their lives in Mexico. After they arrived in Reynosa, they received multiple phone calls from blocked numbers, which Maria believes were from cartel members trying to track her location. On or around October 8, 2018, Maria's ex-husband called her directly and threatened her.

170. Following the filing of the First Amended Complaint in this case, Defendants made arrangements to facilitate the entry of Maria and her children into the United States.

Plaintiffs Úrsula Doe and Juan Doe

171. Úrsula and Juan are natives and citizens of Honduras. They are a married couple with two children. They left Honduras with their children in August 2018 out of fear for their lives and the lives of their children.

172. Úrsula saw members of a Honduran gang kill her brother in 2014. The gang knows she witnessed the murder and have repeatedly warned Úrsula and Juan of harm to their family. Gang members have called the family, gone to their house, and threatened to hurt their children.

173. Úrsula and Juan fled Honduras with their children to seek access to the asylum process in the United States. They traveled to Mexico, where they were robbed at gunpoint by three men who took all their money. Eventually they made it to Nuevo Laredo, Mexico, in late September 2018.

174. The day after they arrived in Nuevo Laredo, Úrsula, Juan, and their children went to the international bridge around 2:00 pm and sought access to the asylum process by presenting themselves at the Laredo POE. When they arrived at the middle of the bridge, U.S. officials told them they could not pass because the port was closed. Although Juan insisted that they wanted to request asylum, one of the officials said that they had to wait their turn, the port was closed, and they could not pass.

175. Úrsula, Juan, and their children subsequently traveled to Reynosa to seek access to the asylum process by presenting themselves at the Hidalgo POE. They went to the bridge in Reynosa with their children around 5:00 a.m. Shortly after they passed through the turnstile, a Mexican official grabbed their documents and ordered them to walk with him back to Mexico.

176. The Mexican official took Úrsula and Juan to a waiting room. A different Mexican official took Juan aside and warned him that he and his family could be deported. Úrsula, Juan, and their children were forced to wait all day without much food or water. Around 6:00 or 7:00 p.m., they were allowed to leave.

177. At the time the First Amended Complaint was filed, Úrsula and Juan desired to seek access to the asylum process in the United States, but based on their past experience with CBP's practice at the U.S.-Mexico border, they feared that they would be turned away again or deported to Honduras. At that time, they feared for their lives in Reynosa.

178. Defendants subsequently made arrangements to facilitate the entry of Juan, Úrsula, and their children into the United States.

Plaintiff Victoria Doe

179. Victoria is a sixteen-year old female native and citizen of Honduras. She is an unaccompanied minor and the mother of a one-year old child. In 2017, members of the infamous 18th Street gang held her at gunpoint and threatened her with death if she did not submit herself sexually to the leader of the gang. Fearful for her life, she was able to flee to a separate part of Honduras. Shortly thereafter, the very same gang members followed her and repeated the same threats, demanding that she submit and become the property of the gang.

180. Victoria came to Tijuana with a refugee caravan in April 2018, intending to seek asylum in the United States. She lived in a migrant shelter for four months but was in constant fear of murder and other crime and was threatened by male strangers on a number of occasions. She was also fearful that she would be forced into sex trafficking as the 18th Street Gang had attempted.

181. On October 8, 2018, Victoria sought to access the asylum process by presenting herself at the San Ysidro POE, despite her fears that she and her son

would be subject to the U.S. child separation policy. When she arrived, she informed the CBP officials of her intent to apply for asylum and her fear of returning to Honduras. In response, the CBP official told her that she could not apply for asylum at that time, and that she had to speak with a Mexican officer instead. The CBP official did not give further instruction as to which Mexican officer or where to locate the officer.

182. At the time the First Amended Complaint was filed, Victoria desired to return immediately to seek access to the asylum process by presenting herself at the San Ysidro POE, but based on her past experience with CBP's practice at the U.S.-Mexico border, she understood that she would likely be turned away again. Victoria was fearful of remaining in Tijuana, for her life and the life of her son. She could not remain and believed seeking assistance from the Mexican government would be futile.

183. Following the filing of the First Amended Complaint in this case, Defendants made arrangements to facilitate the entry of Victoria and her child into the United States.

Plaintiff Bianca Doe

184. Bianca is a native and citizen of Honduras. She is a transgender woman. Bianca suffered physical violence and extreme discrimination while in Honduras because she is transgender. She was targeted by the infamous MS-13 gang who tried to recruit her. Rather than join, and fearing for her life, she fled Honduras on April 2, 2018.

185. Bianca arrived in Tapachula, Mexico and then later Mexico City, where she faced much of the same harassment and discrimination, including by police and federal officials. Eventually she reached Tijuana on September 19, 2018. She proceeded to seek access to the asylum process by presenting herself at the San Ysidro POE. CBP officials informed her that she could not apply for

asylum because they were "full." Instead, they told her to seek assistance from Mexican workers in white shirts. She did not see any and returned to a local shelter where she was staying.

186. Bianca returned the following day to seek access to the asylum process at the San Ysidro POE. She identified the Mexican workers in white shirts who informed her that they handled the asylum "waitlist" process. She was given a number, "919" which reflected her place on the waitlist. The Mexican workers told her that when her number was called she would be able proceed to the POE. She was informed that she would have to wait multiple weeks.

187. Desperate for her life, her safety, and with little resources, on or about September 28th, 2018, at 1:00 a.m. Bianca approached the U.S.-Mexico border fence abutting the beach and climbed over the fence into U.S. territory. Eventually a U.S. Border Patrol guard spotted her on U.S. soil and demanded that she climb back over the fence and into Mexico or else he would call the Mexican authorities.

188. On October 8, 2018, Bianca attempted once again to seek access to the asylum process by presenting herself at the San Ysidro POE. At the POE CBP official "Soto" denied Bianca's request to seek asylum, again informing her that they were "full." He instructed Bianca to stand aside and wait for a Mexican official. No Mexican official came and she left.

189. At the time the First Amended Complaint was filed, Bianca desired to return immediately to seek access to the asylum process by presenting herself at the San Ysidro POE, but based on her past experience with CBP's practice at the U.S.-Mexico border, she understood that she would likely be turned away again. Bianca was fearful of remaining in Tijuana. She could not remain and believed seeking assistance from the Mexican government would be futile.

190. Following the filing of the First Amended Complaint in this case, Defendants made arrangements to facilitate Bianca's entry into the United States.

Plaintiff Emiliana Doe

191. Emiliana is a native and citizen of Honduras. She is a transgender woman. She was threatened with violence and death by transnational drug dealers and gang members in Honduras. She was raped on multiple occasions by police officers. In May 2017, she was kidnapped and held for three days, and eventually thrown out of a moving car. In April 2018, she was abducted by four drug dealers, beaten for over six hours, pistol whipped, thrown out of a moving truck, and ordered to sell drugs. She was refused medical attention because she is transgender.

192. Emiliana fled Honduras on June 5, 2018 and embarked on the arduous journey through Mexico, where she was again repeatedly raped and threatened with death. She eventually reached Tijuana in September 2018. Emiliana intended to seek access to the asylum process in the United States, but was unsure how. She spoke with a stranger who was also attempting to apply for asylum who informed her that she needed to get on the "waiting list." She proceeded to the seek access to the asylum process by going to the San Ysidro POE and speaking with two women who gave her a number, "1014," which reflected her place on a waitlist. They told Emiliana to come back in six weeks.

193. Given the dangers in Tijuana, particularly to transgender women, Emiliana could not wait six weeks and instead on October 8, 2018, she sought access to the asylum process by presenting herself at the San Ysidro POE to ask for asylum. When she informed a CBP official that she wished to seek asylum in the United States, he responded that she could not because they were "full," and instead ordered her to wait off to the side until a Mexican immigration official could come over. No official ever came.

194. At the time the First Amended Complaint was filed, Emiliana desired to return immediately to seek access to the asylum process by presenting herself at the San Ysidro POE, but based on her past experience with CBP's practice at the

U.S.-Mexico border, she understood that she would likely be turned away again. Emiliana was fearful of remaining in Tijuana. She could not remain and believed seeking assistance from the Mexican government would be futile.

195. Following the filing of the First Amended Complaint in this case, Defendants made arrangements to facilitate Emiliana's entry into the United States.

Plaintiff César Doe

196. César is a native and citizen of Honduras. Earlier in 2018, the 18th Street gang demanded that he join the gang at threat of death. He refused. The gang later kidnapped him and kept him in an abandoned house in the mountains. He was able to escape, and fled Honduras the next day.

197. César reached Tijuana on August 1, 2018 with the intention of seeking access to the asylum process in the United States. César approached the plaza immediately before the San Ysidro POE where he was approached by members of "Grupo Beta." Grupo Beta informed him that he would need to go through them to apply for asylum. They explained that they would put him on a list and give him a number, and only when his number was called could he apply for asylum.

198. Soon thereafter, Grupo Beta began racially segregating individuals into three groups: Africans, Central Americans, and Mexicans. They placed César in the Central America group and then Mexican officials arrested him and placed him into detention. César was detained for twelve days and Mexican officials threatened to deport him on multiple occasions. A local shelter eventually secured César's release from detention.

199. Continuing to fear for his life in Tijuana, César returned to the San Ysidro POE to seek access to the asylum process, and he spoke with Grupo Beta. He was eventually placed on the waitlist and given number "740." After waiting a few weeks, César sought access to the asylum process by presenting himself at the San Ysidro POE with two staff members from Al Otro Lado. César

informed CBP officials that he intended to seek asylum in the United States and that he feared return to his home country. The CBP officials refused to let him pass or seek asylum.

200. After waiting another few weeks, in September 2018 César sought access to the asylum process once again by presenting himself at the San Ysidro POE. Members of Grupo Beta intercepted him and threatened to call Mexican immigration officials and child protective services on him. The individuals pushed César toward the corner the plaza near the POE and called Mexican immigration. A staff member from Al Otro Lado escorted César back to the shelter.

201. At the time the First Amended Complaint was filed, César desired to return immediately to seek access to the asylum process by presenting himself at the San Ysidro POE, but based on his past experience with CBP's practice at the U.S.-Mexico border, he understood that he would likely be turned away again. César was fearful of remaining in Tijuana. He could not remain and believed seeking assistance from the Mexican government would be futile.

202. Following the filing of the First Amended Complaint in this case, Defendants made arrangements to facilitate César's entry into the United States.

V. LEGAL BACKGROUND

A. U.S. Law Requires that Asylum Seekers Who Present Themselves at POEs Have Meaningful Access to the Asylum Process

203. U.S. law requires CBP to give individuals who present themselves at POEs and express a desire to apply for asylum or a fear of persecution in their home countries the opportunity to seek protection in the United States without unreasonable delay.

204. Specifically, the Immigration and Nationality Act ("INA") and its implementing regulations set forth a variety of ways in which such individuals may seek protection in the United States. *See, e.g.*, 8 U.S.C. § 1157 (admission of

refugees processed overseas); 8 U.S.C. § 1158 (asylum); 8 U.S.C. § 1231(b)(3) (restriction of removal to a country where individual's life or freedom would be threatened); 8 C.F.R. §§ 208.16-18 (protection under the Convention Against Torture).

205. The INA provides that any noncitizen "who is physically present in the United States or who arrives in the United States" has a statutory right to apply for asylum, irrespective of such individual's status. 8 U.S.C. § 1158(a)(1). The INA also specifies processes that must be followed when an individual states a desire to seek asylum or expresses a fear of returning to his or her home country. *See* 8 U.S.C. § 1158(d)(1) ("The Attorney General shall establish a procedure for the consideration of asylum applications filed [by individuals physically present in the United States or who arrive in the United States]."). Under the INA, CBP must either:

a. Refer the asylum seeker for a credible fear interview (*see* 8 U.S.C. § 1225(b)(1));

b. Place the asylum seeker directly into regular removal proceedings by issuing a Notice to Appear ("NTA"), which will then allow the asylum seeker to pursue his or her asylum claim before an immigration judge (*see* 8 U.S.C. §§ 1225(b)(2), 1229, 1229a); or

c. Parole the asylum seeker temporarily into the United States for urgent humanitarian reasons or significant public benefit (*see* 8 U.S.C. § 1182(d)(5)(A)).

206. The U.S. government recognized that the duty to allow a noncitizen access to the asylum process is "not discretionary." *See, e.g.*, Federal Defendant's Reply Brief in Support of Motion for Summary Judgment and Dismissal for Lack of Jurisdiction, cited in *Munyua v. United States*, No. 03-4538, 2005 U.S. Dist. LEXIS 11499, at *16-19 (N.D. Cal. Jan. 10, 2005) ("[D]efendant acknowledges

that [the immigration officers] did not have the discretion to ignore a clear expression of fear of return or to coerce an alien into withdrawing an application for admission").

207. CBP is responsible for the day-to-day operation of POEs along the U.S.-Mexico border. CBP's obligations include inspecting and processing individuals who present themselves at POEs to enable them to pursue their claims for asylum in the United States. CBP officials themselves are not authorized to evaluate, grant or reject an individual's asylum claim.

208. All noncitizens arriving at POEs along the U.S.-Mexico border must be inspected by CBP officials. *See* 8 U.S.C. § 1225(a)(3) ("All [noncitizens] . . . who are applicants for admission or otherwise seeking admission . . . ***shall be inspected*** by immigration officers.") (emphasis added). During inspection, CBP officials must determine whether a noncitizen may be admitted to the United States. *See* 8 U.S.C. § 1182(a) (specifying grounds of inadmissibility). In order to make this determination, CBP scrutinizes an individual's entry documents. *See* 8 U.S.C. § 1181(a) (outlining documentation requirements for the admission of noncitizens into the United States). Asylum seekers often flee their countries on very short notice and thus frequently lack valid entry documents. Once a CBP official makes a determination of inadmissibility, the individual becomes subject to removal from the United States.

209. CBP officials must then place the noncitizen into either expedited removal proceedings under 8 U.S.C. § 1225(b) or regular removal proceedings under 8 U.S.C. § 1229.

210. Expedited removal proceedings involve a more streamlined process than regular removal proceedings and are reserved for people apprehended at or near the border. *See* 8 U.S.C. § 1225(b)(1)(A)(i) (permitting certain persons who are seeking admission at the border to the United States to be expeditiously removed without a full immigration judge hearing). However, Congress included

important safeguards in the expedited removal statute in an effort specifically to protect asylum seekers.

211. The INA unequivocally states that if a noncitizen placed in expedited removal proceedings "indicates either an intention to apply for asylum . . . or a fear of persecution, the [CBP] officer ***shall*** refer the [noncitizen] for an interview by an asylum officer." 8 U.S.C. § 1225(b)(1)(A)(ii) (emphasis added). The requirement to refer an asylum seeker placed in expedited removal proceedings to an asylum officer is ***mandatory***.

212. Likewise, the applicable regulations promulgated under the INA reinforce that if an individual in expedited removal proceedings asserts an intention to apply for asylum or a fear of persecution, then "the inspecting officer ***shall not*** proceed further with removal of the [noncitizen] until the [noncitizen] has been referred for an interview by an asylum officer." 8 C.F.R. § 235.3(b)(4) (emphasis added).

213. Importantly, CBP officials must read a form to noncitizens subject to expedited removal advising them of their right to speak to an asylum officer if they express a desire to apply for asylum or a fear of returning to their home countries. *See* 8 C.F.R. § 235.3(b)(2)(i); DHS Form I-867A.

214. Affirming that the CBP officials themselves are not authorized to adjudicate asylum claims, the regulations specifically charge ***asylum officers*** from U.S. Citizenship and Immigration Services with making initial determinations as to whether there is a "significant possibility" that an individual can establish eligibility for asylum. *See* 8 C.F.R. § 235.3(b)(4); *see also* 8 U.S.C. § 1225(b)(1)(B)(ii). This is because asylum officers are trained in the often complicated and evolving law surrounding asylum, and thus are uniquely positioned to conduct such interviews, which themselves require particular interviewing and assessment skills as well as comprehension of the social and political contexts from which asylum seekers flee. In fact, the INA specifically

defines "asylum officer" as an immigration officer who "has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications under section 1158." 8 U.S.C. § 1225(b)(1)(E).

215. Applicants who establish that they have a "significant possibility" of proving their eligibility for asylum receive positive credible fear determinations. They are taken out of the expedited removal system altogether and placed into regular removal proceedings, where they have the opportunity to submit an asylum application, develop a full record before an Immigration Judge, appeal to the Board of Immigration Appeals, and seek judicial review of an adverse decision. 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. §§ 235.6(a)(1)(ii), (iii).

216. Alternatively, CBP officials may place noncitizens directly into regular removal proceedings by issuing an NTA. 8 U.S.C. §§ 1225(b)(2), 1229(a)(1), 1229a. Once in regular removal proceedings, the asylum seeker can submit an asylum application and must receive a full hearing before an Immigration Judge, file an administrative appeal with the Board of Immigration Appeals, and seek judicial review. 8 U.S.C. § 1229a(a)(1) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.").

217. At the discretion of the DHS Secretary, an individual may also be temporarily paroled into the United States for urgent humanitarian reasons or significant public benefit. When the purposes of such parole have been served, the individual must be returned to the custody from which he was paroled, after which his case will continue to be handled in the same manner as that of any other applicant for admission to the United States. 8 U.S.C. § 1182(d)(5)(A).

218. Despite these prescribed procedures, CBP has implemented a policy and regularly employs a variety of egregious practices (including those described above) that have one unlawful result: directly or constructively depriving Class

Plaintiffs, and the asylum seekers they represent, of meaningful access to the asylum process, and thereby violating their right to seek asylum under U.S. law.

219. Acknowledging the illegality of the Trump administration's ongoing pushbacks of asylum seekers at the border, the House Appropriations Committee called on DHS in July 2018 to "ensure that the United States is meeting its legal obligations, to include reminding field officers and agents about CBP's legal responsibilities to ensure that asylum-seekers can enter at POES."[87]

B. Defendants Have No Authority Under the INA to Turn Back a Noncitizen Seeking Admission at a POE

220. CBP's authority is limited to that granted by Congress in the INA. Nothing in the INA authorizes Defendants, through their officers and employees, to turn back a noncitizen who seeks admission at a POE.

221. When inspecting a noncitizen who arrives at a POE, CBP officials must follow the procedures mandated by Congress in 8 U.S.C. § 1225. Pursuant to this section, CBP officials are limited to the following possible actions with respect to any arriving noncitizen who is not clearly and beyond a doubt entitled to be admitted:

a. Place arriving noncitizens who are inadmissible under one of two grounds specified by statute in expedited removal proceedings pursuant to 8 U.S.C. § 1225(b)(1)(A)(i);

b. Refer any noncitizen placed in expedited removal proceedings who expresses either an intent to apply for asylum or a fear of persecution if returned to his or her home country to an asylum officer for a credible fear interview pursuant to 8 U.S.C. §§ 1225(b)(1)(A)(ii), 1225(b)(1)(B);

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[87] *Bill Report Draft*, *supra* note 78, at 4.

c. Place "other" arriving noncitizens (*i.e.*, those who are not placed in expedited removal proceedings under 8 U.S.C. § 1225(b)(1)(A) and who are neither crewmen nor stowaways) in removal proceedings under 8 U.S.C. § 1229a pursuant to 8 U.S.C. § 1225(b)(2);

d. Follow other removal procedures with respect to noncitizens suspected of being inadmissible on terrorism or related security grounds pursuant to 8 U.S.C. § 1225(c); or

e. Accept from the noncitizen a voluntary (*i.e.*, non-coerced) withdrawal of her application for admission pursuant to 8 U.S.C. § 1225(a)(4) and 8 C.F.R. § 235.4.

222. Defendants, through their officers, employees, and agents, act without authority and in violation of the law when they directly deny an individual access to the U.S. asylum process at a POE.

223. Defendants, through their officers, employees, and agents, act without authority and in violation of the law when they constructively deny an individual's access to the asylum process by unreasonably delaying their ability to present themselves at a POE.

224. Moreover, Defendants' Turnback Policy is *ultra vires*.

C. Class Plaintiffs Are Entitled to Procedural Due Process Rights Under the Fifth Amendment to the U.S. Constitution

225. The Due Process Clause of the Fifth Amendment to the U.S. Constitution prohibits the federal government from depriving any person of "life, liberty, or property, without due process of law." U.S. Const. Amend. V. In addition, where Congress has granted statutory rights and has directed an agency to establish a procedure for providing such rights, the Constitution requires the government to establish a fair procedure and to abide by that procedure. In the asylum context, U.S. law mandates that asylum seekers be provided with such

process. Multiple courts have recognized that such procedural rights are critical in the asylum context and can result in life or death decisions, because applicants wrongly denied asylum can be subject to death or other serious harm in their home countries. *See, e.g.*, *Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996) ("The basic procedural rights Congress intended to provide asylum applicants . . . are particularly important because an applicant erroneously denied asylum could be subject to death or persecution if forced to return to his or her home country.").

226. The INA and its implementing regulations provide Class Plaintiffs with the right to be processed at a POE and granted meaningful access to the asylum process. *See, e.g.*, 8 U.S.C. §§ 1158(a)(1), 1225(a)(3), 1225(b)(1)(A)(ii), 1225(b)(1)(B), 1225(b)(2). By systematically turning away asylum seekers presenting themselves at POEs along the U.S.-Mexico border or unreasonably delaying their inspections—and thus directly or constructively denying them access to the asylum process, Defendants have failed to comply with the due process procedures for processing asylum seekers under the INA and its implementing regulations.

D. The *Non-Refoulement* Doctrine Under International Law Requires Implementation and Adherence to a Procedure to Ensure Prompt Access to Asylum

227. The United States is obligated by a number of treaties and protocols to adhere to the duty of *non-refoulement*—a duty that prohibits a country from returning or expelling an individual to a country where he or she has a well-founded fear of persecution and/or torture and that requires processes that ensure fair and efficient administration of the asylum process.

228. The Office of the United Nations High Commissioner for Refugees ("UNHCR") has described *non-refoulement* as "the cornerstone of international refugee protection," and notes that it is "of particular relevance to

asylum-seekers."[88] The primary treaty source for the duty of *non-refoulement* is the 1951 Convention on the Rights of Refugees. Article 33 of the Convention prohibits a state from returning "a refugee *in any manner* whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[89] As UNHCR has explained, the Treaty's emphasis on "any manner" of *refoulement* reflects a state duty to avoid using direct or indirect ways of subjecting a person to a risk of return to persecution.[90]

229. In addition, the duty of *non-refoulement* extends not only to a person's country of origin, "but also to any other place where a person has reason to fear threats to his or her life or freedom related to one or more of the grounds set out in the 1951 Convention, or from where he or she risks being sent to such a risk."[91] Accordingly, a state must not only prevent return to danger, it must take affirmative measures to prevent a risk of harm by "adopt[ing] a course that does not result in [asylum seekers] removal, directly or indirectly, to a place where their lives or freedom would be in danger."[92] This includes "access to the territory and to *fair and efficient* asylum procedures."[93]

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[88] *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, UNHCR (Jan. 26, 2007), http://www.unhcr.org/4d9486929.pdf.

[89] 1951 Refugee Convention, Art. 33 (emphasis added).

[90] *Id*. at 7.

[91] *Id.* at 3 (citing UNHCR, Note on Non-Refoulement (EC/SCP/2), 1977 ¶4).

[92] *Id*. at ¶ 8.

[93] *Id.* (emphasis added).

230. The United States adopted the protections of Article 33 by signing onto the 1967 Protocol Relating to the Status of Refugees, which incorporated Articles 2-34 of the 1951 Convention.

231. The prohibition against *refoulement* is likewise central to other treaties ratified by the United States, including the International Covenant on Civil and Political Rights ("ICCPR") and the Convention Against Torture ("CAT"), both of which prohibit returning an individual to harm and obligate the United States to implement and follow legal procedures to protect refugees' right to *non-refoulement*.[94]

232. In order to effectuate an asylum seeker's right to *non-refoulement*, the United States is obligated to implement and follow procedures to ensure that his or her request for asylum be duly and efficiently considered. The United States implemented this legal obligation with the passage of the 1980 Refugee Act, which established a procedure for a noncitizen physically present in the United States or at a land border or POE to apply for asylum.[95]

233. In practice, the duty of *non-refoulement* covers not only those refugees and asylum seekers already present inside the country, but also those who present themselves at POEs along the U.S. border. The duty requires U.S. officials such as Defendants to process those seeking to cross the U.S. border and not to deny or unreasonably delay their access to an efficient, lawful process to present a claim for asylum.

234. The norm of *non-refoulement* is specific, universal and obligatory. It is so widely accepted that it has reached the status of *jus cogens*—a norm not subject to derogation. Indeed, in 1996, the United Nations Executive Committee

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[94] *See* ICCPR, Art. 13; CAT, Art. 3.

[95] *See* Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102 (1980).

on the International Protection of Refugees explicitly concluded that the *non-refoulement* principle had achieved the status of a norm "not subject to derogation."[96] The principle was recognized as such in the 1984 Cartagena Declaration on Refugees; was included in a portion of the Refugee Convention from which derogation is not permitted; and has been recognized by bodies, including the Inter-American Commission on Human Rights and the Organization of American States General Assembly.

235. Defendants' policy and actions to actively or constructively deny Class Plaintiffs, and the asylum seekers they represent, access to the U.S. asylum process violate their binding and enforceable obligations under international law.

VI. CLASS ACTION ALLEGATIONS

236. Class Plaintiffs bring this action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2) on behalf of themselves and all other persons similarly situated. The proposed class is defined as follows:

> All noncitizens who seek or will seek to access the U.S. asylum process by presenting themselves at a POE along the U.S.-Mexico border and are denied access to the U.S. asylum process by or at the instruction of CBP officials.

237. The class is so numerous that joinder of all members is impracticable. CBP's misconduct toward asylum seekers at POEs along the U.S.-Mexico border has been the focus of monitoring, reporting and advocacy by numerous well-respected non-governmental organizations. These organizations have investigated and documented thousands of examples of asylum seekers being turned back by CBP officials. Many more asylum seekers likely have been the victims of this unlawful conduct as these abuses often go unreported. Asylum seekers who are

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[96] Executive Committee Conclusion No. 79, *General Conclusion on International Protection* (1996).

turned back at the border are continuously moving and relocating, also making joinder impracticable.

238. There are questions of law and fact that are common to the class. The class alleges common harms: denial of access to the asylum process at POEs along the U.S.-Mexico border and a violation of the right not to be returned to countries where they fear persecution. The class members' entitlement to these rights is based on a common core of facts. All members of the proposed class have attempted to seek asylum by presenting themselves at a POE along the U.S.-Mexico border. All of them have expressed a fear of persecution or a desire to apply for asylum, or would have done so but for the conduct of Defendants. These facts entitle all of them to the opportunity to seek asylum. Yet each class member has been and likely will again be unlawfully denied access to the U.S. asylum process by CBP. Moreover, all class members raise the same legal claims: that U.S. law requires CBP officials at POEs to give them meaningful access to the asylum process. Their shared common facts will ensure that judicial findings regarding the legality of the challenged practices will be the same for all class members. Should Class Plaintiffs prevail, *all* class members will benefit; each of them will be entitled to a prompt, lawful inspection at a POE along the U.S.-Mexico border and an opportunity to seek asylum.

239. Class Plaintiffs' claims are typical of the claims of the class. Class Plaintiffs and class members raise common legal claims and are united in their interest and injury. All Class Plaintiffs, like all class members, are asylum seekers to whom CBP officials unlawfully denied, whether actively or constructively, access to the U.S. asylum process after they presented themselves at POEs along the U.S.-Mexico border. Class Plaintiffs and class members are thus victims of the same, unlawful course of conduct.

240. Class Plaintiffs are adequate representatives. Class Plaintiffs seek relief on behalf of the class as a whole and have no interest antagonistic to other

members of the class. Class Plaintiffs' mutual goal is to declare Defendants' challenged policies and practices unlawful and to obtain declaratory and injunctive relief that would cure this illegality. Class Plaintiffs seek a remedy for the same injuries as the class members, and all share an interest in having a meaningful opportunity to seek asylum. Thus, the interests of the Class Plaintiffs and of the class members are aligned.

241. Class Plaintiffs are represented by attorneys from the Southern Poverty Law Center, the Center for Constitutional Rights, the American Immigration Council, and Latham & Watkins LLP. Counsel have a demonstrated commitment to protecting the rights and interests of noncitizens and, together, have considerable experience in handling complex and class action litigation in the immigration field. Counsel have represented numerous classes of immigrants and other victims of systematic government misconduct in actions in which they successfully obtained class relief.

242. Defendants have acted or refused to act on grounds that are generally applicable to Class Plaintiffs and the class. Defendants have failed to provide Class Plaintiffs and class members with meaningful access to the U.S. asylum process. Defendants' actions violate Class Plaintiffs' and class members' statutory, regulatory and constitutional rights to access to the asylum process. Declaratory and injunctive relief are appropriate remedies.

243. In the absence of a class action, there is substantial risk that individual actions would be brought in different venues, creating a risk of inconsistent injunctions to address Defendants' common conduct.

FIRST CLAIM FOR RELIEF

DECLARATORY AND INJUNCTIVE RELIEF

AGAINST ALL DEFENDANTS

(VIOLATION OF THE RIGHT TO SEEK ASYLUM UNDER THE IMMIGRATION AND NATIONALITY ACT)

244. Al Otro Lado and Class Plaintiffs reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

245. INA § 208(a)(1) (8 U.S.C. § 1158(a)(1)) gives any noncitizen who is physically present in or who arrives in the United States a statutory right to seek asylum, regardless of such individual's immigration status.

246. When a noncitizen presents himself or herself at a POE and indicates an intention to apply for asylum or a fear of persecution, CBP officials must refer the noncitizen for a credible fear interview under 8 U.S.C. § 1225(b)(1)(A)(ii) and 8 C.F.R. § 235.3(b)(4), or, in accordance with 8 U.S.C. § 1225(b)(2), place the noncitizen directly into regular removal proceedings under 8 U.S.C. § 1229(a)(1).

247. Class Plaintiffs presented themselves at POEs and either asserted an intention to apply for asylum or a fear of persecution in their countries of origin or would have done so but for the Defendants' conduct. Nevertheless, CBP officials did not refer Class Plaintiffs to an asylum officer for credible fear interviews pursuant to 8 U.S.C. § 1225(b)(1)(A)(ii), or, in accordance with 8 U.S.C. § 1225(b)(2), place Class Plaintiffs directly into regular removal proceedings pursuant to 8 U.S.C. § 1229(a)(1).

248. Instead, in direct contravention of the INA, CBP officials engaged in unlawful tactics, including the implementation of the Turnback Policy, that actively or constructively denied Class Plaintiffs' access to the statutorily prescribed asylum process and forced them to return to Mexico.

249. CBP officials' treatment of Class Plaintiffs at the POEs and the U.S.-Mexico border was inflicted at the instigation, under the control or authority, or with the knowledge, consent, direction and/or acquiescence of Defendants.

250. As a result of Defendants' violations of the INA, Class Plaintiffs have been damaged—through the active or constructive denial of access to the asylum process and by being forced to return to Mexico or other countries where they face threats of further persecution.

251. As a result of Defendants' violations of the INA, Plaintiff Al Otro Lado has been damaged—namely its core mission has been frustrated and it has been forced to divert substantial resources away from its programs to counteract CBP's unlawful practices at or near POEs along the U.S.-Mexico border.

252. Defendants' practices have resulted and will continue to result in irreparable injury, including a continued risk of violence and serious harm to Class Plaintiffs and further violations of their statutory rights. Class Plaintiffs and Al Otro Lado do not have an adequate remedy at law to redress the violations alleged herein, and therefore seek injunctive relief restraining Defendants from continuing to engage in the unlawful policy and practices alleged herein.

253. Pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. §§ 2201 and 2202, this Court may declare the rights or legal relations of any party in any case involving an actual controversy.

254. An actual controversy has arisen and now exists between Class Plaintiffs and Al Otro Lado, on one hand, and Defendants, on the other. Class Plaintiffs and Al Otro Lado contend that Defendants' Turnback Policy, as well as the conduct and practices carried out in reliance on it, as alleged in this Second Amended Complaint, violate the INA. On information and belief, Defendants contend that their Turnback Policy, conduct and practices are lawful.

255. Class Plaintiffs and Al Otro Lado therefore request and are entitled to a judicial determination as to the rights and obligations of the parties with respect

to this controversy, and such a judicial determination of these rights and obligations is necessary and appropriate at this time.

SECOND CLAIM FOR RELIEF

DECLARATORY RELIEF AND INJUNCTIVE RELIEF AGAINST ALL DEFENDANTS

(VIOLATION OF SECTION 706(1) OF THE ADMINISTRATIVE PROCEDURE ACT)

256. Al Otro Lado and Class Plaintiffs reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

257. The Administrative Procedure Act ("APA") (5 U.S.C. § 551, *et. seq.*) authorizes suits by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The APA also provides relief for a failure to act: "The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

258. CBP officials, at the instigation, under the control or authority of, or with the direction, knowledge, consent, or acquiescence of Defendants, have engaged in an unlawful widespread pattern or practice of denying and unreasonably delaying asylum seekers' access to the asylum process by, among other tactics: lying; using threats, intimidation and coercion; employing verbal abuse and applying physical force; physically blocking access to POE buildings; imposing unreasonable delays before granting access to the asylum process; denying outright access to the asylum process; and denying access to the asylum process in a racially discriminatory manner.

259. CBP officials, at the instigation, under the control or authority of, or with the direction, knowledge, consent, or acquiescence of Defendants, have also adopted and implemented the Turnback Policy, restricting access to the asylum

process at POEs by mandating that CBP officers directly or constructively turn back asylum seekers at the border based on purported "capacity" constraints.

260. Through this conduct, CBP officials have failed, in violation of the APA, to take actions mandated by the following statutes and implementing regulations:

- 8 U.S.C. § 1225(a)(1)(3) ("All aliens . . . who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States ***shall be inspected by immigration officers***.") (emphasis added);
- 8 U.S.C. § 1225(b)(1)(A)(ii) ("If an immigration officer determines that an alien . . . who is arriving in the United States . . . is inadmissible . . . and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, ***the officer shall refer the alien for an interview by an asylum officer*** . . . .") (emphasis added);
- 8 U.S.C. § 1225(b)(2) ("[I]n the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title."); and
- 8 C.F.R. § 235.3(b)(4) ("If an alien subject to the expedited removal provisions indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the inspecting officer ***shall not proceed further*** with removal of the alien ***until the alien has been referred for an interview by an asylum officer*** . . . .") (emphasis added).

261. Through this conduct, CBP officials have also failed, in violation of the APA, to take the above-listed mandated actions without unreasonable delay.

262. Defendants' repeated and pervasive failures to act, and/or to act within a reasonable time, which denied and/or unreasonably delayed Class Plaintiffs' access to the statutorily prescribed asylum process, constitute unlawfully withheld and unreasonably delayed agency action and therefore give rise to federal jurisdiction and mandate relief under the APA.

263. As a result of the acts constituting violations of the APA, Class Plaintiffs have been damaged through the denial and/or unreasonable delay of access to the asylum process and by being forced to return to and/or wait in Mexico, where they face threats of further persecution.

264. As a result of the acts constituting violations of the APA, Plaintiff Al Otro Lado has been damaged—namely, its core mission has been frustrated and it has been forced to divert substantial resources away from its programs to counteract CBP's unlawful practices at POEs along the U.S.-Mexico border.

265. Defendants' Turnback Policy and widespread pattern or practice have resulted and will continue to result in irreparable injury, including a continued risk of violence and serious harm to Class Plaintiffs and further violations of their statutory and regulatory rights. Class Plaintiffs and Al Otro Lado do not have an adequate remedy at law to redress the violations alleged herein, and therefore seek injunctive relief restraining Defendants from continuing to engage in the unlawful practices alleged herein.

266. Al Otro Lado and Class Plaintiffs have exhausted all available administrative remedies and have no adequate remedy at law.

267. Pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. §§ 2201 and 2202, this Court may declare the rights or legal relations of any party in any case involving an actual controversy.

268. An actual controversy has arisen and now exists between Class Plaintiffs and Al Otro Lado, on one hand, and Defendants, on the other. Class Plaintiffs and Al Otro Lado contend that Defendants' Turnback Policy and

sanctioning of CBP's unlawful widespread pattern or practice at POEs along the U.S.-Mexico border, as alleged in this Complaint, violate the APA. On information and belief, Defendants contend that the Turnback Policy and widespread pattern or practice are lawful.

269. Class Plaintiffs and Al Otro Lado therefore request and are entitled to a judicial determination as to the rights and obligations of the parties with respect to this controversy, and such a judicial determination of these rights and obligations is necessary and appropriate at this time.

THIRD CLAIM FOR RELIEF

DECLARATORY RELIEF AND INJUNCTIVE RELIEF AGAINST ALL DEFENDANTS

(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)

270. Al Otro Lado and Class Plaintiffs reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

271. Under the APA, "the reviewing court shall . . . hold unlawful and set aside agency action, finding, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right [and/or] without observance of procedure required by law." 5 U.S.C. § 706(2)(C), (D).

272. Defendants, through implementation of the Turnback Policy and sanctioning of CBP's unlawful widespread pattern or practice of denying and unreasonably delaying asylum seekers' access to the asylum process, have acted in excess of their statutorily prescribed authority and without observance of the procedures required by law in violation of section 706(2) of the APA. *See* 5 U.S.C. §§ 706(2)(C), (D). Congress mandated the various procedures that

Defendants and their officers, employees, and agents are authorized and required to follow when inspecting individuals who seek admission at POEs. *See* 8 U.S.C. § 1225. Regulations implementing section 1225 also establish the required procedures for inspection of individuals who seek admission at POEs. *See* 8 C.F.R. § 235.3(b)(4). None of these procedures authorizes a CBP official to turn back a noncitizen seeking asylum at a POE, at the physical U.S.-Mexico border, or any place in between.

273. In turning back Class Plaintiffs and purported class members at POEs or along the U.S.-Mexico border without following the procedures mandated by the INA and its implementing regulations, CBP officials have acted and continue to act in excess of the authority granted to them by Congress and without observance of procedure required by law.

274. The Turnback Policy is a policy authorized by Defendants with the purpose of restricting and unreasonably delaying asylum seekers' access to the U.S. asylum process on the basis of purported capacity constraints at U.S. POEs. Defendants' own statements and communications, as well as a report of the DHS Office of Inspector General, confirm Defendants ordered the Turnback Policy and its implementation by CBP. The Turnback Policy thus constitutes a final agency action under 5 U.S.C. § 704 and a violation of 5 U.S.C. § 706(2).

275. Furthermore, each instance where Defendants, through their officers, employees, and agents, directly or constructively deny Class Plaintiffs or purported class members access to the asylum process constitutes a final agency action under 5 U.S.C. § 704 and a violation of 5 U.S.C. § 706(2).

276. As a result of the acts constituting violations of the APA, Class Plaintiffs have been damaged through the denial, restriction, and/or unreasonable delay of access to the asylum process and by being forced to return to and/or wait in Mexico where they face threats of further persecution and/or other serious harm.

277. As a result of the acts constituting violations of the APA, Plaintiff Al Otro Lado has been damaged—namely, its core mission has been frustrated and it has been forced to divert substantial resources away from its programs to counteract CBP's unlawful practices at POEs along the U.S.-Mexico border.

278. Defendants' Turnback Policy and widespread pattern or practice have resulted and will continue to result in irreparable injury, including a continued risk of violence and serious harm to Class Plaintiffs and further violations of their statutory and regulatory rights. Class Plaintiffs and Al Otro Lado do not have an adequate remedy at law to redress the violations alleged herein, and therefore seek injunctive relief restraining Defendants from continuing to engage in the unlawful policy alleged herein.

279. Al Otro Lado and Class Plaintiffs have exhausted all available administrative remedies and have no adequate remedy at law.

280. Pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. §§ 2201 and 2202, this Court may declare the rights or legal relations of any party in any case involving an actual controversy.

281. An actual controversy has arisen and now exists between Class Plaintiffs and Al Otro Lado, on one hand, and Defendants, on the other. Class Plaintiffs and Al Otro Lado contend that Defendants' Turnback Policy and sanctioning of CBP's unlawful widespread pattern or practice at POEs along the U.S.-Mexico border, as alleged in this Complaint, violate the APA. On information and belief, Defendants contend that the Turnback Policy and widespread pattern or practice are lawful.

282. Class Plaintiffs and Al Otro Lado therefore request and are entitled to a judicial determination as to the rights and obligations of the parties with respect to this controversy, and such a judicial determination of these rights and obligations is necessary and appropriate at this time.

FOURTH CLAIM FOR RELIEF

DECLARATORY RELIEF AND INJUNCTIVE RELIEF

AGAINST ALL DEFENDANTS

(VIOLATION OF PROCEDURAL DUE PROCESS)

283. Al Otro Lado and Class Plaintiffs reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

284. The Due Process Clause of the Fifth Amendment to the U.S. Constitution prohibits the federal government from depriving any person of "life, liberty, or property, without due process of law." U.S. Const. Amend. V.

285. Congress has granted certain statutory rights to asylum seekers, such as Class Plaintiffs and the asylum seekers they represent, and has directed DHS to establish a procedure for providing such rights. The Due Process Clause thus requires the government to establish a fair procedure and to abide by that procedure.

286. As set forth above, the INA and its implementing regulations provide Class Plaintiffs the right to be processed at a POE and granted meaningful access to the asylum process. *See* 8 U.S.C. §§ 1158(a)(1), 1225(a)(3), 1225(b)(1)(A)(ii), 1225(b)(1)(B), 1225(b)(2); *see also* 8 C.F.R. § 235.3(b)(4).

287. By adopting the Turnback Policy and using a variety of tactics to turn back asylum seekers at POEs along the U.S.-Mexico border, CBP officials have denied Class Plaintiffs access to the asylum process and failed to comply with procedures set forth in the INA and its implementing regulations.

288. CBP officials' treatment of Class Plaintiffs at the U.S.-Mexico border was inflicted at the instigation, under the control or authority, or with the knowledge, consent, or acquiescence of Defendants.

289. By denying Class Plaintiffs' access to the asylum process, Defendants have violated Class Plaintiffs' procedural due process rights under the Fifth Amendment to the U.S. Constitution.

290. As a result of the Defendants' violations of the Fifth Amendment to the U.S. Constitution, Class Plaintiffs have been damaged through the denial of access to the asylum process and by being forced to return to Mexico where they face threats of further persecution.

291. Defendants' practices have resulted and will continue to result in irreparable injury, including a continued risk of violence and serious harm to Class Plaintiffs and further violations of their constitutional rights. Class Plaintiffs do not have an adequate remedy at law to redress the violations alleged herein, and therefore seek injunctive relief restraining Defendants from engaging in the unlawful policy, conduct and practices alleged herein.

292. An actual controversy exists between Class Plaintiffs, on one hand, and Defendants, on the other. Class Plaintiffs contend that Defendants' Turnback Policy and sanctioning of CBP's unlawful widespread pattern or practice at POEs along the U.S.-Mexico border, as alleged in the Complaint, violate the Fifth Amendment to the United States Constitution. On information and belief, Defendants contend that the Turnback Policy and widespread pattern or practice are lawful.

293. Class Plaintiffs therefore request and are entitled to a judicial determination as to the rights and obligations of the parties with respect to this controversy, and such a judicial determination of these rights and obligations is necessary and appropriate at this time.

FIFTH CLAIM FOR RELIEF

DECLARATORY RELIEF AND INJUNCTIVE RELIEF

AGAINST ALL DEFENDANTS

(VIOLATION OF THE *NON-REFOULEMENT* DOCTRINE)

294. Class Plaintiffs reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

295. CBP officials have systematically denied, or unreasonably delayed, access to the asylum process by Class Plaintiffs, and the asylum seekers they represent, in violation of customary international law reflected in treaties which the United States has ratified and implemented: namely, the specific, universal and obligatory norm of *non-refoulement*, which has also achieved the status of a *jus cogens* norm, and which forbids a country from returning or expelling an individual to a country where he or she has a well-founded fear of persecution and/or torture, whether it is her home country or another country.

296. The duty of *non-refoulement* also requires the adoption of procedures to ensure prompt, efficient, and unbiased access to the asylum process.

297. CBP officials' treatment of Class Plaintiffs at the U.S.-Mexico border was inflicted at the instigation, under the control or authority, or with the knowledge, consent, direction or acquiescence of Defendants.

298. Defendants' conduct is actionable under the Alien Tort Statute, 28 U.S.C. § 1350, which authorizes declaratory and injunctive relief.

299. As a result of the acts constituting violations of the *jus cogens* norm of *non-refoulement*, Class Plaintiffs have been damaged through denial or unreasonable delay of access to the asylum process and by being forced to return to Mexico or other countries where they face threats of further persecution.

300. As a result of the acts constituting violations of the norm of *non-refoulement*, Al Otro Lado has been damaged—namely, its core mission has been frustrated and it has been forced to divert substantial resources away from its

programs to counteract CBP's unlawful practices at POEs along the U.S.-Mexico border.

301. Defendants' practices have resulted and will continue to result in irreparable injury, including a continued risk of violence and serious harm to Class Plaintiffs and further infringement of the protections afforded to them under international law. Class Plaintiffs and Al Otro Lado do not have an adequate remedy at law to redress the violations alleged herein, and therefore seek injunctive relief restraining Defendants from engaging in the unlawful conduct and practices alleged herein.

302. An actual controversy exists between Class Plaintiffs and Al Otro Lado, on one hand, and Defendants, on the other. Class Plaintiffs and Al Otro Lado contend that Defendants' Turnback Policy, as well as the widespread pattern or practice carried out in reliance on it, as alleged in this Complaint, violate the norm of *non-refoulement*. On information and belief, Defendants contend that their policy, conduct and practices are lawful.

303. Class Plaintiffs and Al Otro Lado therefore request and are entitled to a judicial determination as to the rights and obligations of the parties with respect to this controversy, and such a judicial determination of these rights and obligations is necessary and appropriate at this time.

PRAYER FOR RELIEF

304. WHEREFORE, Plaintiff Al Otro Lado and Class Plaintiffs respectfully request that the Court:

a. Issue an order certifying a class of individuals pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(2);

b. Appoint the undersigned as class counsel pursuant to Federal Rule of Civil Procedure 23(g);

c. Issue a judgment declaring that Defendants' Turnback Policy, as well as the practices, acts and/or omissions described herein, give rise to federal jurisdiction;

d. Issue a judgment declaring that Defendants' Turnback Policy, as well as the practices, acts and/or omissions described herein, violate one or more of the following:

(1) The Immigration and Nationality Act, based on violations of 8 U.S.C. §§ 1158 and 1225;

(2) Section 706(1) of the Administrative Procedure Act, based on the unlawful withholding and unreasonable delay of agency action mandated by 8 U.S.C. § 1225 and 8 C.F.R. § 235.3;

(3) Section 706(2) of the Administrative Procedure Act;

(4) The Due Process Clause of the Fifth Amendment; and

(5) The duty of *non-refoulement* under international law;

e. Issue injunctive relief requiring Defendants to comply with the laws and regulations cited above;

f. Issue injunctive relief prohibiting Defendants, and any of their officers, agents, successors, employees, representatives, and any and all persons acting in concert with them or on their behalf, from continuing to implement the Turnback Policy and from engaging in the unlawful practices, acts and/or omissions described herein at POEs along the U.S.-Mexico border;

g. Issue injunctive relief requiring Defendants to implement procedures to provide effective oversight and accountability in the inspection and processing of individuals who present themselves at POEs along the U.S.-Mexico border for the purpose of seeking asylum;

h. Award Plaintiffs their reasonable attorneys' fees, costs and other expenses pursuant to 28 U.S.C. § 2412, and other applicable law; and

i. Grant any and all such other relief as the Court deems just and equitable.

Dated: November 7, 2018

LATHAM & WATKINS LLP
Manuel A. Abascal
Michaela R. Laird

By: */s/ Manuel A. Abascal*
Manuel A. Abascal
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Southern District of California by using the CM/ECF system on November 13, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Manuel A. Abascal

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Attorneys for Plaintiffs

EXHIBIT 1

Memorandum from Todd C. Owen, Executive Assistant Commissioner, Office of Field Operations, Subject: "Metering Guidance" (Apr. 27, 2018)

Al Otro Lado, Inc., et al. v. Kevin K. McAleenan, et al., No. 3:17-cv-02366-BAS-KSC (S.D. Cal.)

1300 Pennsylvania Avenue NW
Washington, DC 20229

U.S. Customs and Border Protection

APR 2 7 2018

MEMORANDUM FOR: See Distribution [redacted]

FROM: Todd C. Owen
Executive Assistant Commissioner
Office of Field Operations

SUBJECT: Metering Guidance

When necessary or appropriate to facilitate orderly processing and maintain the security of the port and safe and sanitary conditions for the traveling public, DFOs may elect to meter the flow of travelers at the land border to take into account the port's processing capacity. Depending on port configuration and operating conditions, the DFO may establish and operate physical access controls at the borderline, including as close to the U.S.-Mexico border as operationally feasible. DFOs may not create a line specifically for asylum-seekers only, but could, for instance, create lines based on legitimate operational needs, such as lines for those with appropriate travel documents and those without such documents.

Ports should inform the waiting travelers that processing at the port is currently at capacity and CBP is permitting travelers to enter the port once there is sufficient space and resources to process them. At no point may an officer discourage a traveler from waiting to be processed, claiming fear of return, or seeking any other protection. Officers may not provide tickets or appointments or otherwise schedule any person for entry. Once a traveler is in the United States, he or she must be fully processed.

INAMI has, at times, elected to conduct exit controls at some locations in Mexico to limit the throughput of travelers into the United States. DFOs should be particularly aware of any INAMI controls that are preventing U.S. citizens, LPRs, or Mexican nationals (some of whom may intend to claim fear) from entering the United States, and should work with INAMI, as appropriate, to address such concerns.

Please ensure that this memorandum is disseminated to all ports of entry within your area of responsibility. Should you have any questions or require additional information, please contact [redacted], Executive Director, APP, at [redacted].

Distribution: Director, Field Operations, El Paso
Director, Field Operations, Laredo
Director, Field Operations, San Diego
Director, Field Operations, Tucson

DEFENDANTS' EXHIBIT 7

Declaration of Randy Howe, Executive Director for Operations, Office of Field Operations, U.S. Customs and Border Protection (Oct. 4, 2019)

Al Otro Lado, Inc., et al. v. Kevin McAleenan, et al.,
No. 3:17-cv-02366-BAS-KSC (S.D. Cal.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Al Otro Lado, Inc., *et al.*, *Plaintiffs,*	)	
v.	)	No. 3:17-cv-02366-BAS-KSC
Kevin K. McAleenan, *et al.*, *Defendants.*	)	

DECLARATION OF RANDY HOWE

I, Randy Howe, pursuant to 28 U.S.C. § 1746, and based upon personal knowledge and information made known to me from official records and reasonably relied upon in the course of my employment, hereby declare as follows relating to the above-captioned matter.

1. I am currently the Executive Director for Operations, Office of Field Operations (OFO), U.S. Customs and Border Protection (CBP), U.S. Department of Homeland Security (DHS). I have been employed in this role since October 2017. I began my career in 1988 with the legacy U.S. Immigration and Naturalization Service. During my 30 years of federal service, I have held various leadership positions, including Area Port Director, Buffalo; Assistant Director for Border Security; and Border Security Coordinator. Immediately prior to assuming my current role, I served as Director of Field Operations for the Preclearance Office. In my current position, I oversee more than 23,000 employees, with operations at 20 major field offices, 328 POEs, and 16 Preclearance locations. Because of my responsibilities, I am familiar with the agency's queue management processes generally, as well as the information that is or is not collected from individuals during that process. I am

also familiar with the types of records that OFO generally creates for individuals encountered at a port of entry.

2. Queue management, or "metering," is the process by which OFO manages the flow of pedestrian traffic at the land border ports of entry. Generally, this process involves CBP officers standing at the international boundary line that separates Mexico from the United States (sometimes referred to as the "limit line"). These officers identify whether or not travelers approaching the port of entry have documentation that appears to permit them to lawfully enter the United States. If a traveler has such documentation, then they will generally be permitted to cross the international boundary, enter the United States, and enter the port of entry right away. If the traveler does not have such documentation, then, depending on the current operational capacity of the port, they will either be permitted to enter the United States and the port or they will be informed that such access is not immediately available. This is because conducting thorough inspections of individuals without documentation sufficient for lawful entry is particularly resource-intensive. CBP must, for instance, verify the identity and background, if available, of these individuals seeking to enter the United States, which can be time consuming. The port of entry must ensure that it has sufficient capacity to conduct such inspections, as well as capacity to temporarily hold those individuals found inadmissible to the United States, pending their transfer out of CBP custody to another federal agency.
3. CBP policy states that no CBP personnel may take any steps to discourage travelers from waiting to be processed, from claiming fear of return to another country, or from seeking any other protections.
4. Personnel at the limit line generally only have brief, normally entirely verbal, encounters with individuals and, if those individuals present any forms of identification or travel

documents, conduct basic visual document examinations. Officers at the limit line do not have the means or opportunity to authenticate those documents and generally do not obtain biographical information about the traveler or memorialize the encounter in any way, whether that be the date, time, or other factual specifics about the encounter. The encounter at the physical border line is not intended to be a detailed encounter; memorializing a great deal of information at this time would be not only impracticable but potentially dangerous to the personnel and the port. The primary function of personnel at the limit line is to manage the queue of individuals seeking to enter the port and to ensure a safe and secure environment. Personnel at the limit line are in a constant or near-constant cycle of encountering dozens or hundreds of travelers a day, some of whom may be seeking to cause harm or evade the law. For these reasons, forcing limit line personnel to halt their present duties and memorialize the encounter, when those travelers may or may not need interpretive assistance to engage in thorough dialogue, including collecting biographical information about that individual or family unit (along with at least some measure of verification), would weaken the operational posture of the remainder of the limit line and could pose a threat to safety.

5. Because many of the travelers seeking entry do not possess easily authenticable forms of identification, and because there is no systematic record of these encounters, there is no way for CBP to determine who may or may not have been encountered at the limit line historically. Indeed, there is no way to even calculate, with any degree of accuracy, how many individuals have been encountered at the limit line. Were any individual to come forward and assert that they had been encountered at the limit line, CBP would have no way to either confirm or refute that individual's own statements.

6. Once an individual is present in the United States and is inspected by CBP, CBP creates a number of records about that individual's encounter and processing. Such records include sworn statements regarding an individual's reason for traveling to the United States, records evidencing the circumstances surrounding an individual's encounter, appropriate removal documents for those aliens determined to be inadmissible, as well as records documenting their treatment in CBP custody. Such records are generally linked to a specific individual, and are stored in CBP's electronic systems of records. None of these records would include any indicia of whether an individual, at some point, sought entry to the United States at the international boundary at a time when the port did not have capacity to immediately process the individual.

Executed this 4 day of October, 2019.

Randy Howe
Executive Director – Operations
Office of Field Operations
U.S. Customs and Border Protection

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Al Otro Lado, Inc., *et al.*, *Plaintiffs,*	)	
v.	)	No. 3:17-cv-02366-BAS-KSC
Chad F. Wolf, *et al.*, *Defendants.*	)	

DECLARATION OF ASHLEY B. CAUDILL-MIRILLO

I, Ashley B. Caudill-Mirillo, pursuant to 28 U.S.C. § 1746, and based upon personal knowledge and information made known to me from official records and reasonably relied upon in the course of my employment, hereby declare as follows relating to the above-captioned matter.

1. I am currently the Deputy Chief of the Asylum Division with U.S. Citizenship and Immigration Services (USCIS), U.S. Department of Homeland Security (DHS). I have held this position since February 2019. Prior to becoming the Deputy Chief of the Asylum Division, I served as the Management Branch Chief at Asylum Division Headquarters since 2015, where I was responsible for overseeing the Division's resource management and strategic planning, as well as its contracts, performance management initiatives, and labor-management obligations among other duties. I joined USCIS as an Asylum Officer in the New York Asylum Office in 2008, and, in 2011, I became a Supervisory Asylum Officer. In 2012, I was selected to be the Deputy Director of the New York Asylum Office. In my current position as Deputy Chief of the Asylum Division, I oversee all Asylum Offices

nationwide as well as the Division's headquarters component, which is involved in policy development, quality assurance, and overall management of the asylum program.

Identifying Provisional Class Members and Applying the Preliminary Injunction Prospectively

2. The October 4, 2019 Declaration of Randy Howe, Executive Director for Operations, Office of Field Operations, U.S. Customs and Border Protection (CBP) (filed on the district court docket at ECF No. 307-8), explains at paragraphs 4 to 6 that CBP does not keep a systematic record of encounters with individuals at the international boundary line between the United States and Mexico who are informed that access to a port of entry is not immediately available, and that CBP records would not include any indicia of whether an individual, at some point, sought entry to the United States at the international boundary at a time when the port did not have capacity to immediately process the individual.
3. Because DHS maintains no such lists, it will need to identify class members prospectively. To accomplish that task reliably, USCIS will have to spend an additional estimated 15 to 30 minutes per person asking as many as 30 additional questions during each credible fear screening interview regarding metering and any attempted entry before July 16, 2019, to determine whether the individual can establish that he or she is a member of the provisionally certified class. Even if USCIS had access to any lists, purportedly maintained by shelters or otherwise, of individuals who were subjected to metering prior to July 16, 2019 but were unable to cross the border because the port of entry did not have immediate capacity to process the individual, USCIS has no definitive way to verify the accuracy or authenticity of any such lists. Thus, even if USCIS could access the lists, asylum officers would still need to question the interviewees to assess the veracity of any documentation provided and determine whether or not they are class members. Further, obtaining documentary evidence from each individual to establish class membership in the form of a declaration, shelter list,

or other documentation is likely to result in significant delays in credible fear processing. For example, individuals are likely to seek to reschedule their credible fear interviews to obtain documentary evidence or to consult with an attorney to draft a declaration to submit in support of their assertion that they were impacted by CBP's metering policy and therefore are a member of the provisional class.

4. Given the extremely high volume of credible fear cases that USCIS processes daily (an average of approximately 390 completions per business day over the past four months), lengthening the duration of each interview – even by 15 to 30 minutes per person – and any increase in the number of rescheduled interviews, would have a significant negative impact on credible fear processing times overall. Based on information provided to me, I estimate that credible fear interviews generally take anywhere between 1 and 3 hours per case, with asylum officers generally completing between 3 and 4 cases during an 8-hour day, depending on the location, the number of people interviewed (single adult v. family unit), and the specific needs of the case.[1] Increasing the length of each interview by 15 to 30 minutes would reduce the total number of interviews an asylum officer could complete per day. If asylum officers complete fewer credible fear cases per day overall, each individual referred to USCIS for a credible fear determination will wait longer to receive that determination. Additionally, if a high number of individuals arrive at their interviews only to ask to reschedule in order to draft a declaration or obtain other documentary evidence to prove class membership, USCIS may not be able to substitute a different individual for an immediate interview to make use of that interview slot because USCIS must work with CBP personnel, Immigration and Customs Enforcement (ICE) personnel, or non-USCIS contracted personnel

[1] Because of the volume of credible fear cases, officers complete additional interviews and cases beyond the 3-4 range referenced above on overtime. On those days, officers may interview and complete 5-6 cases per day.

to facilitate bringing persons to the interviewing rooms, which would cause even fewer case completions per day. The individual seeking to reschedule will then take up a second interview slot, which will in turn increase the overall credible fear processing time for that individual and increase the length of time other individuals are waiting to be interviewed. Most individuals are detained throughout the credible fear process, so increased credible fear processing times due to longer interviews and/or unused interview slots due to rescheduling would generally also increase the length of time an individual remains detained in ICE custody, including at the family residential centers, and in certain limited locations, CBP custody.

5. To address these increased burdens in the credible fear workload, USCIS would need to shift even more officers than it already has from other Asylum Division workloads. If USCIS were to shift officers from other Asylum Division workloads to add resources to the credible fear workload, it would negatively affect cases in those other workloads, by generally increasing the overall processing times for reasonable fear cases, Migrant Protection Protocol (MPP) cases, assessments under the U.S.-Guatemala Asylum Cooperation Agreement (ACA), and affirmative asylum adjudications, thereby lengthening the amount of time an individual would wait to receive the screening or adjudication. MPP assessments and ACA threshold screenings are generally conducted while individuals are in CBP custody. Accordingly, any increase in processing time for the MPP and ACA workloads and any credible fear cases conducted while individuals are in CBP custody would prolong time in CBP custody for such individuals. It is my understanding that increased detention times in CBP custody would result in CBP facilities having less space to hold additional individuals arriving at the port of entry, and that any decrease in CBP's capacity to process additional

individuals may require CBP to take additional steps to manage the flow of aliens at the port of entry.

Identifying Provisional Class Members and Applying the Preliminary Injunction Retrospectively

6. For cases where the credible fear screening interview already took place and the decision has already been served, USCIS would have no sound way to identify class members retrospectively without reviewing the credible fear documentation and conducting case-by-case follow-up interviews for each individual to whom the Third Country Transit Asylum Bar was applied and who received a negative screening determination, but who has not yet been removed. It is my understanding that ICE estimates that there are approximately 700 detained individuals who received a negative screening determination from an asylum officer between July 16, 2019 and mid-November, which was upheld by an immigration judge. USCIS would need to schedule a second interview (either follow-up interviews or new credible fear interviews) to individually question each person regarding metering and attempted entry before July 16, 2019. As with prospective cases, USCIS would be unable to readily corroborate the individual's responses because USCIS does not have access to any shelter lists or other lists, and CBP does not maintain their own list of such individuals.
7. In order to conduct these individual follow-up interviews, it is necessary for USCIS to coordinate with ICE to identify which individuals were subject to the Third Country Transit Asylum Bar and received a negative screening determination, but who have not already been removed. Once such individuals are identified, USCIS would also need to develop a process with ICE for referring these individuals back to USCIS to conduct a follow up interview, and, if found to be class members, issue a new credible fear determination. The interview process alone, depending on the case composition and the issues involved, could take up to

several hours per case on average and USCIS will need to fit these interviews into its existing heavy workload. Other factors that may impede the process are whether the detention facilities have sufficient phone line capacity to handle the number of interviews that will need to occur, and whether the telephonic interpreters can handle the additional number of interviews. If any such individuals are not detained, coordinating follow-up interviews would present additional logistical challenges, as USCIS would likely need to obtain addresses for such individuals from ICE, mail out follow-up interview notices, and rely on the individuals to appear for their interviews. If any individuals failed to appear for their follow-up interviews, DHS would be unable to assess class membership unless they are later apprehended. This process would require close coordination with ICE to ensure such individuals are not removed before USCIS conducts the follow-up/new credible fear interview. The entire process outlined above would be estimated to take months.

8. For individuals who appear to be class members based on additional questioning about metering and attempted entry prior to July 16, 2019, USCIS would have to review the interview and credible fear determination record from the original credible fear screening to determine if there is sufficient information to make a new credible fear determination applying the "significant possibility" standard. If there is insufficient information from the original interview, and depending on how much time has passed since the original interview, USCIS may need to conduct additional questioning on the substance of the individual's claim in order to make a new credible fear determination. Additionally, for cases where USCIS must review the original interview and credible fear determination record and the asylum office does not still have a local copy of the credible fear paperwork, it may be necessary for USCIS to request the hard-copy A-file, which may be in use by another DHS component. In

those cases, the A-file must be shipped back to USCIS. Requesting the A-file will be an additional operational burden that will further delay processing of the case.

9. For individuals found to meet the provisional class definition and for whom USCIS issues a new negative credible fear determination applying the significant possibility standard, USCIS would have to issue new negative credible fear determination documentation and, if the individual requests immigration judge review, refer the case for such review by an immigration judge. This would further prolong the completion of the credible fear process for each such individual. For those individuals that are detained throughout the credible fear process, increased credible fear processing times would generally also increase the length of time an individual remains detained in ICE custody, including at the family residential centers, and, in certain limited locations, CBP custody.

10. The logistics involved with identifying, processing, and accommodating follow-up and/or new credible fear interviews for the individuals described in Paragraphs 6 through 9 above into the Asylum Division's existing workload would significantly increase the Asylum Division's overall workload and would require a significant diversion of resources from the high volume of existing Asylum Division work. In FY 2019, USCIS received approximately 105,301 credible fear referrals. In FY 2019, USCIS received approximately 13,177 reasonable fear referrals, 10,481 Migrant Protection Protocol referrals, and 95,959 new affirmative asylum applications. Over the past four months, the average number of cases completed on a daily basis for the Asylum Division's primary workloads are: 390 credible fear cases, 50 reasonable fear cases, 90 MPP cases, and 280 affirmative asylum cases. The addition of an estimated 700 interviews, including the logistics and administrative processing involved, would significantly slow processing in these other workloads as resources would need to be shifted to accommodate this additional work, resulting in increased processing

times for other Asylum Division workloads. The same consequences described in paragraph 4 above regarding the impact of increased processing times for other Asylum Division workloads, including potential downstream consequences for time in ICE and CBP custody and CBP processing, would likewise apply if hundreds of additional interviews were required. Additionally, pursuant to a settlement agreement in Alfaro-Garcia v. Johnson, 4:14-cv-01775, N.D. Ca. (Oct. 27, 2015), USCIS is required to maintain a national average reasonable fear determination period of 10 court days for detained reasonable fear cases and must report each individual detained reasonable fear case that exceeds 20 court days to class counsel. Accordingly, USCIS would be limited in its ability to shift resources from the detained reasonable fear workload.

11. Given the incredible volume of credible fear cases that USCIS already handles, as well as the time-sensitive challenges of processing these cases, individually questioning each alien on this issue going forward and calling individuals who were already screened back in for follow up interviews would place an unmanageable operational burden on USCIS.

Executed this 12th day of December, 2019.

Ashley B. Caudill-Mirillo
Deputy Chief, Asylum Division
U.S. Citizenship and Immigration Services
Department of Homeland Security

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(San Diego)

Al Otro Lado, INC., *et al.*, *Plaintiffs*, v. Chad WOLF, Acting Secretary of Homeland Security, *et al.*, *Defendants.*	Case No. 17-cv-02366-BAS-KSC

I, **SIRCE E. OWEN,** do hereby declare under penalty of perjury that the following statements are true and correct to the best of my knowledge, information, and belief:

1. I serve as the Assistant Chief Immigration Judge for the immigration courts located in Atlanta, Georgia, which are a component of the Executive Office for Immigration Review ("EOIR"). My responsibilities include managing and coordinating the Immigration Judge and Court Administrator activities in the courts that I supervise. I was appointed to this post in August 2018. As an Assistant Chief Immigration Judge, I have knowledge of the policies, procedures, and practices related to staffing, scheduling, and docketing immigration removal and bond hearings at the courts.

2. I am aware that the preliminary injunction issued in the case *Al Otro Lado, Inc. et al., v. Wolf, et al.*, No. 3:17-cv-02366-BAS-KSC (S.D. Cal. Nov. 19, 2019), enjoins the Defendants nationwide from applying the interim final rule "Asylum Eligibility and Procedural Modifications," 84 Fed. Reg. 33,829 (July 16, 2019) (the "IFR"), to the provisionally certified class of "all non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. POE 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." While EOIR is not a party to the litigation, the requirements of the preliminary injunction significantly impact immigration court operations.

3. The immigration judges conduct hearings to determine, among other things, whether or not an alien is admissible or removable, and, if found removable, to adjudicate the alien's application(s) for relief from removal. These applications may include asylum, withholding of removal, protection under the Convention Against Torture, cancellation of removal, waivers of inadmissibility or removability, and/or adjustment of status. Each alien in removal proceedings has several hearings during which the immigration judge hears the alien's and his or her witnesses' testimony, evaluates evidence, conducts fact-finding, and either delivers or reserves a decision.

4. I understand from the Court's order (at p. 22) that the Plaintiffs claim that there are an estimated 26,000 class members to whom the nationwide preliminary injunction applies. U.S. Citizenship and Immigration Services ("USCIS") will conduct a credible fear assessment for each of these class members, and depending on its finding will either place the individual in removal proceedings pursuant to 8 U.S.C. § 1229a, or refer the alien to an immigration judge for review of a negative credible determination.

5. If a class member previously had a negative reasonable fear assessment entered pursuant to the IFR that was affirmed by an immigration judge, USCIS will be required to reassess that individual's fear of persecution or torture under the credible fear standard to prevent that individual from being subjected to the IFR in violation of the preliminary injunction. If USCIS then reaches a negative credible fear determination, the class member will again be entitled to immigration judge review.

6. All additional adjudications consume immigration court resources and compound existing volume and backlog issues. The preliminary injunction's effective requirement that USCIS provide each provisional class member in the U.S. government's custody with a new credible fear determination will further adversely impact wait times for aliens already in proceedings before the immigration court, because any class members who receives a negative credible-fear determination has a right to seek review of the decision by an immigration judge.

7. Credible fear review hearings and removal proceedings under 8 U.S.C. § 1229a where asylum is sought will likely take longer for the immigration judge to complete as he or she now will be required to assess class membership to determine if the asylum bar applies. While the time will vary because each case must be decided on its individual facts, the inquiry will likely require soliciting additional information from the alien and, in the case of removal proceedings, hear any witnesses; receiving and reviewing additional documentary evidence; and providing government counsel the opportunity to present its own documentary evidence and witnesses. This additional intensive fact-specific inquiry, in most cases with the assistance of an interpreter, could add an extra 45 minutes to an hour per alien to the hearing, plus additional time for cross-examination by DHS counsel. In removal proceedings, the alien may require additional time to obtain evidence, which would necessitate continuing the case to a later date and filling docket space with an additional hearing. These additional steps will not only likely cause delays in adjudicating an individual case, they will take up already-limited docket time and severely impact the adjudication of other matters.

I affirm, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief. Signed in Falls Church, Virginia.

Dated: December 12, 2019

Sirce E. Owen

Assistant Chief Immigration Judge