No.

In the Supreme Court of the United States

KRISTI NOEM, SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

AL OTRO LADO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 22-55988 and 22-56036
D.C. No. 3:17-cv-02366-BAS-KSC

AL OTRO LADO, A CALIFORNIA CORPORATION; ABIGAIL DOE; BEATRICE DOE; CAROLINA DOE; DINORA DOE; INGRID DOE; URSULA DOE; VICTORIA DOE; BIANCA DOE; JUAN DOE; ROBERTO DOE; CESAR DOE; MARIA DOE; EMILIANA DOE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

v.

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW,
APPELLANT/CROSS-APPELLEE

AND

KRISTI NOEM, SECRETARY OF HOMELAND SECURITY; PETE FLORES, ACTING COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION (CBP); DIANE SABATINO, ACTING EXECUTIVE ASSISTANT COMMISSIONER OF CBP'S OFFICE OF FIELD OPERATIONS, IN THEIR OFFICIAL CAPACITIES,
DEFENDANTS-APPELLANTS/CROSS-APPELLEES

Argued and Submitted: Nov. 28, 2023
San Diego Carter & Keep U.S. Courthouse
Filed: Oct. 23, 2024
Amended: May 14, 2025

Appeal from the United States District Court
for the Southern District of California
Cynthia A. Bashant, District Judge Presiding

ORDER AND AMENDED OPINION

Before: JOHN B. OWENS, MICHELLE T. FRIEDLAND, and RYAN D. NELSON, Circuit Judges.

Order;
Opinion by Judge FRIEDLAND;
Dissent by Judge R. NELSON;
Dissent from Order by Judge BRESS;
Statement Respecting Denial of Rehearing En Banc by Judge BEA

ORDER

The opinion and dissent filed on October 23, 2024, and published at 120 F.4th 606, are amended. The amended opinion and amended dissent are filed concurrently with this order.

A judge of this court sua sponte requested a vote on whether to rehear this case en banc. A vote was taken, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. *See* Fed. R. App. P. 40. Rehearing en banc is **DENIED**. Judge Bress's dissent from the denial of en banc rehearing and Judge Bea's separate statement respecting the denial of en banc rehearing are filed concurrently herewith. No further petitions for rehearing or rehearing en banc may be filed.

FRIEDLAND, Circuit Judge:

In 2016, Customs and Border Protection adopted a policy of "metering" asylum seekers at ports of entry along the border between Mexico and the United States. Under that policy, whenever border officials deemed a port of entry to be at capacity, they turned away all people lacking valid travel documents. Many of those people intended to seek asylum in the United States but were not allowed to even apply. They could try to come back some other time, but there was no guarantee that they would ever be processed.

The immigrant rights group Al Otro Lado and various individuals filed suit in federal district court challenging that metering policy on behalf of classes of asylum seekers. While the litigation was ongoing, the Government adopted a regulation, known as the "Asylum Transit Rule," that generally required persons traveling through a third country to apply for asylum there before seeking asylum in the United States. For many asylum seekers who already had been turned away under the metering policy, the Asylum Transit Rule effectively barred them from qualifying for asylum if they were ever able to apply—even though they would not have been subject to the Rule if they had been processed when they first presented themselves at the border.

The district court ultimately declared the metering policy to be unlawful. As part of the remedy, the district court enjoined the Government from applying the Asylum Transit Rule to noncitizens turned away under the metering policy before the Rule's adoption. The court also ordered the Government to unwind past denials of asylum to such individuals.

We must evaluate the lawfulness of the metering policy to decide whether to uphold the district court's remedy, even though the Government rescinded the metering policy years ago. We largely affirm.

I.

Under federal law, asylum protects noncitizens who face persecution in their home countries because of their race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. §§ 1158(b)(1)(A), 1101(a)(42)(A). A noncitizen is eligible to apply for asylum if she is "physically present in the United States" or if she "arrives in the United States." *Id.* § 1158(a)(1).

People seeking to lawfully enter the United States via the southern border generally must present themselves for processing at a designated port of entry. 8 C.F.R. § 235.1(a). By statute, immigration officials are required to inspect all noncitizens "present in the United States who [have] not been admitted," noncitizens who "arrive[] in the United States," and noncitizens "otherwise seeking admission." 8 U.S.C. § 1225(a)(1), (3). If, during inspection at a port of entry, a noncitizen expresses an intent to apply for asylum or a fear of persecution, the inspecting border official must refer the noncitizen to an asylum officer for an interview to determine whether the noncitizen has a credible fear of persecution. *Id.* § 1225(b)(1)(A)(ii), (B). Otherwise, and if the noncitizen is inadmissible within the meaning of the statute, the official shall order her removed "without further hearing or review." *Id.* § 1225(b)(1)(A)(i).

Until 2016, noncitizens seeking asylum at ports of entry on the U.S.-Mexico border would cross over onto

U.S. soil and then wait in line to be inspected. In 2016, citing capacity constraints, Customs and Border Protection ("CBP") officials began taking steps to prevent asylum seekers from entering port buildings or otherwise joining an inspection queue. In November 2016, the Department of Homeland Security ("DHS"), which includes CBP, approved "metering," allowing border officials who deemed a port of entry to be at capacity to turn away all people lacking valid travel documents. CBP gave ports of entry flexibility to implement metering based on "what [worked] best operationally and whether it [was] required on any given day or [at] any specific location." At some ports of entry, people were stepping onto U.S. soil before being turned back. CBP soon determined that it could not send such people back to Mexico without processing them, so it directed officials to implement metering at "the actual boundary line." Officials standing on the U.S. side of the border therefore stopped people right before they crossed the border.

The Government formalized its metering policy in the spring of 2018. In an April 2018 guidance memorandum, CBP authorized border officials to "meter the flow of travelers at the land border" based on "the port's processing capacity." The memorandum specifically permitted officials to "establish and operate physical access controls at the borderline." It further stated that officers "may not provide tickets or appointments or otherwise schedule any person for entry" and that "[o]nce a traveler is in the United States, he or she must be fully processed." The DHS Secretary publicly explained that the metering policy meant "that if we don't have the resources to let them in on a particular day, they are going to have to come back." A June 2018

guidance memorandum from the DHS Secretary stated that the agency was prioritizing other components of its mission, such as national security and trade, above "[p]rocessing persons without documents required by law for admission arriving at the Southwest Border."

Due to the metering policy, asylum seekers began to accumulate on the Mexico side of the border. Many camped near the bridges at ports of entry. In an attempt to impose some order, Mexican government officials and nonprofits made lists of people waiting to be processed. U.S. border officials sometimes coordinated informally with those keeping lists, but they did not keep lists of their own.

Asylum seekers waited in Mexico for days, weeks, or months. Many were subject to persecution and crime, and they often lacked adequate food and shelter. Some were murdered in Mexico while waiting for an opportunity to be processed by U.S. officials. Some attempted to reach U.S. soil by other means, such as running down vehicle lanes at ports of entry, so that they could apply for asylum. Others, including young children, tried to swim across the Rio Grande River and drowned.

The immigrant rights organization Al Otro Lado, Inc., and thirteen individual asylum seekers (collectively "Plaintiffs") challenged the lawfulness of the metering policy in a putative class action in the United States District Court for the Southern District of California. They named as defendants the DHS Secretary, the CBP Commissioner, and the Executive Assistant Commissioner of CBP's Office of Field Operations (collectively "the Government").

Plaintiffs asserted five claims, each presenting a different legal theory for why the metering policy was unlawful. One claim alleged that metering violated § 706(1) of the Administrative Procedure Act ("APA"), which prohibit agencies from unlawfully withholding or unreasonably delaying action that they are required by law to take. Another claim alleged that the government violated § 706(2) of the APA by acting "in excess of [its] statutorily prescribed authority." Plaintiffs also allege that metering violated the Immigration and Nationality Act ("INA") the Alien Tort Statute, and the Due Process Clause of the Fifth Amendment. Plaintiffs sought the same relief for each claim: classwide declaratory and injunctive relief ending the Government's metering policy.[1]

The Government moved to dismiss the complaint, and the district court denied the motion in relevant part. *Al Otro Lado, Inc v McAleenan*, 34 F. Supp. 3d 1168 (S.D. Cal. 2019.

At around the same time, DHS and the Department of Justice jointly adopted the Asylum Transit Rule as an interim final rule. That Rule rendered ineligible for asylum nearly any noncitizen "who enter[ed], attempt[ed] to enter, or arrive[d] in the United States across the southern land border on or after July 16, 2019, after transiting through at least one country" unless she first applied for protection in that other country

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[1] In addition to challenging the metering policy, Plaintiffs alleged that border officials used misrepresentation, threats, and coercion to deny noncitizens the opportunity to seek asylum. On appeal, the parties do not raise issues related to those other allegations and instead focus only on the formalized metering policy. We therefore also focus only on that policy.

and received a final denial. *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33829, 33843 (July 16, 2019), *codified at* 8 C.F.R. § 208.13(c)(4) (2019).

Plaintiffs moved for provisional class certification and for a preliminary injunction blocking application of the Asylum Transit Rule to the provisional class. They asserted that, without an injunction, tens of thousands of people who had been turned away under the metering policy would be denied asylum under the Asylum Transit Rule. Plaintiffs argued that people unable to seek asylum because of the metering policy should not be subjected to asylum rules that they would not have faced had they been processed when they first presented themselves at the border. The district court provisionally certified a "Preliminary Injunction Class" ("P.I. class"), represented by named Plaintiff Roberto Doe, consisting of "all non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. [port of entry] before July 16, 2019[,] because of the U.S. Government's metering policy, and who continue to seek access to the U.S. asylum process." The court granted the requested preliminary injunction as to that class.

The court later clarified that the preliminary injunction required the Government to reopen past denials of class members' asylum applications that were based on the Asylum Transit Rule. The court also clarified that the preliminary injunction bound the Executive Office of Immigration Review ("EOIR"), which is the division of the Department of Justice that includes immigration judges ("IJs") and the Board of Immigration Appeals ("BIA"). Although EOIR was not a named defendant, the court held that EOIR was bound by the injunction

because it operated in concert with the named defendants.[2]

A final version of the Asylum Transit Rule took effect in January 2021. *See Asylum Eligibility and Procedural Modifications*, 85 Fed. Reg. 82260 (Dec. 17, 2020). The accompanying statement in the Federal Register "clari[fied]" that DHS and the Department of Justice intended the Rule to apply to noncitizens subject to metering prior to the Rule's promulgation. *Id.* at 82268 & n.22. The district court entered a temporary restraining order against application of the Final Rule to members of the P.I. class. The parties stipulated to the conversion of that temporary restraining order into a second preliminary injunction.

As the litigation progressed, the district court certified an additional class consisting of "all noncitizens who seek or will seek to access the U.S. asylum process by presenting themselves at a Class A [port of entry] on the U.S.-Mexico border, and were or will be denied access to the U.S. asylum process by or at the instruction of [CBP] officials on or after January 1, 2016."

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[2] The Government filed two interlocutory appeals regarding the preliminary injunction. The first appeal challenged the district court's initial entry of the preliminary injunction. Our court denied a stay pending appeal, noting without deciding that Plaintiffs' statutory analysis was "likely correct." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1013-16 (9th Cir. 2020). The second appeal challenged the district court's order clarifying the scope of the preliminary injunction. We again denied a stay pending appeal. Order, *Al Otro Lado v. Wolf*, No. 20-56287 (9th Cir. Jan. 14, 2021), ECF No. 30. Both interlocutory appeals were later dismissed as moot when the district court entered final judgment. *Al Otro Lado v. Wolf*, No. 19-56417, 2022 WL 15399693 (9th Cir. Sept. 20, 2022); *Al Otro Lado v. Wolf*, No. 20-56287, 2022 WL 17369223 (9th Cir. Sept. 20, 2022).

The parties filed cross-motions for summary judgment. The district court granted summary judgment in favor of the Government on the INA and Alien Tort Statute claims. It granted summary judgment in favor of Plaintiffs on the APA § 706(1) and due process claims and concluded that it did not need to reach the APA § 706(2) claim. It then ordered the parties to brief the appropriate remedy.

Shortly thereafter, in November 2021, CBP rescinded the metering policy. CBP issued new guidance stating that "[a]bsent a [port of entry] closure, officers . . . may not instruct travelers that they must return to the [port of entry] at a later time."

About a year after the district court ruled on the parties' summary judgment motions, it entered declaratory and injunctive relief in favor of Plaintiffs and entered final judgment. The declaratory relief stated that the "denial of inspection or asylum processing to [noncitizens] who have not been admitted or paroled, and who are in the process of arriving in the United States at Class A Ports of Entry, is unlawful regardless of the purported justification for doing so."

The court entered permanent injunctive relief as to the P.I. class. The permanent injunction replaced the two preliminary injunctions and similarly prohibited the application of the Asylum Transit Rule to members of the P.I. class. The district court's permanent injunction order further clarified the scope of the Government's obligations under the injunction by summarizing (and largely approving) the Government's ongoing efforts to comply with the preliminary injunctions. Those efforts included identifying possible class members, notifying them of the injunction, and reopening

and reconsidering P.I. class members' asylum denials that were based on the Asylum Transit Rule.

The parties timely cross-appealed. We heard oral argument at the end of November 2023. The parties then engaged in six months of mediation, but their efforts to reach a settlement ultimately failed.

II.

The district court exercised jurisdiction under 28 U.S.C. § 1331. We have jurisdiction over this appeal under 28 U.S.C. § 1291.[3]

"We review legal questions de novo." *Romero v. Garland*, 7 F.4th 838, 840 (9th Cir. 2021). We review the scope of a permanent injunction for abuse of discretion. *United States v. Washington*, 853 F.3d 946, 962 (9th Cir. 2017). "A district court abuses its discretion when it makes an error of law." *Native Ecosystems Council v. Marten*, 883 F.3d 783, 789 (9th Cir. 2018).

III.

Section 706(1) of the Administrative Procedure Act provides that a court shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). A claim under § 706(1) can reach only "discrete agency action" that an agency is "required to

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[3] The rescission of the metering policy does not render this case moot because Plaintiffs sought (and the district court entered) equitable relief to ameliorate past and present harms stemming from the policy, and the relief ordered imposes ongoing obligations on the Government. Because that relief could be modified, it is possible for us to "grant any effectual relief whatever to the prevailing party," preventing this appeal from being moot. *Edmo v. Corizon, Inc.*, 935 F.3d 757, 782 (9th Cir. 2019) (quoting *Shell Offshore Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 628 (9th Cir. 2016)).

take." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (emphasis omitted). The Government acknowledges that border officials have a mandatory duty to process noncitizens, including allowing them to apply for asylum. But the Government contends that the metering policy did not violate § 706(1) because border officials lack any duty to noncitizens who have not stepped across the border. The Government also contends that even if the officials' mandatory duty extends to such noncitizens, the metering policy did not constitute withholding of that duty within the meaning of § 706(1).

We disagree on both fronts.

A.

The extent of the Government's duty turns on two interacting statutes. One statute, 8 U.S.C. § 1158, defines the rights of noncitizens to apply for asylum. Another statute, 8 U.S.C. § 1225, governs the obligations of border officials to process noncitizens. We begin with the statute defining the right to apply for asylum because, as a practical matter, the Government's obligation to process a noncitizen stopped at the border only matters here if that noncitizen is eligible to apply for asylum. We agree with Plaintiffs that a noncitizen stopped at the border is eligible to apply for asylum under § 1158. We next conclude that a border official must process such a noncitizen under § 1225. We reject the Government's contrary interpretations, including its argument based on the presumption that statutes do not apply extraterritorially.

1.

The right of a noncitizen to apply for asylum is codified at 8 U.S.C. § 1158(a)(1), which states 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.

The parties agree that a noncitizen stopped by officials right at the border is not yet "physically present in the United States." They disagree about whether such a person is covered by the language "arrives in the United States."

In the Government's view, a noncitizen stopped at the border is not eligible to apply for asylum because she is not covered by the phrase "arrives in the United States." The Government's position is that one only "arrives in the United States" upon stepping across the border.

The Government improperly reads a fragment of statutory text in isolation. "Statutory language 'cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016) (quoting *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012)). And another "cardinal principle of statutory construction [is] that we must 'give effect, if possible, to every clause and word of a statute.'"[4] *Williams v. Taylor*, 529 U.S. 362,

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[4] The dissent criticizes our consideration of these commonsense canons of statutory interpretation as "skip[ping]" a step, Dissent at 52, but until we look at the language of the provision—the whole provision—and figure out what it means, we cannot simply an-

404 (2000) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). Section 1158(a)(1) covers a noncitizen who is *either* "physically present in the United States *or* who arrives in the United States" (emphasis added).[5] We therefore must endeavor to give the phrase "arrives in the United States" a meaning that is not completely subsumed within the phrase "physically present in the United States." *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174 (1993) (refusing to adopt an interpretation of the word "return" that would make the word "deport" redundant in another INA stat-

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nounce that Congress "says in [the] statute what it means and means in [the] statute what it says," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). Contrary to the dissent, Dissent at 52 n.1, our reliance on context here neither replaces the statute's ordinary meaning nor imposes a meaning it cannot bear. *See King v. Burwell*, 576 U.S. 473, 486 (2015) ("[O]ftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.'" (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000))).

[5] The dissent engages in a corpus linguistics analysis even though no party or amicus made a corpus linguistics argument in this case. Whether or not this could be a helpful interpretive methodology, the relevant question to ask the database would be how the phrase "physically present in the United States or who arrives in the United States" has been used. Because the corpus linguistics database tool is incapable of performing this search, it has limited utility in this case. The dissent's narrow focus on the two words "arrives in," Dissent at 53-58, wrenches these words out of the context in which they are used in the statute, *see Sturgeon*, 577 U.S. at 438; *Abuelhawa v. United States*, 556 U.S. 816, 819 (2009) ("[S]tatutes are not read as a collection of isolated phrases."). We also note that the database the dissent consults does not contain statutes, which would seem to limit any value it has for determining how Congress uses particular terms. *See, e.g.*, *Peter v. Nantkwest, Inc.*, 589 U.S. 23, 32 (2019) (looking to how two terms were used "across various statutes" to indicate how "Congress understands" the terms).

ute that uses both words). The Government's interpretation fails to do so because it reads the phrase "arrives in the United States" to apply only to those who are also "physically present in the United States."[6]

Considering the provision's "text and context," *Pulsifer v. United States*, 601 U.S. 124, 141 (2024), we conclude that it is possible to give nonredundant meaning to those two categories. The phrase "physically present in the United States" encompasses noncitizens within our borders, and the phrase "arrives in the United States" encompasses those who encounter officials at the border, whichever side of the border they are standing on. 8 U.S.C. § 1158(a)(1). The two categories overlap, because one might be both physically present in the United States (that is, standing on U.S. soil) while presenting oneself to a border official at a port of entry. But each category includes people not included in the other, such that every clause and word of the provision has meaning.

Start with the text. The statute refers to any noncitizen "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)." *Id.*

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[6] The dissent all but concedes that the Government's reading renders the phrase "arrives in the United States" redundant with the phrase "physically present in the United States," calling that redundancy a "belt- and-suspenders approach." Dissent at 62. The dissent notes that "[s]ometimes the better overall reading of the statute contains some redundancy." *Id.* at 63 (quoting *Barton v. Barr*, 590 U.S. 222, 239 (2020)). But the Government's reading does not merely create "some redundancy" in the statutory scheme. It creates *total* redundancy between two phrases that Congress enacted side by side.

Although the statute does not define what it means to "arrive[] in the United States," that phrase plainly pertains to the border. To "arrive" means "to reach a destination." *Arrive*, Merriam-Webster's Collegiate Dictionary (10th ed. 1996). For a person coming to the United States to seek asylum, the relevant destination is the U.S. border, where she can speak with a border official. A person who presents herself to an official at the border has therefore reached her destination—she has "arrive[d]." Although it is possible to imagine that the prepositional phrase "in the United States" means that she must both present herself to a border official *and* get one of her feet onto U.S. soil, that is not the best reading of the phrase. The lengthy parenthetical that follows the phrase "arrives in the United States" specifies that the phrase covers those "at a designated port of arrival." A noncitizen who presents herself to a border official at a port of entry has "arrive[d] in the United States . . . at a designated port of arrival," whether she is standing just at the edge of the port of entry or somewhere within it.[7]

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[7] The dissent's corpus linguistics examples actually illustrate how the phrases surrounding "arrives in" provide useful context to help understand its meaning. For example, the dissent relies on the phrase "greeted with a ticker-tape parade" to infer that "arrives in New York" means that Nelson Mandela must be "inside the Empire State" because he is "parad[ing] through New York." Dissent at 54-55. But imagine if the sentence instead read "arrives in New York at Ellis Island." That would describe a person who had reached Ellis Island, even if he might technically be standing on the New Jersey side. Similarly, here, the phrase "at a designated port of arrival" provides important context to understand the meaning of "arrives in the United States."

Our construction of the statute's language also comports with the larger context of the immigration system. In particular, it avoids creating a "perverse incentive to enter at an unlawful rather than a lawful location." *DHS v. Thuraissigiam*, 591 U.S. 103, 140 (2020); *see also* 8 C.F.R. § 235.1(a) ("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."). Under the Government's reading, an asylum seeker who knows she will be turned away at a port of entry before being allowed to apply for asylum may well be better off circumventing the official channels for entering the United States. If she manages to surreptitiously cross the border, she will be able to apply for asylum. We do not think Congress would have created that incentive.

The Government proposes an alternative theory for why § 1158(a)(1) refers to both a noncitizen "physically present in the United States" and a noncitizen who "arrives in the United States." It argues that the language "arrives in the United States" is necessary to address the "entry fiction," a concept in immigration law that deems noncitizens physically within the United States, but not legally admitted, to be outside the United States for some legal purposes. *See Lin Guo Xi v. INS*, 298 F.3d 832, 837 (9th Cir. 2002). For instance, the Supreme Court has explained that noncitizens "who arrive at ports of entry—even those paroled elsewhere in the country for years pending removal—are 'treated' for due process purposes 'as if stopped at the border.'" *Thuraissigiam*, 591 U.S. at 139 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953)). To give another example, the Supreme Court once held that a woman paroled into the United States pending a

determination on her assertion of U.S. citizenship was not "within the United States" within the meaning of an INA provision that would have allowed the Attorney General to withhold her deportation. *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958). According to the Government, the entry fiction means that some noncitizens, such as those who have just crossed the border into the United States, are not "physically present in the United States," so Congress added the phrase "arrives in the United States" to allow them to apply for asylum.

The Government's explanation is unpersuasive. Other language in § 1158(a)(1) already makes clear that the entry fiction does not interfere with a noncitizen's right to apply for asylum. The statute grants that right to noncitizens "*physically* present in the United States." *Id.* (emphasis added). The entry fiction means that certain noncitizens who are physically present are nonetheless not legally present, but it does not change the fact that they are physically present. *See, e.g.*, *Leng May Ma*, 357 U.S. at 188 (stating that "the detention of an alien in custody pending determination of his admissibility does not *legally* constitute an entry [into the United States] though the alien is *physically* within the United States" (emphasis added)). By specifying "physically present," Congress instructed courts not to apply the entry fiction when interpreting § 1158(a)(1). Moreover, both the "physically present" and "arrives in" categories are modified by the phrase "irrespective of such alien's status." *Id.* The entry fiction applies only to those who lack lawful immigration "status." *See, e.g.*, *Leng May Ma*, 357 U.S. at 190 (explaining that because parole into the United States does not "affect an alien's status," a paroled person was still not "within the United States" under the entry fiction).

It would have been very strange for Congress to define two categories essentially based on immigration status and then modify both with the phrase "irrespective of such alien's status." Given those other features of the statutory text, there is no reason to think that the phrase "arrives in the United States" serves the purpose suggested by the Government.

Furthermore, if the rest of the statutory language in § 1158(a)(1) were insufficient to ensure that someone potentially subject to the entry fiction can apply for asylum, the phrase "arrives in the United States" would not do so either. The Government contends that a person standing on U.S. soil at a port of entry, waiting to be inspected by an immigration officer, is not yet "physically present in the United States" because of the entry fiction. According to the Government, the phrase "arrives in the United States" fills that gap. But if we thought that the entry fiction required us to conclude that such a person on U.S. soil was not "physically present *in the United States*," then to be consistent we would also have to conclude that she had not yet "arrive[d] *in the United States*," either. The Government's interpretation therefore does not make sense as a way to address the entry fiction.

We note that our interpretation of § 1158 is not breaking new ground. A prior version of § 1158 provided, "The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum." 8 U.S.C. § 1158(a)

(1980).[8] It is indisputable that a noncitizen stopped at a border is "at a land border" whether or not they have stepped across. So our interpretation of the current "arrives in" category does not radically expand the right to apply for asylum—it gives that category essentially the same scope as the previous "at a land border" category. Indeed, the Government's reading would reflect a radical contraction of the right to apply for asylum because it would give the Executive Branch vast discretion to prevent people from applying by blocking them at the border.[9]

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[8] The dissent suggests that this prior version of § 1158 contained the phrase "arrives at," Dissent at 52-53, but it did not. The dissent also suggests that the italicized part of the phrase "an alien physically present in the United States or *at a land border* or port of entry" (emphasis added) somehow "compel[s] th[e] conclusion" that it was only discussing people "in the United States." *Id.* at 66. That not only ignores the meaning of "or," but it also makes the entire italicized phrase surplusage—far from compelling the meaning the dissent offers.

[9] Congress adopted the current text of § 1158(a)(1) in a 1996 omnibus bill. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104- 208, tit. VI, subtit. A, § 604, 110 Stat. 3009, 3009-690 to -694 (1996). The dissent argues that "the [amendment] history suggests the opposite" of our interpretation. Dissent at 64 (alteration in original) (quoting *Trump v. Hawaii*, 585 U.S. 667, 692 (2018)). But, as the dissent notes, Congress "amend[ed] the [INA] in dozens of important but technical ways." *Id.* at 65 (alterations in original) (quoting *Renteria-Gonzalez v. INS*, 322 F.3d 804, 809 (5th Cir. 2002)). This situation is therefore unlike *Trump v. Hawaii*, where Congress "borrow[ed] 'nearly verbatim' from the pre-existing statute," aside from "one critical alteration." 585 U.S. at 692. Nor is this case like *Stone v. INS*, 514 U.S. 386, 397 (1995), where Congress amended the INA to add a brand-new exception to the Hobbs Act procedures.

The Government contends that interpreting § 1158 to apply to persons stopped right before the border misses the distinction between asylum under § 1158 and refugee resettlement under 8 U.S.C. § 1157. Section 1157 empowers the Attorney General to "admit any refugee who is not firmly resettled in any foreign country" (subject to numerical limitations and other restrictions). 8 U.S.C. § 1157(c)(1). In *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the Supreme Court explained that § 1157 "governs the admission of refugees who seek admission from foreign countries" while § 1158 "sets out the process by which refugees currently in the United States may be granted asylum." *Id.* at 433. We made a similar statement in *Yang v. INS*, 79 F.3d. 932 (9th Cir. 1996), where we explained that § 1157 "establishes the procedure by which an alien *not* present in the United States may apply for entry as a refugee" and that § 1158 "sets out procedures for granting asylum to refugees *within* the United States." *Id.* at 938. Relying on those statements, the Government contends that the

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We have recognized that "[t]he mere fact of an amendment itself does not [always] indicate that the legislature intended to change a law." *United States v. Pepe*, 81 F.4th 961, 978 (9th Cir. 2023) (alterations in original) (quoting *Callejas v. McMahon*, 750 F.2d 729, 731 (9th Cir. 1985)), *cert. denied*, 144 S. Ct. 2565 (2024). Indeed, at least one part of the legislative history indicates that the revisions to § 1158 were not understood to substantively change the scope of the right to apply for asylum. A committee report described the new language as "provid[ing] that any alien who is physically present in the United States or at the border of the United States, regardless of status, is eligible to apply for asylum." H.R. Rep. No. 104-469, pt. 1, at 259 (1996). In other words, the report understood the new phrase, "arrives in the United States," to be essentially equivalent to the old phrase, "at a land border or port of entry."

noncitizens stopped at the border under the metering policy remained within the ambit of § 1157 because they were still in Mexico, and that they therefore did not fall within § 1158.

Cardoza-Fonseca and *Yang* do not support the Government's position. Neither case concerned people presenting themselves at the border. The sentences seized upon by the Government were general background summaries of § 1157 and § 1158. Nothing about the analysis in those cases suggested that either the Supreme Court or our court was trying to define which statute would apply to someone seeking protection at the border. Moreover, both cases were referencing the prior version of § 1158, which covered both noncitizens "physically present in the United States" and noncitizens "at a land border or port of entry." *Cardoza-Fonseca*, 480 U.S. at 427; *Yang*, 79 F.3d. at 934 & n.2. The cases' willingness to gloss § 1158 the way they did indicates that someone "at a land border" is "in the United States" for purposes of asylum. That is consistent with our conclusion that someone "arrives in the United States" under the current version of § 1158 when she encounters officials at a land border.[10]

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[10] The dissent argues that the Fourth Circuit "disagrees" with our conclusion. Dissent at 66 n.10 (citing *Cela v. Garland*, 75 F.4th 355, 361 n.9 (4th Cir. 2023)). But just as in *Cardoza-Fonseca* and *Yang*, the Fourth Circuit in *Cela* provided background on the asylum and refugee statutes; it did not address whether § 1158 applies to someone stopped at the border. *Cela*'s discussion of the relationship between the asylum and refugee statutes is entirely consistent with our holding here.

We therefore conclude that a noncitizen stopped by U.S. officials at the border is eligible to apply for asylum under § 1158(a)(1).

2.

The responsibilities of officials with respect to noncitizens at the border are set out in 8 U.S.C. § 1225. That section defines as an "applicant for admission" any noncitizen "present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters)." *Id.* § 1225(a)(1). Border officials must "inspect[]" such applicants for admission—essentially, process them to determine their admissibility. *Id.* § 1225(a)(3). If, during inspection, a noncitizen "indicates either an intention to apply for asylum . . . or a fear of persecution, the officer shall refer" her for an asylum interview. *Id.* § 1225(b)(1)(A)(ii).

The definition of an "applicant for admission" in § 1225(a)(1) is nearly identical to the language of § 1158(a)(1). The minor ways in which the relevant language of § 1225(a)(1) differs from § 1158(a)(1) all relate to the fact that § 1225(a)(1) is solely about people seeking admission to the country. Accordingly, for the same reasons we just articulated regarding § 1158(a)(1), we conclude that a noncitizen stopped by officials at the border is an "applicant for admission" under § 1225(a)(1) because she "arrives in the United States." That is consistent with our prior en banc holding that § 1225(a)(1) "ensures that all immigrants who have not been lawfully admitted, regardless of their physical presence in the country, are . . . 'applicant[s] for ad-

mission.'" *Torres v. Barr*, 976 F.3d 918, 928 (9th Cir. 2020) (en banc) (quoting 8 U.S.C. § 1225(a)(1)).

Our conclusion comports with the Government's own reference in a regulation to 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). Here, the Government contends that a person "attempting to come into the United States" cannot be an applicant for admission because she has not yet succeeded in crossing the border. But that would mean its own regulation erroneously refers to just such a person: "an applicant for admission . . . attempting to come into the United States." *Id.* It may be that the Government was wrong when it drafted its regulation and that it is right today, but we "may consider the consistency of an agency's views when we weigh the persuasiveness of any interpretation it proffers in court." *Bittner v. United States*, 598 U.S. 85, 97 (2023). We think that the Government had it right when it drafted its regulation, before the question became the subject of this litigation.

Our reading of § 1225(a)(1) is bolstered by the surrounding statutory text, which indicates that Congress did not intend to impose strict limits on which noncitizens at the border must be inspected. The statute requires inspection not only of "applicants for admission" but also of noncitizens "otherwise seeking admission or readmission to or transit through the United States." 8 U.S.C. § 1225(a)(3). The statute also provides that even a stowaway on a ship, who "[i]n no case may . . . be considered an applicant for admission," is subject to "inspection by an immigration officer" and must be referred for an asylum interview if the stowaway states an

intention to apply for asylum or a fear of persecution. *Id.* § 1225(a)(2). Given that Congress took care to provide for the inspection of both the catch-all category of noncitizens "otherwise seeking admission" and stowaways, we are confident that Congress did not define the category of "applicant[s] for admission" to exclude those stopped by U.S. officials right before the border.

Because noncitizens stopped right before the border are "applicant[s] for admission" under § 1225(a)(1), border officials have a mandatory duty to inspect them under § 1225(a)(3).

3.

The presumption against extraterritorial application of statutes does not change our interpretation of § 1158 or § 1225. The presumption against extraterritoriality is "a canon of statutory construction" that "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *RJR Nabisco v. Eur. Cmty.*, 579 U.S. 325, 335 (2016) (citing *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010)). The Supreme Court has set out "a two-step framework for analyzing extraterritoriality issues." *Id.* at 337. At the first step, a court must ask whether the statute in question "gives a clear, affirmative indication that it applies extraterritorially." *Id.* If so, the presumption is rebutted, and the scope of the statute's extraterritorial application "turns on the limits Congress has (or has not) imposed" in the statutory text. *Id.* at 337-38. If not, then the court must proceed to the second step and ask if the case at hand involves a "permissible domestic application" of the statute. *Id.* at 337. For example, in *Morrison*, the Supreme Court first determined that there was no affirm-

ative indication in the Securities Exchange Act of 1934 that § 10(b) applied extraterritorially. 561 U.S. at 265. At the second step, the Court determined that the focus of § 10(b) was securities transactions in the United States. *Id.* at 266. Because all of the alleged transactions in *Morrison* undisputedly occurred on foreign exchanges, the Supreme Court concluded that the case did not involve a permissible domestic application of the Exchange Act. *Id.* at 266-67, 273.

The presumption against extraterritoriality makes sense to consider if a litigant is asking a court to apply a federal statute to conduct occurring outside the United States. But the issue presented here is whether a noncitizen turned away by U.S. officials at the border had "arrive[d] in the United States." In other words, the entire question in this case is whether the U.S. officials' conduct of standing on the U.S. side of the border and stopping people right before they crossed the border is foreign or domestic. The presumption that "federal laws will be construed to have only domestic application," *RJR Nabisco*, 579 U.S. at 335, just begs the question: is the conduct at issue in this case a domestic application? Because we hold that the answer is "yes," the presumption against extraterritoriality has no role to play here. The dissent takes the position that the answer is "no," and therefore contends that the presumption against extraterritoriality comes into play. Either way, the presumption against extraterritoriality does not help address the threshold issue that is the core of this case: has a noncitizen encountering U.S. officials at the border "arrive[d] in the United States"? As an illustration from another context, if the dispute in *Morrison* had been whether the exchange on which the alleged transactions took place were a foreign or a do-

mestic exchange, the presumption against extraterritoriality would have been of no help.

B.

Section 706(1) of the APA provides that "[t]he reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The Government offers two theories why, even if § 1158 and § 1225 create a mandatory duty to inspect noncitizens stopped at the border, the metering policy did not withhold that required action within the meaning of § 706(1).

First, the Government contends that the duty was not withheld because the metering policy did not result in universal denial of the opportunity to apply for asylum, given that some noncitizens were processed in some instances. But even if the Government processed other noncitizens, the district court certified classes of people who were not processed. The Government does not argue on appeal that class certification was inappropriate, and whether other people were processed does not affect whether the Government fulfilled its obligations to the class members here.

Second, the Government argues that the duty to inspect was merely delayed as to each person, not withheld. The distinction between agency withholding and delay is important. If an agency withholds a required action, it violates § 706(1) regardless of its reason for doing so. But if an agency delays a required action, it violates § 706(1) only if the delay is "unreasonabl[e]." *Id.* The reasonableness of any delay is a fact-intensive inquiry analyzed under "the so-called *TRAC* factors." *Indep. Mining Co. v. Babbitt*, 105

F.3d 502, 507 (9th Cir. 1997) (citing *Telecomms. Rsch. & Action Ctr. v. FCC*, 750 F.2d 70, 79-80 (D.C. Cir. 1984)).[11]

The Tenth Circuit has articulated an apparently categorical rule that agency action can be considered "withheld" only if there is "a date-certain deadline" by which the agency must act—otherwise the failure to act is evaluated for unreasonable delay. *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999). If we were to apply that rule, we would have to analyze the metering policy for unreasonable delay because § 1158 and § 1225 do not include specific deadlines.

But our court has taken a different approach from that of the Tenth Circuit. In *Vietnam Veterans of America v. CIA*, 811 F.3d 1068 (9th Cir. 2016), we considered a regulation that "unequivocally command[ed] the Army to provide former [chemical-weapons] test subjects with current information about their health."

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[11] The *TRAC* factors are:

> (1) the time agencies take to make decisions must be governed by a "rule of reason"[;] (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason[;] (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake[;] (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority[;] (5) the court should also take into account the nature and extent of the interests prejudiced by the delay[;] and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."

Indep. Mining Co., 105 F.3d at 507 n.7 (alterations in original) (quoting *Telecomms. Rsch. & Action Ctr.*, 750 F.2d at 80).

Id. at 1076. The regulation imposed no deadline for carrying out that duty, stating only that the Army was required to provide test subjects with "newly acquired information . . . when that information becomes available." *Id.* We concluded that the Army's obligations were enforceable under § 706(1) of the APA, and we affirmed the district court's decision to enter an injunction requiring the Army to provide such information. *Id.* at 1071, 1078-80. We did not state explicitly whether the Army's failure to comply with the regulation constituted withholding or delay under the APA. *See id.* at 1078-80. But we did not evaluate the *TRAC* factors or otherwise consider the reasonableness of the Army's failure to act, *id.*, as would have been required before we could affirm the injunction if agency action had been delayed instead of withheld. Our decision therefore must have rested on a conclusion that the Army's failure to act constituted withholding. Under that precedent, then, the fact that 8 U.S.C. § 1158 and § 1225 do not include a specific deadline does not resolve whether the Government's failure to act in this case constitutes withholding.[12]

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[12] The dissent would set aside *Vietnam Veterans* based on the briefing in that case and would instead rely on *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166 (9th Cir. 2002). Dissent at 72-75. But *Badgley* holds only that where there is a statutory deadline, failure to comply by that deadline constitutes unlawful withholding of agency action. 309 F.3d at 1177-78, 1177 n.11. It does not say that an agency can have withheld action only if there is a statutory deadline. In other words, *Badgley* holds that violating a statutory deadline is a sufficient condition for concluding that agency inaction constitutes withholding, but nothing in *Badgley* suggests it is a necessary condition. The same is true of the D.C. Circuit and Fourth Circuit cases on which the dissent relies. Indeed, the Fourth Circuit described "an agency's failure to meet a

We hold that when an agency refuses to accept, in any form, a request that it take a required action, it has "withheld" that duty within the meaning of § 706(1). That holding is informed by a provision of the APA that requires an agency to "conclude a matter presented to it" "within a reasonable time." 5 U.S.C. § 555(b). By refusing to accept a matter at all, an agency indicates that it will not "conclude" it at any time in the future. In other words, it withholds action entirely. *See Viet. Veterans*, 811 F.3d at 1079 (treating as withholding a "situation where a federal agency refuses to act in disregard of its legal duty to act" (quoting *EEOC v. Liberty Loan Corp.*, 584 F.2d 853, 856 (8th Cir. 1978))).

Our interpretation of the difference between withholding and delay in § 706(1) comports with the ordinary meaning of those terms. When an action is delayed, one expects that, with the passage of time (maybe even an unreasonable amount of time), the action eventually will be completed. By contrast, when an action has been withheld, no amount of waiting can be expected to change the situation. With patience, one can wait out delay, but even with superhuman patience, one cannot wait out withholding.

Consider someone who heads to the post office to mail a package shortly before the holidays. The postal workers tell the person that they will not accept her package that day because they are very busy, but that she is welcome to come back the next day. They do not give her an appointment, and they warn her that tomor-

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hard statutory deadline" as only one example of when agency action can be "unlawfully withheld" under 5 U.S.C. § 706(1), indicating that such a deadline is not a necessary condition. *South Carolina v. United States*, 907 F.3d 742, 760 (4th Cir. 2018).

row they are likely to be just as busy as today. Just keep coming back, they say—eventually, perhaps within a few days or a few weeks or a few months, the post office might accept her package. Have the postal workers delayed carrying out the task of mailing her package? No, they have withheld their services. That is true even though the person could come back the next day to try to mail the package again. If the postal employees gave the customer an appointment to come back when they would accept her package, then their conduct would amount to delay. So too if they made a waitlist of customers and guaranteed they would work through it. If the postal workers accepted the package but were unable to ship it promptly, that too would be delay, not withholding. But it is not mere delay to tell a person requesting an action that her current request will not be entertained but that she is welcome to make the request again another time.

We accordingly conclude that the metering policy constituted withholding of agency action, not delay. Under the metering policy, border officials turned away noncitizens without taking any steps to keep track of who was being turned away or otherwise allowing them to open asylum applications. Such a wholesale refusal to carry out a mandatory duty—leaving the responsibility to try again in each noncitizen's hands—cannot be called delay within the meaning of § 706(1). Nor did the Government's informal and sporadic coordination with Mexican government officials or nonprofits keeping waitlists transform the metering policy into delay rather than withholding. Organizing by interested third parties did not satisfy the *Government's* obligation to inspect asylum seekers. If anything, it indicates that the Government was not fulfilling its obligations.

We stress that our decision leaves the Government with wide latitude and flexibility to carry out its duties at the border. Our role as a court is not to superintend the Executive Branch's decisions about how to carry out its many obligations. Our role is only to enforce the requirements enacted into law by Congress. Even minimal steps by the Government, such as implementing and following a waitlist system or initiating the asylum process, would shift the § 706(1) analysis of any challenge from the withholding category into the delay category. But because the Government in this case did not take any such steps, we need not (and cannot) reach the question whether any delay would have been reasonable. Sections 1158 and 1225 require border officials to inspect noncitizens seeking asylum at the border, and the metering policy withheld that duty.

IV.

Because we affirm the district court's conclusion that the metering policy violated § 706(1) of the APA, we need not reach the other merits claims. Plaintiffs acknowledge that, if they prove a § 706(1) violation, nothing about the scope or validity of the district court's relief turns on whether they also prevail on any of the other claims in their Complaint. We accordingly construe Plaintiffs' cross-appeal on the § 706(2), INA, and Alien Tort Statute claims as merely presenting alternative grounds for affirmance, which we decline to reach. *See, e.g.*, *Townsel v. Contra Costa County*, 820 F.2d 319, 320 (9th Cir. 1987). We also vacate the district court's entry of judgment for Plaintiffs on the constitutional due process claim without further analysis of the parties' arguments as to that claim. "A fundamental and longstanding principle of judicial restraint requires that

courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988). That principle requires courts "to determine, before addressing [a] constitutional issue, whether a decision on that question could have entitled [the plaintiffs] to relief beyond that to which they were entitled on their statutory claims." *Id.* at 446. "If no additional relief would have been warranted, a constitutional decision" is "unnecessary and therefore inappropriate." *Id.* When we are persuaded that a district court's constitutional holding was "unnecessary," we may "simply vacate the relevant portions of the judgment . . . without discussing the merits of the constitutional issue." *Id.* We do so here.

V.

We turn finally to the appropriateness of the declaratory and injunctive relief entered by the district court.

A.

The district court entered classwide declaratory relief stating that the metering policy violated § 1158 and § 1225. Such relief was proper under the Declaratory Judgment Act, 28 U.S.C. § 2201(a). The Government presents only one argument to the contrary: that the classwide declaratory relief is prohibited by 8 U.S.C. § 1252(f)(1), which provides that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation" of specified immigration statutes on a classwide basis. As the Government concedes, however, that argument is foreclosed by circuit precedent holding that § 1252(f)(1) does not "bar classwide declaratory relief." *Rodriguez v. Hayes*, 591

F.3d 1105, 1119 (9th Cir. 2010). We therefore affirm the district court's entry of classwide declaratory relief.[13]

B.

The district court entered a permanent injunction prohibiting application of the Asylum Transit Rule to members of the P.I. class—who were prevented by the metering policy from applying for asylum before the Rule took effect—and requiring the Government to unwind past denials of P.I. class members' asylum applications based on the Rule. The Government asserts that the permanent injunction violates 8 U.S.C. § 1252(f)(1), which, as explained, prohibits courts other than the Supreme Court from entering classwide injunctive relief regarding the operation of specified immigration statutes. We summarize the requirements of the district court's injunction before addressing the meaning of § 1252(f)(1) and its application here.

1.

The permanent injunction includes both negative injunctive relief (prohibiting the Government from taking certain actions) and affirmative injunctive relief (requiring the Government to take certain actions). The negative injunctive relief prohibits the application of the

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[13] The Supreme Court recently declined to reach the question whether § 1252(f)(1) prohibits classwide declaratory relief. *Garland v. Aleman Gonzalez*, 596 U.S. 543, 551 n.2 (2022). Because the Supreme Court's reservation of a question is not clearly irreconcilable with a precedent of our court that resolves the same question, we follow our binding precedent. *Mont. Consumer Couns. v. FERC*, 659 F.3d 910, 920 (9th Cir. 2011) (citing *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)).

Asylum Transit Rule to asylum applications by P.I. class members. The affirmative injunctive relief has three components. First, the Government "must make all reasonable efforts to identify" P.I. class members. Second, the Government must notify identified P.I. class members "in administrative proceedings before United States Citizenship and Immigration Services or EOIR, or in DHS custody, of their class membership, as well as the existence and import of the" injunction. Finally, DHS and EOIR "must take immediate affirmative steps to reopen or reconsider past determinations that potential [P.I. class members] were ineligible for asylum based on the [Asylum Transit Rule], for all potential [P.I. class members] in expedited or regular removal proceedings." The district court specified that "[s]uch steps include identifying affected [P.I. class members] and either directing immigration judges or the Board of Immigration Appeals to reopen or reconsider their cases or directing DHS attorneys representing the government in such proceedings to affirmatively seek, and not oppose, such reopening or reconsideration."[14]

2.

The Government contends that the injunction is prohibited by 8 U.S.C. § 1252(f)(1), which provides in full:

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[14] The district court's permanent injunction order detailed how the Government was complying with its obligations under the materially identical preliminary injunctions. Order, *Al Otro Lado, Inc. v. Mayorkas*, No. 17-cv-2366 (S.D. Cal. Aug. 5, 2022), ECF No. 816. The district court largely concluded that the Government's actions were adequate, so we accept the parties' understanding that the court's recitation of those actions defined the details of the injunction's requirements. It is not necessary for us to recount all those details here to resolve this appeal.

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter [8 U.S.C. chapter 12, subchapter II], as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ["IIRIRA"], other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

That provision poses no bar to injunctions concerning § 1158, the asylum statute, which falls within part I (not part IV) of the relevant subchapter. But the provision prohibits certain injunctions affecting the operation of expedited removal proceedings under § 1225 and regular removal proceedings under § 1229a, both of which do fall within part IV of the relevant subchapter.[15] We therefore must decide whether any of the injunction's requirements "enjoin or restrain the operation of" those statutory sections.

Precedent offers some guidance. The Supreme Court explained in *Aleman Gonzalez* that § 1252(f)(1) "generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise

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[15] We have explained that § 1252(f)(1) does not apply to every section codified within the specified portion of the U.S. Code, but rather applies only to such sections that are also part of the INA. *Galvez v. Jaddou*, 52 F.4th 821, 829-31 (9th Cir. 2022). That wrinkle makes no difference here because § 1225 and § 1229a are part of the INA. *See* Ira J. Kurzban, Kurzban's Immigration Law Sourcebook 2400 (17th ed. 2020-21).

carry out the specified statutory provisions" with respect to an entire class. 596 U.S. at 550. Such an injunction is barred even if a court determines that the Government's "operation" of a covered provision is unlawful or incorrect. *Id.* at 552-54. Applying § 1252(f)(1), the Supreme Court concluded that the provision prohibits classwide injunctions requiring the Government to hold bond hearings for individuals detained pending removal pursuant to a covered statutory provision. *Id.* at 551. The Court explained that such an injunction improperly "require[s] officials to take actions that (in the Government's view) are not required" by the detention provision "and to refrain from actions that (again in the Government's view) are allowed by" that provision. *Id.* One clear lesson of *Aleman Gonzalez* is that § 1252(f)(1) prohibits courts from awarding injunctive relief that directly adds a new procedural step to the Government's operation of covered provisions.

What else § 1252(f)(1) may prohibit is a more difficult question. Our court has repeatedly held that § 1252(f)(1) does not prohibit an injunction simply because of collateral effects on a covered provision. In *Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007), we held that an injunction regarding "the unlawful application of statutory provisions regarding adjustment of status" was not barred by § 1252(f)(1). *Gonzales v. DHS*, 508 F.3d at 1233. We explained that a court may enter a classwide injunction regarding adjustment of status even though adjustment of status can change the outcome of a removal proceeding under a covered provision. *Id.* We observed that the injunction would have at most a "collateral" effect on DHS's operation of proceedings under covered provisions, and that the injunction "directly implicate[d]" a non-covered provision. *Id.* We reasoned

that a "one step removed" effect on a covered provision did not bring the injunction within the scope of § 1252(f)(1). *Gonzales v. DHS*, 508 F.3d at 1233.

More recently, in *Gonzalez v. ICE*, 975 F.3d 788 (9th Cir. 2020), we considered an injunction concerning the issuance of "immigration detainers," with which federal officials request that law enforcement agencies temporarily keep a noncitizen in custody so that DHS can assume custody and initiate removal proceedings. *Id.* at 797-99. We concluded that the injunction in that case did not run afoul of § 1252(f)(1) because DHS's authority to issue such detainers arises out of a section not covered by § 1252(f)(1). *Gonzalez v. ICE*, 975 F.3d at 812-15, 814 n.17. Although the detainers served to facilitate DHS's authority to arrest and detain noncitizens pending removal proceedings—an authority that *does* arise from statutory sections covered by § 1252(f)(1)—any effect on that authority was collateral. *See Gonzalez v. ICE*, 975 F.3d at 815 & n.19.

The Supreme Court acknowledged our collateral-effect rule in *Aleman Gonzalez* and left it undisturbed. 596 U.S. at 553 n.4 (citing *Gonzales v. DHS*, 508 F.3d at 1233).

3.

Applying those precedents here, the negative injunctive relief entered by the district court is not barred by § 1252(f)(1). That relief, which prohibits the Government from applying the Asylum Transit Rule to P.I. class members, concerns asylum eligibility under § 1158, which is not covered by § 1252(f)(1). The Asylum Transit Rule was promulgated under § 1158(b)(2)(C) and § 1158(d)(5)(B), which allow the Attorney General to

establish additional substantive and procedural requirements for obtaining asylum. *See* 84 Fed. Reg. 33829, 33830 (July 16, 2019). The negative injunctive relief therefore "directly implicates" asylum eligibility under § 1158. *Gonzales v. DHS*, 508 F.3d at 1233. Even though asylum eligibility may change the outcome of a removal proceeding under a covered provision, such an effect is collateral under our precedents. In litigation concerning the validity of a different rule excluding some people from eligibility for asylum, we explained that "[a]t best, the law governing asylum is collateral to the process of removal" because noncitizens "can apply and be eligible for asylum and never encounter any of the statutory provisions governing removal." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 667 (9th Cir. 2021). Although in that case we were not addressing § 1252(f)(1), our reasoning that asylum eligibility is collateral to removal is equally applicable here. The negative injunctive relief prohibiting the application of the Asylum Transit Rule to P.I. class members' asylum applications is therefore permissible.

That conclusion is not affected by the fact that an asylum application can arise within an expedited removal proceeding under § 1225 or a regular removal proceeding under § 1229a (which are covered provisions). The text of § 1225 repeatedly makes clear that applications for asylum raised within expedited removal proceedings are nevertheless made "under section 1158." 8 U.S.C. § 1225(a)(2), (b)(1)(A)(i)-(ii), (b)(1)(B)(v), (b)(1)(C). An asylum officer acting under § 1225 essentially predicts whether a noncitizen "could establish eligibility for asylum under section 1158." *Id.* § 1225(b)(1)(B)(v). Section 1229a likewise refers to asylum as relief "under section[] 1158." *Id.* § 1229a(c)(7)(C)(ii). In evaluating the

merits of a noncitizen's application for "relief or protection from removal," *id.* § 1229a(c)(4)(A), an IJ applies "the applicable eligibility requirements," *id.* § 1229a(c)(4)(A)(i), which for asylum are set out under § 1158.[16] None of those provisions shift asylum determinations out from § 1158, which is not covered by § 1252(f)(1).

The first two components of the affirmative injunctive relief, which require the Government to identify possible P.I. class members and notify them about their class membership and the significance of the injunction, are also permissible under § 1252(f)(1). Those requirements do not "enjoin or restrain the operation" of any covered provision. *Id.* § 1252(f)(1). Indeed, the Government offers no specific argument to the contrary.

The final portion of the affirmative injunctive relief requires the Government either to "direct[] immigration judges or the Board of Immigration Appeals to reopen or reconsider" asylum determinations sua sponte for P.I. class members denied asylum under the Asylum Transit Rule or to "direct[] DHS attorneys representing the government in such proceedings to affirmatively seek, and not oppose, such reopening or reconsideration." According to the Government, that requirement is barred by § 1252(f)(1) because it "affirmatively requires the Government to disturb determinations that have already been made" under covered removal provisions.

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[16] Although § 1229a also suggests that asylum relief might arise under 8 U.S.C. § 1231(b)(3), that provision merely states that the Government cannot remove a noncitizen to a country where the noncitizen's "life or freedom would be threatened" because of his or her "race, religion, nationality, membership in a particular social group, or political opinion."

We agree that, in requiring the Government to take the initiative to revisit determinations in removal proceedings even absent a motion by the noncitizen, the injunction "require[s] officials to take actions that (in the Government's view) are not required by" the covered removal provisions. *Aleman Gonzalez*, 596 U.S. at 551. In effect, that requirement forces the Government to add a new procedural step within the removal process with respect to the P.I. class. It "thus interfere[s] with the Government's efforts to operate" the covered removal provisions. *Id.* Because that interference cannot be categorized as a collateral effect under our precedents, we must narrow the district court's injunction in the following way: The injunction may not require the Government, *on its own initiative*, to reopen or reconsider (or to move to reopen or reconsider) an asylum officer, IJ, or BIA decision in a removal proceeding.

That said, the *negative* injunctive relief properly prohibits the Government from applying the Asylum Transit Rule to a P.I. class member, even if it permissibly applied the Rule to that person in the past. For instance, if an IJ has denied a P.I. class member's asylum application on the basis of the Asylum Transit Rule, and the P.I. class member moves for reconsideration by the IJ, the negative injunctive relief prohibits the IJ from relying on the Asylum Transit Rule to deny the motion (although the IJ may deny the motion if there is a different valid ground). Likewise, if that P.I. class member appeals to the BIA, the BIA may not use the Asylum Transit Rule to affirm the IJ's decision (although the BIA may affirm if there is a different valid ground). And if the BIA reverses the IJ's decision and remands, the IJ may not apply the Asylum Transit Rule on remand. The same principle applies if a P.I. class mem-

ber moves to reopen her removal proceeding: The IJ or the BIA may not use the Asylum Transit Rule to deny the motion (although they may deny the motion on a different valid ground). In each of those scenarios, the negative injunctive relief operates under § 1158 and has only collateral effects on the operation of the immigration statutes covered by § 1252(f)(1), as explained above.

VI.

For the foregoing reasons, we affirm the judgment in favor of Plaintiffs on the APA § 706(1) claim, vacate the judgment in favor of Plaintiffs on the constitutional due process claim, affirm the declaratory relief, and affirm the injunctive relief other than the requirement that the Government reopen or reconsider (or move to reopen or reconsider) past determinations on its own initiative.

AFFIRMED IN PART, VACATED IN PART.

R. NELSON, J., dissenting:

In 1996, Congress provided that an alien may apply for asylum when she "arrives in the United States." 8 U.S.C. § 1158(a)(1). That can mean only one thing: the alien must be physically present in the United States. After years of litigation, Plaintiffs have not identified a single example of when "arrives in" means anything besides physically reaching a destination. The majority does not provide an example, either. For good reason. A basic corpus linguistic analysis shows that no English speaker uses the term "arrives in" to mean anything but being physically present in a location. This statutory language is as unambiguous as it gets.

Yet the majority concludes that aliens currently in Mexico have "arrive[d] in the United States" and can apply for asylum. No circuit court has ever reached such a strained conclusion. Not since the current act was adopted 30 years ago. Not under the prior act adopted 45 years ago which had even more permissive language. At oral argument, Plaintiffs' counsel acknowledged that in several years of legal research, she could not find a single judicial precedent supporting this interpretation. And the motions panel majority four years ago entered an injunction without deciding that Plaintiffs' strained statutory argument was likely correct. *Al Otro Lado v. Wolf*, 952 F.3d 999, 1013 (9th Cir. 2020) (concluding it "need not decide" the issue).

The majority's holding is wrong, troubling, and breathtaking. In its struggle to create ambiguity in the statutory language, the majority skips over the statute's plain meaning, ignores a common-sense understanding of the English language, misapplies a semantic canon, disregards the typical presumption against extraterritorial-

ity, and usurps Congress' authority to make law. By so doing, the

After securing an unprecedented and favorable decision and attempting to evade further review, Plaintiffs asked the district court to set aside the relief they spent years seeking. Now, the majority also amends its opinion. While the majority couches its rhetoric more palatably, it fails to correct its fundamental legal errors—it makes them worse. The majority's wavering confirms what its reasoning makes obvious: this decision needs to be corrected en banc or by the Supreme Court.

Because a person standing on Mexican soil has not "arrive[d] in the United States" or "at a designated port of arrival," I dissent.

I

8 U.S.C. § 1158(a)(1) allows an alien who is "physically present in the United States" or who "arrives in the United States" to apply for asylum. A different statute, 8 U.S.C. § 1225(a)(1), provides that aliens who are unadmitted but "present" in the United States or who "arrive[] in the United States" can apply for admission. An applicant for admission must, in turn, be inspected. Asylum officers then interview inspected aliens to determine whether they have a credible fear of persecution. *Id.* § 1225(b)(1)(B). The statute imposes no deadline on these obligations.

All agree that "physically present in the United States" refers to those located in the United States. *Id.* § 1158(a)(1). As the majority explains, this phrase "encompasses noncitizens within our borders." Maj. at 22. That reading is supported by our precedent. *Barrios v. Holder*, 581 F.3d 849, 863 (9th Cir. 2009)

("physically present" means "corporeally being in the place in question or under consideration" (cleaned up)).

A

We disagree on whether an alien who has not "stepped across the border," Maj. at 19, "arrives in the United States." Text, history, precedent, and common sense show that she has not—even if that means that "arrives in the United States" and "physically present in the United States" have nearly identical meanings.

1

Begin with the text. When, as here, "a statute does not define a term, we typically give the phrase its ordinary meaning." *FCC v. AT&T Inc.*, 562 U.S. 397, 403 (2011) (quotation omitted). The ordinary meaning is not merely a *possible* meaning. "[S]tatutes, no matter how impenetrable, do—in fact, must—have a single, best meaning." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024). Our role as judges is to "use every tool at [our] disposal to determine th[at] best reading." *Id.* "The starting point for statutory interpretation is the actual language of the statute"—what the words mean to an ordinary American. *United States v. Yankowski*, 184 F.3d 1071, 1072 (9th Cir. 1999). The majority skips this important and basic first step—which is dispositive here.[1]

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[1] The majority claims that it cannot interpret "arrives in" without looking to the whole statute. *See* Maj. at 20 n.4. True, words must be understood in context. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 569 (2012). But context is a tool to understand a law's ordinary meaning, not a tool to replace it. *See id.* We cannot use context to impose a meaning that a term cannot bear. *See id.* (using context only after determining that a term "can en-

The first term is the verb "arrive." Since at least the 14th Century, the word "arrive" has meant to "reach[] a destination." John Ayto, *Dictionary of Word Origins* 36 (2011). Its meaning remained the same in 1996, when the statute was enacted. Then, as now, "arrive" meant to "reach a destination" or "come to a particular place." *The American Heritage Illustrated Encyclopedic Dictionary* 102 (1987). Other dictionaries confirm that a person "arrives" somewhere when she "come[s] to a certain point in the course of travel" or "reach[es] [her] destination." *Random House Webster's Unabridged Dictionary* 116 (2001).

Thus, to "arrive at" a place means to reach it after traveling. *Id.*; *see also Al Otro Lado*, 952 F.3d at 1028 (Bress, J., dissenting) (collecting examples from other dictionaries).[2] Had Congress used the term "arrive at," perhaps the majority's ambiguity argument would have some plausible force. But Congress didn't use "arrives at"—it used "arrives in." Indeed, in 1996, Congress changed the statutory language from "at" to "in." And *that* is the language we interpret.

"Arrive in," the term Congress used, has a clearer meaning—it is used "[w]hen the place of arrival is the object." *Webster's Dictionary of English Usage* 120 (1989). Consider the preposition "in." "*In* has re-

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compass" two meanings); *see also King v. Burwell*, 576 U.S. 473, 500-01 (2015) (Scalia, J., dissenting). The majority's proposed interpretation is not only unnatural, but unheard of.

[2] For example, the term "at" is used with the "verb[] of motion" "arrive" to "indicat[e] attainment of a position." 1 *Oxford English Dictionary* 739 (2d ed. 1989). So a person could "arrive at" the border on either side, depending on which direction they are coming from.

mained in use with verbs of motion" for hundreds of years. *Id.* at 533. It describes being "[w]ithin the limits or bounds of" a place with "material extension." 7 *Oxford English Dictionary* 759 (2d ed. 1989). Accordingly, it is typically used "with the proper names of . . . countries." *Id.* Putting those two terms together, a person "arrives in" a country when she has reached its inner limits or bounds.

Real-life experience bears this out. Imagine, for example, that Apple says a new iPhone will "arrive in stores" on January 2. Hearing this, you would expect the phone to be on the shelves on January 2—not in an unloaded semitrailer behind the store. Or imagine that Amazon tells you a package will "arrive in your mailbox" on June 3. On June 3, you would expect the package to be inside your mailbox—not at the local post office, ready for delivery. As these common-sense examples show, to "arrive in" a location means to be physically within the premises. Not at the border, or in the process of arriving.

Linguistic data confirms that these are not isolated examples. *See Wilson v. Safelite Grp.*, 930 F.3d 429, 440 (6th Cir. 2019) (Thapar, J., concurring in part) (courts "ought to embrace" corpus linguistics as "another tool to ascertain the ordinary meaning"). The Corpus of Contemporary American English is a database of over one billion words spoken in everyday contexts between 1990 and 2010. Within that database, "arrives in" was used to describe a destination 161 times between 1990 and 1996 (when the statute was enacted).[3]

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[3] This search can be replicated by searching "arrives in" on english-corpora.org/coca. Restrict results to those occurring before 1996. That yields 219 results. But 58 are irrelevant. The

Appendix 1. Of those, 160—the overwhelming majority—referenced someone or something physically within the destination. And not once was the phrase clearly used to mean standing at the destination's border.

A few examples are illustrative. One source describes a plane that "arrives in Newark but late," forcing the passengers to rush through the airport to catch their connections.[4] Did the plane "arrive" when, circling miles above the city, the captain announced that the plane was cleared to begin its descent? Of course not. The plane "arrive[d] in Newark" when it touched Newark ground. After all, the passengers could not rush through the airport until the plane physically landed.

Other sources describe dignitaries who "arrive[d] in" a city to attend a summit. To attend the summit, of course, the dignitaries must have been physically present. Nelson Mandela, for example, "arrives in New York" and is "greeted with a ticker-tape parade and crowds of thousands."[5] Clearly, to parade through New York, Mandela was inside the Empire State—not standing just across the river in Jersey City.

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statute uses "arrives in" to describe *where* immigrants are located. By contrast, 58 results use "arrives in" to describe either *when* something arrives ("arrives in two hours") or *how* it arrives ("arrives in a bad mood"). Setting aside those 58,161 results use "arrives in" to describe a location. *See* Appendix 1.

[4] Valerie Lister, *Road Trip: The Women's Pro Basketball Way*, USA Today (1996), *relevant text available at Corpus of Contemporary American English*, https://www.english-corpora.org/coca (last accessed Sep. 18, 2024).

[5] Barbara Reynolds, *Mandela's Visit*, USA Today (1990), *relevant text available at Corpus of Contemporary American English*, https://www.english-corpora.org/coca (last accessed Sep. 18, 2024).

Finally, consider an example from the great American sport: "[a]s the pitch arrives in the catcher's hands, the catcher digs in to take on [the runner]."[6] A pitch "arrives in" the catcher's hands when it physically lands in the mitt. Not when leaving the pitcher's hand, flying through the air, or even spinning inches from the catcher's outstretched mitt.

We could go on and discuss all 161 usages. But the underlying point is clear. English speakers use "arrives in" to mean standing within a destination, not outside.[7] The majority does not identity a counterexample. Nor does it deny what this linguistic data suggests: its interpretation of "arrives in" is not only unnatural, but unheard of.[8] *See* Maj. At 21 n.5.

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[6] *Cobb* (1994), *relevant text available at Corpus of Contemporary American English*, https://www.english-corpora.org/coca (last accessed Sep. 18, 2024).

[7] Of the 161 examples, one usage is arguable. A TV script said, "the elevator arrives in the hall, bringing more people." *Metropolis* (1995), *relevant text available at Corpus of Contemporary American English*, https://www.english-corpora.org/coca (last accessed Sep. 18, 2024). Perhaps one could argue that elevators are at a hall's border, not physically inside. But even so, one ambiguous example out of 161 does not show that "arrives in" *ordinarily* means to stand at a destination's border. If anything, the (arguable) exception proves the rule. To "arrive in" a location is unambiguous and means only one thing: to be physically inside.

[8] Of the 161 examples, one usage is arguable. A TV script said, "the elevator arrives in the hall, bringing more people." *Metropolis* (1995), *relevant text available at Corpus of Contemporary American English*, https://www.english-corpora.org/coca (last accessed Sep. 18, 2024). Perhaps one could argue that elevators are at a hall's border, not physically inside. But even so, one ambiguous example out of 161 does not show that "arrives in" *ordinarily* means to stand at a destination's border. If anything, the (argu-

Instead, the majority emphasizes that statutory language must be understood in context. *Id.* at 21 n.5, 23 n.7. I agree. Statutory interpretation must determine how words are ordinarily understood, and ordinary English speakers leverage context to convey and interpret meaning. It's because of context, after all, that we easily distinguish "drove the sheep into the pen" from "used the pen to sign a contract." But context never justifies giving a term a meaning that it cannot bear. *See Taniguchi*, 566 U.S. at 569 (using context only after determining a term "can encompass" two meanings); *see also King*, 576 U.S. at 500-01 (Scalia, J., dissenting). That is why the sentence "used the corral to sign the contract" leaves readers scratching their heads. Unlike "pen," the term "corral" simply does not mean a writing instrument, even if all the context suggests it might.

So too here. Dictionaries catalogue the possible uses of "arrives in," and linguistic evidence indicates which of those uses are ordinary. Together, these tools confirm that "arrives in" simply cannot mean standing outside a destination's border. No amount of context can change that linguistic fact. *See Taniguchi*, 566 U.S. at 569.

Here, moreover, the context supports the plain meaning. I discuss other contextual clues below, *see infra* at 60-61, but two points are worth emphasis here. First, contrary to the majority's suggestion, the fact that the statute covers an alien "who arrives in the United States *(whether or not at a designated port of arrival)*" does not alter the plain meaning of "arrives

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in." Maj. at 22-23 & n.7. The parenthetical clarifies that the statute applies to immigrants who arrived through designated entry ports and those who crossed the border elsewhere. It does not mean that immigrants who have yet to enter an arrival port have somehow arrived in the United States. *Contra id.* Because entry ports are part of the United States, an immigrant "arrives in the United States" whether she stands on Ellis Island or in rural Texas. But either way, the immigrant does not "arrive in" until she steps onto United States soil.

Second, the majority suggests that because "arrives in" appears in the context of a statute, the only relevant linguistic evidence is other statutory language. Maj. at 21 n.5. Why would that be? Congress presumably uses words "in their natural sense." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 71 (1824). So evidence of how "arrives in" is used in everyday contexts is highly probative. *See Muscarello*, 524 U.S. at 129 (citing dictionaries and "searching computerized newspaper databases" to determine a word's ordinary meaning); *United States v. Costello*, 666 F.3d 1040, 1044 (7th Cir. 2012) (Posner, J.) (relying on dictionaries and a Google search). Even so, other statutes use "arrives in" in its ordinary sense. *See* 22 U.S.C. § 2507a(c) (providing for training "[o]nce a volunteer has arrived in" a country). One provision, for example, states that aliens who arrive in the United States at undesignated times or locations are inadmissible. 8 U.S.C. § 1182(a)(6)(A)(i). Are immigrants who approach border agents after hours therefore inadmissible? What about Mexican citizens who come within 20 feet of an undesignated portion of the border? Of course not. Congress, like ordinary English speakers, uses "arrives in" to mean those physically present, not

those standing in Mexico—or as the majority calls it—"at the border." Maj. at 19.[9]

In sum, the linguistic data confirms what dictionaries and intuition suggest: for a person to "arrive in the United States," she must arrive "in the United States"—"there is no in-between." *Al Otro Lado*, 952 F.3d at 1028 (Bress, J., dissenting).

Today, the majority divines an "in-between." Moving forward, a person who "encounter[s] officials at the border," Maj. at 22, or is "in the process of arriving" in the United States, Maj. at 17, 48, may apply for asylum.

The majority leaves each phrase ambiguously open-ended. At any rate, none of these phrases appears in the text. The statute does not say "encounter officials at the border." Nor does it say "in the process of arriving." It says "arrives in." No amount of context justifies the majority's redlining of Congress's statutory language.

In a half-hearted attempt to change the statutory text, the majority cites a single dictionary definition for "arrive." Maj. at 22-23. But, again, the statute says "arrives in," not just "arrive." And why credit that single definition over all the other evidence discussed above? The majority does not say. Nor does the majority explain how "arrives in" can mean "at the border"

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[9] The majority initially held that aliens "on the United States' doorstep" had "arrived in" the United States. *Al Otro Lado v. Exec. Off. for Immigr. Rev.*, 120 F.4th 606, 615 (9th Cir. 2024); *id.* at 634 (R. Nelson, J., dissenting). The majority replaces "on the United States' doorstep" with "at the border." Maj. at 19. The majority's softer word choice does nothing to diminish its dangerous holding and strained logical analysis.

or "in the process of arriving" when each phrase has a historically different meaning.

More than being wrong, the majority's conclusion is harmful. Judicial redlining of statutes, as the majority does here, undercuts Congress's authority, eliminates citizens' ability to rely on the law, and erodes democracy, allowing unelected judges to revise the decisions of the People's representatives.

There is more. Borders define the very bounds of a nation's sovereign power. Border, *Black's Law Dictionary* (12th ed. 2024) ("The boundary between one country (or a political subdivision) and another."). They also protect a country from those outside it and are, by their nature, exclusionary. Thus, the Supreme Court has recognized a "longstanding concern for the protection of the integrity of the border." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). So strong is that interest that even constitutional rights yield when "[b]alanced against the sovereign's interests at the border." *Id.* at 539. The majority subverts these interests. It treats those in Mexico—but ambiguously close to the border—as if they were "in" the United States. And it assumes that Congress implicitly set aside constitutional principles that, for centuries, have uniformly been applied to protect our border.

The statutory language forecloses the majority's interpretation. A person at the border, but on the Mexican side, might be close to the United States. She might have arrived *at* the United States border. But until she crosses the border, she has not arrived in the United States. This is not just the best reading of the statute; it is the only reading. The majority has not

pointed to any example in which "arrives in" means anything besides crossing the border into the destination. We would expect Congress to use clearer language to subvert long-established border protections.

2

The statute's context reinforces the unambiguous plain meaning. Another provision, § 1225, provides for the expedited removal of noncitizens "*from* the United States." 8 U.S.C. § 1225(b)(1)(A)(i) (emphasis added). As the Supreme Court has explained, § 1225 allows applicants for admission to "avoid expedited removal by claiming asylum." *DHS v. Thuraissigiam*, 591 U.S. 103, 109 (2020); *see also United States v. Gambino-Ruiz*, 91 F.4th 981, 985 (9th Cir. 2024). We have explained that the statute "ensures that all immigrants who have not been lawfully admitted, regardless of their physical presence in the country, are . . . 'applicant[s] for admission.'" *Torres v. Barr*, 976 F.3d 918, 928 (9th Cir. 2020) (en banc) (quoting § 1225(a)(1)).

The majority reads "regardless of their physical presence in the country" to mean that the expedited removal protections can be avoided even when an alien is outside the country. But that line is better understood to make asylum available to those subject to expedited removal regardless of whether they are in a port of entry or elsewhere within the country. After all, a person not yet in the United States cannot be "removed" from it.

This conclusion further follows from the fact that Congress provided separate protections for immigrants who have not yet arrived in the United States. *See* 8 U.S.C. § 1157. The Supreme Court has explained that

§ 1157, and not § 1158, "governs the admission of refugees who seek admission from foreign countries." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 433 (1987). The majority's reading places aliens on the Mexican side of the border in a penumbral zone where they can apply for refugee status under § 1157 or for asylum under § 1158. Thus, while the statutory scheme applies different protections to an alien based on her location—either in the United States or out of it—the majority's reading creates a fiction where these aliens are entitled to both.

In no other statute has Congress provided more asylum protection to aliens outside the United States than those inside. On the contrary, Congress consistently provides foreign aliens fewer protections, as § 1157 demonstrates. Thus, it makes sense that § 1158 applies only to those physically within the United States.

3

History and precedent further support this conclusion. We have long treated aliens who arrive at a port of entry "as if stopped at the border" even if they are "on U.S. soil." *Thuraissigiam*, 591 U.S. at 139 (quotation omitted). This is called the "entry fiction." Maj. at 24-25. For at least a century, our immigration laws have treated those at ports of entry as though they have not "entered the country." *Thuraissigiam*, 591 U.S. at 139. An alien who arrived at Ellis Island, for example, "was to be regarded as stopped at the boundary line and kept there unless and until her right to enter should be declared." *Kaplan v. Tod*, 267 U.S. 228, 230 (1925). So it makes sense that in § 1158, Congress listed both those who "arrive in the United States" and those already "physically present." By so doing, Congress clarified that, despite the entry fiction, those who just

crossed the border can apply for asylum on the same terms as someone who is otherwise "physically present."

The majority resists this conclusion. It notes that the entry fiction is just that—a fiction. Whether aliens in ports of entry are legally deemed to be outside the country, they are nonetheless physically present. That is true. But that is hardly a reason to set aside the statute's plain meaning. And, given the entry fiction's long history, Congress can hardly be faulted for going out of its way to respond to it. Congress clarified that the two categories of aliens contemplated in § 1158 and § 1225—those physically present and those just arriving in the United States—can apply for asylum. This belt-and-suspenders approach makes sense, and it cleanly supports the statute's plain meaning.

Thus, text, history, and precedent all point in one direction. An alien "arrives in the United States" only when she crosses the border into it.

B

The majority ignores or diminishes this text, history, and precedent. It engages in "textual backflips to find some way[,] any way," *Fischer v. United States*, 144 S. Ct. 2176, 2195 (2024) (Barrett, J., dissenting), to conclude that aliens in Mexico have arrived in the United States. Each attempt fails.

1

The majority begins with the rule against surplusage. Because the majority deems it "possible to give nonredundant meaning to those two categories," it concludes it must give "arrives in the United States" a different meaning than "physically present in the United States." Maj. at 22.

But as I have already suggested, there is no surplusage. The phrase "arrives in" addresses the entry fiction, ensuring that those in ports of entry can apply for asylum just like those who are otherwise physically present in the United States. Thus, "arrives in" does not totally overlap with "physically present"; it plays a meaningful, independent role in the statute. *Contra* Maj. at 22 n.6.

Even if the majority were right that "arrives in" and "physically present" totally overlap, *id.*, that would not justify disregarding the statute's plain meaning. True, courts often presume that ordinary speakers of English avoid surplusage. But the presumption is just that—a presumption. As anyone who has read a contract or deed knows, surplusage is common. *Moskal v. United States*, 498 U.S. 103, 120 (1990) (Scalia, J., dissenting) ("give, grant, bargain, sell, and convey" (quotation omitted)); *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012). And, in any case, the presumption "should not be used to distort ordinary meaning." *Moskal*, 498 U.S. at 120 (Scalia, J., dissenting). "Sometimes the better overall reading of the statute contains some redundancy." *Barton v. Barr*, 590 U.S. 222, 239 (2020) (quotation omitted). Courts should "tolerate a degree of surplusage rather than adopt a textually dubious construction." *United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 137 (2007); A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 177-78 (2012). After all, ordinary meaning—not nonduplicative meaning—is the lodestar in statutory interpretation. The statute's ordinary meaning is clear, and the presumption against surplusage does not justify rewriting it.

The majority next turns to the 1980 version of the statue. The majority urges that its interpretation is not "breaking new ground" because that prior version allowed aliens "at a land border or port of entry" to apply for asylum. Maj. at 26 (quoting 8 U.S.C. § 1158(a) (1980)). Because this forty-five-year-old statute used language that—in the majority's view—allowed aliens on the Mexican side of the border to apply for asylum, the majority argues that its interpretation of the current statute "does not radically expand" the asylum right. *Id.*

No court, however, interpreted the 1980 statute like the majority does now. *Al Otro Lado*, 952 F.3d at 1029 (Bress, J., dissenting). That concern aside, the meaning of the 1980 statute cannot change the meaning of the 1996 statute now before us.

"If anything, the [amendment] history suggests the opposite" of what the majority suggests. *Trump v. Hawaii*, 585 U.S. 667, 692 (2018). That Congress replaced "at a land border" with "arrives in the United States" suggests that it understood the terms to have different meanings. After all, when Congress amends a statute, "we presume it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995). Thus, the better view is that Congress resolved whatever ambiguity existed in "at" by using "in" in the 1996 statute. *See supra* at 52-53.

The majority suggests that the 1996 act did not substantively change the law. Maj. at 27 n.9. But Congress used language in 1996 that differs in meaning from the 1980 statute. We cannot disregard a statute's amendment history simply by declaring that the stat-

ute's new terms—though quite different—mean the same thing as the old terms. Yet that is what the majority does. It claims the amendment had no practical impact. And it provides no textual analysis to support this *ipse dixit*.

Moreover, we have already rejected the majority's suggestion that the 1996 amendments were minor. As we have noted, those amendments made "large scale changes to the INA." *Gonzales v. DHS*, 508 F.3d 1227, 1229 (9th Cir. 2007). Other circuits agree. *Groccia v. Reno*, 234 F.3d 758, 759 (1st Cir. 2000) ("In 1996, Congress made massive changes to the immigration laws."); *Acevedo v. Barr*, 943 F.3d 619, 623 n.6 (2d Cir. 2019) (enacted "comprehensive immigration reform"); *Prestol-Espinal v. Att'y Gen. of U.S.*, 653 F.3d 213, 216, 222 n.9 (3d Cir. 2011) ("significant changes"); *Renteria-Gonzalez v. INS*, 322 F.3d 804, 809 (5th Cir. 2002) ("amend[ed] the [INA] in dozens of important but technical ways"). That overhaul went only one direction—the 1996 act was "widely regarded as placing important new limits on immigration." *Al Otro Lado*, 952 F.3d at 1029 (Bress, J., dissenting). So even that major overhaul did not, as the majority concludes, collapse § 1158 into § 1157 and drastically expand asylum protections.

In any case, the majority is of two minds with respect to the reach of the 1980 statute. When citing it as evidence of the 1996 statute's meaning, it assures the public that the 1996 amendments were minor. Everything changes when the majority claims the 1996 amendments abrogated two binding cases. Maj. at 28-29. In *INS v. Cardoza-Fonseca*, 480 U.S. at 433, the Supreme Court explained that § 1158 sets out the process by which refugees "currently in the United States" can get asylum.

We recognized the same in *Yang v. INS*, 79 F.3d 932, 938 (9th Cir. 1996). After waiving away those unambiguous statements as mere "general background summaries," the majority says these cases are not helpful anyway because they reference the prior version of § 1158. Maj. at 28. But this just shows that the Supreme Court thought even the prior version of § 1158, which used the much broader "at a land border" applied only on our side of the border. Further, if the majority is correct that the 1996 changes were "minor," then it is hard to say that those changes extended the statute's protections to aliens in another country.

In any event, the majority errs in waiving away the clear language of *Cardoza-Fonseca* and *Yang*. Those cases recognized that § 1158 applied only to people "in the United States" because the statute's plain meaning compelled that conclusion. Never has our court—or any other court—concluded that § 1158 applies to aliens who seek admission from foreign countries. The reason is clear. As discussed above, such aliens—including Plaintiffs—can seek refugee status under § 1157.[10] *Cardoza-Fonseca*, 480 U.S. at 433. So if anything, the 1996 amendments confirm that aliens can apply for asylum only when they have entered the United States.

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[10] At least one of our sister circuits disagrees with the majority's conclusion that Congress silently collapsed the differences between § 1157 and § 1158. *See Cela v. Garland*, 75 F.4th 355, 361 n.9 (4th Cir. 2023) ("Unlike aliens granted asylum—who are physically present in the United States or arrive in the United States when they seek asylum—aliens admitted as refugees seek admission to the United States from foreign countries." (citing *Cardoza-Fonseca*, 480 U.S. at 433)).

Even if the majority could show that "arrives in the United States" ordinarily references those just outside the United States, its analysis still falls short. For at most, the majority could show that "arrives in" is ambiguous. And the Supreme Court has instructed us to apply a presumption against extraterritoriality to ambiguous statutes.

"Congress ordinarily legislates with respect to domestic, not foreign, matters." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010). Thus, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id.*

True, Congress need not enact an "express statement of extraterritoriality" to overcome the presumption. *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 340 (2016). But it must provide "a clear indication of extraterritorial effect." *Id.* Only the "rare statute" will meet this standard without "an express statement of extraterritoriality." *Id.*

The majority does not dispute that 8 U.S.C. § 1158 lacks a clear indication of extraterritorial effect.[11] Yet it declines to apply the presumption against extraterritoriality. According to the majority, the presumption doesn't apply because "the entire question in this case" is whether the border officials' conduct "is foreign or do-

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[11] The majority initially held that § 1158 contains a clear indication of extraterritorial effect. *Al Otro Lado*, 120 F.4th at 621-22. The majority now amends its opinion to excise that argument. For good reason. As I explained in my initial dissent, there is no indication of extraterritorial effect. *Id.* at 638-39 (R. Nelson, J., dissenting). Switching gears, the majority now raises a new argument—one that neither party briefed.

mestic." Maj. at 32. Applying the presumption "just begs the question." *Id.*

Not so. The "entire question" is *not* whether interviewing aliens on Mexican soil is "foreign or domestic." The answer is clear and, except for a single paragraph in the majority opinion, undisputed. Take it from the majority itself: all parties "agree that a noncitizen stopped by officials right at the border is not yet 'physically present in the United States.'" Maj. at 20. Exactly. If an alien is standing on Mexican soil (as Plaintiffs were), sending federal officials to interview him is definitionally extraterritorial.

The question is whether Congress, through the phrase "arrives in the United States," extended asylum protections to aliens on Mexican soil. In other words, the question is whether 8 U.S.C. § 1158 has extraterritorial application. If the presumption against extraterritoriality doesn't apply to that question of statutory interpretation, it doesn't apply anywhere.[12]

Arguing otherwise, the majority refocuses the analysis from the aliens seeking asylum to the border officials interviewing them. According to the majority, if the officials are in the United States, any interview they conduct is domestic—even if the interviewee is in Mexico.

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[12] The majority misunderstands substantive canons when describing the presumption as "beg[ging] the question," as if that were a reason not to apply the presumption. Substantive canons pick a winner between two competing interpretations. By putting a policy thumb on the scales, substantive canons are designed to "beg the question" as the majority uses that term.

This reframing fails on two levels. First, the statutes focus on the location of the alien, not the officer. *See RJR Nabisco*, 579 U.S. at 336 (looking to the "statute's focus"). Section 1158 gives aliens the right to apply for asylum when they "arrive[] in" the United States; it does not discuss officer conduct at all. And the statute that creates officer obligations triggers those duties only when the alien "arrives in" the United States. 8 U.S.C. § 1225(a)(1). Because both statutes focus on the alien's location, the majority errs by defining the conduct in terms of where the officer stands. Second, wherever the officer was standing, it is undisputed that Plaintiffs were on Mexican soil. So even if the statute focused on the officer's location, the officer's interactions with Plaintiffs were still cross-border interviews. *See Hernandez v. Mesa*, 589 U.S. 93, 97, 104 (2020). And cross-border conduct is extraterritorial.

The majority also suggests that it matters that Plaintiffs were close to—even "at"—the United States border. But it is undisputed that Plaintiffs were standing on Mexican soil. *See* Maj. at 12. And whether ten feet from the border or twenty, Mexican soil is Mexican. *See Hernandez*, 589 U.S. at 97, 104. When it comes to the applicability of the presumption against extraterritoriality, there is no distinction between Mexican land right next to the United States and Mexico City. Anything across the border is, by definition, extraterritorial.

Even if there were ambiguity in the statute (there is not), the majority cannot overcome the presumption against extraterritoriality. That presumption confirms that § 1158 applies only to aliens who have crossed the border.

The majority next argues that its interpretation is necessary to avoid a perverse incentive for aliens to enter the United States somewhere other than a designated port of entry. Maj. at 23-24 (quoting *Thuraissigiam*, 591 U.S. at 140).[13] This argument is grounded in the presumption against ineffectiveness, which provides that interpretations that "further[] rather than obstruct[] the document's purpose" are to be favored. *See* Scalia & Garner, *supra*, at 63.

This presumption prevents interpretations that would "enable offenders to elude its provisions in the most easy manner." *Garland v. Cargill*, 602 U.S. 406, 428 (2024) (quoting *The Emily*, 22 U.S. (9 Wheat.) 381, 389 (1824)). But like all presumptions, it is rebuttable. The majority's reliance on this presumption is misplaced for at least two reasons. First, as with the other interpretive canons, the presumption only applies to textually permissible interpretations. Scalia & Garner, *supra*, at 63. As already explained, the majority's interpretation is not textually permissible.

Second, the presumption does not allow courts to supplant or "rewrite statutory text" just because a bad actor might evade the statute to avoid an interpretation that its plain text requires. *Cargill*, 602 U.S. at 428 (quotation omitted).

Cargill illustrates this principle. There, the Supreme Court considered whether semiautomatic rifles equipped

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[13] *Thuraissigiam* addresses perverse incentives in a single sentence and only after the Supreme Court had rejected all other textual arguments. 591 U.S. at 140. That case provides weak support for the majority's reliance on the presumption against ineffectiveness, particularly because the majority uses the presumption to avoid the text's plain meaning.

with a bump-stock device are machineguns as defined by statute. 26 U.S.C. § 5845(b) defines machineguns as weapons that can fire more than one shot "automatically . . . by a single function of the trigger." Bump stocks allow a semiautomatic rifle to fire quickly, but they still require a shooter to "reset the trigger between every shot." *Cargill*, 602 U.S. at 415. Faced with these facts, the Supreme Court concluded that, although bump-stock-equipped semiautomatic rifles can fire at rates that approach those of true machineguns, they were not machineguns as defined in the statute. In so concluding, the Court rejected arguments grounded in the presumption against ineffectiveness. *Id.* at 427-28. The Court applied the statute's plain meaning—even if that meaning would undermine the statute's overall purpose in some applications.

As in *Cargill*, adopting the statute's plain meaning may well have perverse consequences. And those consequences may well undermine the very purpose of the INA—to regulate the border in an orderly fashion. But those consequences exist under any interpretation of the statute. The several hoops through which aliens must jump when seeking admission to the United States already encourage millions to enter the country at unlawful locations. And even though laws require those procedures, "it remains relatively easy for individuals to enter the United States," and often "without detection." *United States v. Martinez-Fuerte*, 428 U.S. 543, 552 (1976). Our cases are full of examples of aliens doing just that. *See United States v. Gambino-Ruiz*, 91 F.4th 981, 983-84 (9th Cir. 2024) (discussing one alien who repeatedly illegally crossed the border at various points). This reality does not give the majority a blank check to cash any atextual interpretation. Nor may the

majority adopt a textually impermissible interpretation just to avoid perverse incentives.

In sum, the statute's plain text precludes the majority's interpretation. But even if the statute were ambiguous, the presumption against extraterritoriality, properly applied, supports the plain meaning. The majority's attempts to find a workaround fail. All roads lead to the same conclusion: an alien "arrives in the United States" only when she crosses the border.

II

After erroneously holding that the government has a duty to process asylum seekers in Mexico, the majority narrowly defines what it means for the government to "withh[old]" that duty. *See* 5 U.S.C. § 706(1). The majority assures the government that it retains broad discretion to decide how to process asylum seekers in Mexico. And it suggests that the government could comply with its duty simply by keeping a list of potential asylum seekers. Maj. at 38.

The majority's narrow interpretation of "withholding" limits the practical impact of its opinion. Indeed, because the government retains broad discretion to limit access to asylum, plaintiffs just across the border likely will still not get any relief—despite the majority's expansive reading of "arrives in." That is a salutary effect. But the way the majority gets there—narrowly interpreting "withholding"—is wrong. And two wrongs do not make a right.

Section 706(1) of the APA requires us to compel agency action if it is either "withheld or unreasonably delayed." 5 U.S.C. § 706(1). Under this section, "the only agency action that can be compelled under the APA

is action legally *required*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (emphasis in original). Even when an organic statute requires agency action, it may not require *immediate* agency action. Unless the statute imposes a deadline, agencies need only complete their statutory duties "within a reasonable time." 5 U.S.C. § 555(b).

We have held that agency action is "withheld" when "Congress has specifically provided a deadline for performance." *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 n.11 (9th Cir. 2002). We explained that the "failure to complete" the required agency action "within the mandated time frame compelled the court to grant injunctive relief."[14] *Id.* at 1178.

Other circuits follow a similar approach. In the D.C. Circuit, agency action is withheld when "agency inaction violates a clear duty to take a particular action by a date certain." *Sierra Club v. Thomas*, 828 F.2d 783, 794 (D.C. Cir. 1987).[15] The Fourth Circuit similarly recognizes that "an agency's failure to meet a hard statutory deadline" is withholding. *South Carolina*, 907 F.3d

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[14] Although we did not analyze the text of § 706(1) in *Badgley*, the Fourth Circuit correctly recognized that, by declining to apply the unreasonable-delay factors, we necessarily concluded that the agency action was "unlawfully withheld." *South Carolina v. United States*, 907 F.3d 742, 760 (4th Cir. 2018) (citing *Badgley*, 309 F.3d at 1176-77 & n.11).

[15] The D.C. Circuit recognizes that "[a]n agency's own timetable for performing its duties in the absence of a statutory deadline is due 'considerable deference.'" *Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001) (quoting *Sierra Club v. Gorsuch,* 715 F.2d 653, 658 (D.C. Cir. 1983)). This suggests that it is difficult, if not impossible, for an agency to withhold an action in the absence of a statutory deadline.

at 760. So too the Tenth Circuit, which has concluded that agency action is withheld only if "Congress imposed a date-certain deadline on agency action" that the agency fails to meet. *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999).

The weight of authority—including our opinion in *Badgley*—thus provides that agency action is withheld only when an agency fails to act by a statutory deadline. Rather than create a circuit split, we should follow this clear consensus. Applying that standard here, the government did not withhold one of its duties. The statute does not impose any deadline on the government's obligation to process asylum seekers (assuming an obligation exists). So not even the majority argues that the government "withheld" agency action under this standard.

Instead, the majority concludes that we have already rejected this standard. It reaches this conclusion based on a questionable reading of *Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068, 1081 (9th Cir. 2016). There, we granted relief under the APA under a statute that did not impose a deadline. The majority concludes that, because we did not address whether agency action was unreasonably delayed, we must have decided that the government "withheld" its obligations.

At the start, *Vietnam Veterans* was decided more than a decade after *Badgley*. To the extent there is any conflict, *Badgley*—which held that a missed deadline was withholding, not delay—controls.[16]

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[16] To circumvent *Badgley*, the majority notes that *Badgley* held a statutory deadline was a sufficient (but not necessary) condition for withholding. Maj. at 35 n.12. But the majority fails to iden-

In any event, the majority overreads *Vietnam Veterans*. It concedes that *Vietnam Veterans* did not analyze "whether the Army's failure to comply with the regulation constituted withholding or delay under the APA." Maj. at 35. Rather, we held that the Army had a mandatory obligation enforceable under § 706(1)—without deciding whether the Army withheld or delayed action. Thus, *Vietnam Veterans* cannot have defined what it means for agency action to be "withheld."

The majority concludes otherwise, arguing that the only possible conclusion in *Vietnam Veterans* was that the "failure to act constituted withholding." *Id.* This cannot withstand scrutiny. First, for a century, the Supreme Court has cautioned that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). We have applied that rule to issues lurking in our own cases. *See Schram v. Robertson*, 111 F.2d 722, 725 (9th Cir. 1940). And it should govern with greater force here. The briefing in *Vietnam Veterans* suggests that the issue litigated was not whether a duty was withheld or delayed, but whether there was a duty at all.[17]

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tify another case addressing the distinction between withholding and delay. *Badgley* is the closest we have. Even so, the relevant question is not whether a statutory deadline is necessary or sufficient for withholding. The relevant question is instead whether the government "withheld" an obligation (rather than "delayed" it) when it told aliens to come back later.

[17] *See generally* Opening Brief of Appellants, *Vietnam Veterans*, 811 F.3d at 1068; Opening Brief for Defendants-Appellees/Cross-Appellants, *Vietnam Veterans*, 811 F.3d at 1068; Appellants'/

In *Badgley*, by contrast, the government argued—and we rejected—that any deviation from the statutorily mandated deadline was reasonable delay. 309 F.3d at 1177 n.11. Thus *Badgley*, not *Vietnam Veterans*, governs whether agency inaction constitutes withholding.

Second, *Vietnam Veterans* is distinguishable. Here, the government told Plaintiffs—like it told all other metered aliens—to come back to the overwhelmed port of entry for processing later. The Army in *Vietnam Veterans*, by contrast, gave no indication that it would ever take the actions the plaintiffs sought. *See generally Vietnam Veterans*, 811 F.3d at 1068. Unlike in *Vietnam Veterans*, the government has not "withheld" any duty to process asylum applications. At most, it has delayed that duty.

Unmoored from precedent, the majority's sweeping new rule—that the government withholds a duty whenever it "refuses to accept, in any form, a request that it take a required action" for any period is indefensible. Maj. at 36. The majority's rule swallows the distinction between "withheld" and "delayed" agency action. After all, the government did not say it would never process Plaintiffs. It merely told those aliens who were turned away to come back when the Ports of Entry were not overwhelmed. That is a far cry from "refus[ing] to accept" a duty to interview those aliens.

In any event, as even *Vietnam Veterans* recognizes, "the operation of § 706(1) is restricted to discrete actions that are unequivocally compelled by statute or regula-

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Cross-Appellees' Reply Brief and Opposition to Cross-Appeal, *Vietnam Veterans*, 811 F.3d at 1068; Reply Brief for Defendants-Appellees/Cross-Appellants, *Vietnam Veterans*, 811 F.3d at 1068.

tion." *Vietnam Veterans*, 811 F.3d at 1081. That obligation must be "so clearly set forth that it could traditionally have been enforced through a writ of mandamus." *Id.* at 1076 (quoting *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010)). The majority does not even try to explain how its withholding rule satisfies this standard.

To the contrary, the majority suggests the government would not have "withheld" its duty to process aliens if it had kept a waitlist or immediately initiated the asylum process. Maj. at 38. But under *Vietnam Veterans*, we can grant § 706(1) relief only if the statute "unequivocally compels" those actions. The relevant statute says nothing about a waitlist or immediate processing. Thus, the majority imposes on agencies a requirement to do "that which [they are] not required to do." *In re A Cmty. Voice*, 878 F.3d 779, 784 (9th Cir. 2017). Section 706(1) gives the majority no such authority. *See Norton*, 542 U.S. at 63.

The good news is the majority's error is limited. If—as the majority concludes—"[e]ven minimal steps," such as keeping a waitlist, would evade the majority's rule and "shift the § 706(1) analysis . . . from the withholding category into the delay category," then the majority's rule is good for this case only. Maj. at 38. But the narrowness of the majority's conclusion only limits its harm; it does not make it legally correct. We should reverse the grant of summary judgment to Plaintiffs on their § 706(1) claim and vacate the corresponding injunction.

III

Plaintiffs' other claims also fail.

A

The majority properly vacates the injunction based on Plaintiffs' Due Process claim. It does so, however, on constitutional avoidance grounds. Maj. at 39. I would reject the claim on the merits.

"[M]ore than a century of precedent" establishes that aliens denied entry have no Due Process rights beyond "the procedure authorized by Congress." *Thuraissigiam*, 591 U.S. at 138-39 (quotation omitted). In other words, arriving noncitizens' procedural rights "are purely statutory in nature and are not derived from, or protected by, the Constitution's Due Process Clause." *Mendoza-Linares v. Garland*, 51 F.4th 1146, 1167 (9th Cir. 2022). Plaintiffs thus warrant no relief on their Due Process claim.

B

Plaintiffs also raise a claim under § 706(2) of the APA. The district court did not reach this claim. But I would dismiss this claim as moot because the memoranda promulgating the metering policy were rescinded years ago. *See Akiachak Native Cmty. v. Dep't of Interior*, 827 F.3d 100, 113 (D.C. Cir. 2016) ("[W]hen an agency has rescinded and replaced a challenged regulation, litigation over the legality of the original regulation becomes moot.").

Even if the § 706(2) claim remained live, it fails on the merits. The metering policy was a lawful exercise of the government's authority to "[s]ecur[e] the borders," 6 U.S.C. § 202(2), (8), and the ability to admit aliens falls within the Executive's inherent powers, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). The government's exercise of its inherent authority was

reasonable given the pressures it faced at the border when it enacted the metering policy.

C

Finally, Plaintiffs raise a claim under the Alien Tort Statute (ATS), arguing that the metering policy violated the international-law norm of non-refoulement. This claim also lacks merit.

The ATS gives district courts "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. This modest statute is an ordinary jurisdictional statute. It does not say when an action violates the law of nations or a federal treaty. Nor does it say which torts properly fall within its reach.

In *Sosa v. Alvarez-Machain*, the Supreme Court established a path for "recogni[zing] . . . new causes of action" under the ATS. *Doe v. Cisco Sys., Inc.*, 73 F.4th 700, 714 (9th Cir. 2023) (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004)). Gratefully, that path is exceedingly narrow. The bar for recognizing a new cause of action is "high." *Sosa*, 542 U.S. at 727. The ATS creates a cause of action only for "violations of international law norms that are 'specific, universal, and obligatory.'" *Kiobel*, 569 U.S. at 117 (citing *Sosa*, 542 U.S. at 732).[18] But even identifying such a norm is not enough—once identified, courts then apply a second, "extraordinarily strict" step of asking whether there is

[18] This test "bears a marked resemblance to the 'clearly established law' standard in qualified immunity analysis." Gerald Weber, *The Long Road Ahead: Sosa v. Alvarez-Machain and "Clearly Established" International Tort Law*, 19 Emory Int'l L. Rev. 129, 132 (2005).

"even one" reason to think that Congress might "doubt the efficacy or necessity of the new remedy." *Nestle USA, Inc. v. Doe*, 593 U.S. 628, 637 (2021) (plurality op.) (quotation omitted). If the answer to the second question is "yes," then "courts must refrain from creating [a] remedy" for even a specific, universal, and obligatory norm. *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 264 (2018) (quotation omitted).

Since both steps must be met, private rights of action under the ATS are available only "in very limited circumstances." *Nestle*, 593 U.S. at 631 (plurality op.). Indeed, the Supreme Court has "yet to find [the two-part test] satisfied." *Id.* at 637. The Court's reluctance to expand the ATS beyond *Sosa* underscores its commitment to ending the "*ancient regime*" when the Court "ventur[ed] beyond Congress's intent" to create rights of action that were—at best—only implied. *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). A plurality of the Court has already suggested that it will not infer any rights of action beyond "the three historical torts identified in *Sosa*": "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Nestle*, 593 U.S. at 635, 637 (plurality op.). Reading between the lines, we should *never* infer additional causes of action under the ATS. The three torts identified in *Sosa*, and no more.

Finally, even if plaintiffs allege violations of one of the three torts identified in *Sosa*, they must go a step further and show that the violation took place in the United States. That is because the ATS lacks extraterritorial effect. Any claim alleging "violations of the law of nations occurring outside the United States is barred." *Kiobel*, 569 U.S. at 124.

Plaintiffs' ATS claim founders on all these shoals. Extraterritoriality is a good place to start. Plaintiffs seek a remedy under the ATS for actions that occurred in Mexico. Because "the presumption against extraterritoriality applies to claims under the ATS," *id.*, their claim cannot succeed even if non-refoulement is a "specific, universal, and obligatory" norm.

Besides seeking to give extraterritorial effect to the ATS, Plaintiffs also seek to elevate non-refoulement to a universal status it does not have. Assume Plaintiffs are right to define non-refoulement as they do: non-refoulement "encompass[es] any measure . . . which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened[.]" UNHCR Exec. Comm., Note on International Protection, ¶ 16, U.N. Doc. A/AC.96/951 (Sept. 13, 2001). Even on that definition, the metering policy is not non-refoulement. The United States did not accept any metered aliens into the United States. So how could it have returned asylum-seekers or refugees anywhere?

In any event, assuming that the metering policy was non-refoulement, Plaintiffs' arguments remain unpersuasive.

Plaintiffs argue that non-refoulement has reached *jus cogens* status, meaning that it is binding on the United States regardless of whether it has consented to it. *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 714-17 (9th Cir. 1992). Because finding that a norm has *jus cogens* status is harsh medicine, only the rarest of norms will achieve that status. *Jus cogens* norms must be "so universally disapproved by other nations" that they are "automatically unlawful." *Sosa*, 542 U.S. at

751 (Scalia, J., concurring in part). The list of such norms is so small that the Restatement (Third) of the Foreign Relations Laws of the United States enumerates them: only norms prohibiting "official torture," "genocide, slavery, murder or causing disappearance of individuals, prolonged arbitrary detention, and systematic racial discrimination" have achieved that status. *Siderman de Blake*, 965 F.2d at 717. The refoulement of aliens who have never entered the United States is a far cry from that status.

As the district court correctly recognized, many European countries and Australia have policies that belie any claim that the non-refoulement standard universally applies extraterritorially. Indeed, some countries have policies that mirror the metering policy here. That is unsurprising. Most countries, including the United States, respect and protect their borders. Only the Ninth Circuit—which is not a sovereign nation—seems to reject this nearly universal goal of national border security. Plaintiffs cannot identify the "general assent of civilized nations" necessary to create a cause of action under the ATS. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 254 (2d Cir. 2009).

But even if non-refoulement were as universally disapproved as Plaintiffs suggest, a cause of action would still not exist under the ATS. Under the second prong of the Court's ATS test, there are countless sound reasons to think that Congress would doubt the efficacy or necessity of a remedy under the ATS. *Jesner*, 584 U.S. at 264.

I offer just one—the ATS "has not been held to imply any waiver of sovereign immunity." *Tobar v. United States*, 639 F.3d 1191, 1196 (9th Cir. 2011). "A waiver

of sovereign immunity cannot be implied but must be unequivocally expressed." *Id.* at 1195 (quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980)). Thus, recognizing an ATS claim *against the United States* for violating a norm of non-refoulement would require us to find that Congress, which generally legislates against the backdrop of existing law, *see Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994), silently waived the Nation's sovereign immunity in cases brought by any alien not immediately processed at the border. Nothing Plaintiffs identify would support such a drastic departure from precedent, particularly in a case that would open the federal coffers to aliens who have never stepped foot in the United States.

In sum, for a host of reasons, Plaintiffs' ATS claim, which would mark a drastic expansion of *Sosa*, fails.

IV

The majority's interpretation of "arrives in the United States" is indefensible. It twists the statutory language, ignores history, flips multiple presumptions, and ignores common-sense English usage. The majority also erroneously concludes that the government "withheld" a statutory duty (rather than merely delaying it) by telling aliens to come back later. We should have rejected Plaintiffs' claims, including those that the majority saves for another day. I dissent.

APPENDIX 1

Table 1: 161 Uses of "Arrives in" to Describe a Destination

Year	Source	Content
1990	Christian Science Monitor	Transplanted from her West Indian home, the 19-year-old arrives in a large East Coast city . . . to work as an au pair.
1990	USA Today	Nelson Mandela, who arrives in New York today, is being greeted with a tickertape parade and crowds of thousands.
1990	Christian Science Monitor	Mr. Gorbachev arrives in Washington [for a summit].
1990	Washington Post	Prime Minister Tadeusz Mazowiecki, the diffident, sad-faced leader of Poland's Solidarity-controlled government, arrives in Washington [to meet with President Bush].
1990	Washington Post	When the new Congress arrives in Washington in January, it will face a major piece of unfinished business.

Year	Source	Content
1990	J. of Am. Ethnic History	[She] used to think that money was got on the streets here, but if ever she arrives in this country she will find it quite different, as there is nothing got here by idleness.
1990	Ethnology	A vendor arrives in the market with a small supply of capital and knowledge of market trade.
1990	World Affairs	Soviet leader Mikhail Gorbachev arrives in Beijing for the first Sino-Soviet summit in thirty years.
1990	Style	When Roderick arrives in London, he must concoct a voice with which to advance his career.
1990	American Heritage	In "Squaring the Circle," a mountain man from Kentucky arrives in Manhattan and is made vertiginous by its pitiless rush forward.
1990	American Heritage	[Photo description:] Lajos Kossuth arrives in America in 1851, with the Guardian Genius of Hungary in attendance.

Year	Source	Content
1990	White Hunter: Black Heart	You can leave if you want. I'm staying. The company arrives in Entebbe the day after tomorrow [to film a movie].
1990	USA Today	Ragged arrives in an era of declining rock' n' roll, a drift that hasn't alarmed Young.
1990	Newsweek	[Photo description:] Ambassador to Kuwait Nathaniel Howell arrives in Germany.
1990	ABC	Mikhail Gorbachev arrives in Washington next Wednesday evening [for a summit].
1990	CNN Specials	[We have to design the equipment so that it] is lighter and able to get there and then do a different job when it arrives in the arena.
1990	CNN Crossfire	And your view is that . . . let[ting] food supplies go into Kuwait would be an excellent idea? . . . The moment that food arrives in Kuwait, it will be taken by the Iraqis.
1990	PBS Newshour	Mandela arrives in New York on Wednesday for a 12-day visit to the U.S.

Year	Source	Content
1990	PBS Newshour	Each day a new harvest of inmates arrives in The Crosses [where they are detained for months, waiting for investigations to finish.]
1990	PBS Newshour	I think he is positioning himself also to improve the chances for his foreign minister, Teraq Aziz, when he arrives in Washington [for negotiations].
1990	ABC Nightline	Furthermore, he said when Perez de Cuellar arrives in Amman, they are not arriving with any proposals for the secretary general.
1990	Atlantic	As first light arrives in a beech and hemlock forest, setting the birds sounding their chaotic vowels . . .
1990	Interior Landscapes	I am the one by whom my past arrives in this world.
1990	Good Fellas	A bedraggled Henry arrives in his brother, Michael's, room. Michael is all dressed and sitting in his wheelchair, ready to go.

Year	Source	Content
1990	Newsweek	Hence, productivity begins even before the worker arrives in the office.
1990	Newsweek	This child . . . is the grandson of . . . a Russian Jew who arrives in Baltimore on the Fourth of July, 1914, and declares it the most beautiful place he's ever seen.
1990	U.S. News & World Report	Until the supertanker arrives in the U.S., no one knows the price its oil cargo will bring.
1990	Changing Times	[A cruise ship], for example, leaves Miami on Saturdays and after two days at sea arrives in St. Martin/St. Maarten, which is half French and half Dutch.
1990	Weatherwise	[T]he Count, disguised as a large, black dog, arrives in England. Fortunately for His Excellency, immigration and quarantine laws were much less strict then than now.
1990	TIME	If you think of the telephone purely as a secular voice thrower, it arrives in the mind at its most irritating.

Year	Source	Content
1991	ABC Special	On November 15th, a second ambassador arrives in the United States to help Nomura, the current ambassador, who's been negotiating for almost a year.
1991	ABC Special	[T]he note is seen as an ultimatum. The same day Hull's note arrives in Japan, the Japanese fleet departs from Japan.
1991	PBS Newshour	Terry Anderson arrives in Germany [to begin his first full day of freedom at an American military base]
1991	ABC Nightline	James Baker arrives in Saudi Arabia tonight [to meet with Kuwait's leader.]
1991	ABC Nightline	Once the food arrives in the port, yes, there will have to be some work done on the roads.
1991	ABC Nightline	He will likely tell the President which way it's going to go before he arrives in Moscow for the summit with Mr. Gorbachev, July 30th, 31st.

Year	Source	Content
1991	JFK	Six months after he arrives in Russia, Francis Gary Powers' U2 spy flight goes down in Russia.
1991	Forbes	[I]f the wine is likely to cost at least 20%-25% more when it arrives in the U.S. 18 to 24 months later.
1991	Nat'l Rev.	Her calculation is shown in one sequence in Truth or Dare when her tour arrives in Toronto and she is told that the police are prepared to arrest her if [she performs a specific bit.]
1991	Saturday Evening Post	In New York City, only 32 cents of every education dollar arrives in the classroom.
1991	Compute!	The robot will sell for less than $1,000 when it arrives in stores and catalogs next February.
1991	Compute!	When the shuttle arrives in space, the crew reconfigures the computers for orbital operations.
1991	Weatherwise	[Photo description:] An ore carrier bearded with the frozen

Year	Source	Content
		spray of the Great Lakes arrives in Superior, Wisconsin, in a -15 degrees F deep freeze.
1991	NY Times	She gives one party each summer for about 400 Saratogians, even before the racing crowd arrives in town.
1991	Christian Science Monitor	Gorbachev decided to speed it up and finish everything before the delegation arrives in Vilnius. . . . Then the delegation will arrive to find 'order' restored.
1991	Associated Press	First Egyptian contingent arrives in Saudi Arabia. Iraqi President Saddam Hussein urges Arabs to sweep "emirs of oil" from power.
1991	USA Today	The Giffords will be reunited temporarily Friday. Kathie Lee arrives in Tampa to tape Regis & Kathie Lee.
1991	USA Today	John Major is expected to brief President Bush on the positions of Britain, Italy, France and Germany when he arrives in the United States Wednesday for a three-day visit.

Year	Source	Content
1991	USA Today	His new album, Dangerous, arrives in stores Tuesday.
1992	Houston Chronicle	Uher said he would support a rules change requiring the Calendars Committee to schedule a bill for floor debate within 30 days after it arrives in Calendars.
1992	ABC Business	President Bush arrives in Japan on Tuesday on a mission to open Japanese markets to American products.
1992	ABC Special	As Clinton arrives in Albuquerque, New Mexico, it is very late at night and [local supporters are gathered to meet him.]
1992	NPR All Things Considered	The vice president arrives in Tokyo on Tuesday to take part in a ceremony.
1992	CNN	One drawback to electing a governor President is that he arrives in the White House with little foreign policy experience.
1992	ABC Nightline	President Bush arrives in Japan with a demand: Japanese

Year	Source	Content
		markets must be opened to American-made goods.
1992	NPR Weekend	Boris Yeltsin arrives in Washington, DC, on Tuesday [for a summit.]
1992	Batman 2	Descending the stone stairs, Alfred arrives in the Batcave.
1992	Batman 2	Frick arrives in the doorway [to speak to someone.]
1992	Jennifer Eight	[A man] spits gum at the sink as he arrives in the kitchen.
1992	Jennifer Eight	[She] hurr[ies] into her dressing gown with a similar urgency to get out. She arrives in the living room as the figure is clambering through the window.
1992	Newsweek	[Photo description:] A shipload of Somali refugees arrives in Yemen
1992	America	The hero of *And You, Too* arrives in France [to study]
1992	Christian Science Monitor	A young senator, Jefferson Smith, arrives in the nation's capital [to serve his term]

Year	Source	Content
1992	Associated Press	Churchill arrives in Cairo, disturbed by a telegram from Gen. Auchinlek saying Britain's 8th Army will not have the strength to make new attacks.
1992	Associated Press	Churchill arrives in Moscow to tell Stalin no second front will be opened in Europe in 1942.
1992	Washington Post	The first installment of her $60 million, multimedia deal with Time Warner arrives in stores today.
1992	Washington Post	The Subway Finally Arrives in Woodbridge and Waldorf[, expanding] the Metro into the outer counties.
1992	Washington Post	Hillary Clinton arrives in town today still in the process of figuring out how to be an impeccable
1992	Atlanta J.-Const.	Joel Fleischman, a whiny New Yorker, arrives in Alaska to fulfill his obligation under a state program that had paid his tuition

Year	Source	Content
1992	San Francisco Chronicle	His co-star, Susan Strasberg, portrays a naive deaf woman who arrives in the Haight looking for her missing brother. She's quickly befriended.
1992	World Affairs	The first Mainland Chinese to visit Taiwan arrives in Taipei.
1993	ABC 20/20	Three days before Kennedy arrives in Dallas, [Lee Harvey Oswald is] given a gift on a silver platter. Jack Kennedy's going to pass in front of the Depository.
1993	NPR All Things Considered	But Clinton arrives in Tokyo [for negotiations] with his stature as an international leader tarnished by his performance over the last four months.
1993	NPR Morning	Bosnia's President Alija Izetbegovic arrives in New York today. He'll address the U.N. tomorrow.
1993	ABC Nightline	The President arrives in Tampa, Florida, a medium-sized city where one out of five people has no health insurance. [The President is interviewed.]

Year	Source	Content
1993	CNN	A young English nurse, a new bride, arrives in Africa with a man that she met while working as a nurse during the war . . . [and] sought out friends among the local Africans.
1993	CNN	A package arrives in the mail. You open it . . .
1993	Southern Review	Mariana of Austria is not yet queen the day that Mari Barbola arrives in Madrid: someone else fills that role, an Isabella.
1993	So I Married an Axe Murderer	Charlie runs across the dance floor, fighting for an exit to the outside. He arrives in someone's arms on his way [and says,] 'I need your help.'
1993	NY Times	William Nathaniel Showalter III arrives in Fort Lauderdale, Fla., for spring training today.
1993	NY Times	When Mr. Clinton arrives in Des Moines, he will join Mr. Harkin for a helicopter tour.
1993	Christian Science Monitor	One-and-a-half hours northeast of the Salvadoran capital . . . , one arrives in Ilobasco,

Year	Source	Content
		marked by its red-tiled roofs. Here, the combination of fine-grained clay and local talent has produced a cottage industry of ceramic crafts.
1993	Christian Science Monitor	But when our renga arrives in the morning mail, I find that the wind that climbs the pine hill behind David's house is stirring the apple boughs behind me.
1993	Associated Press	The flight from Miami arrives in Iquitos, Peru, late at night and you get on the boat immediately. . . .
1993	Washington Post	The first, a nonstop from Ocean City to Washington, departs Ocean City at 8 a.m. daily and arrives in Washington at 1:50 p.m.
1993	Washington Post	The second departs Ocean City at 11:20 a.m., stops in Rehoboth Beach at 12:05 p.m. and arrives in Washington at 3:55.
1993	Washington Post	The last bus, also a nonstop, leaves Ocean City at 5 p.m. and arrives in Washington at 10:45.

Year	Source	Content
1993	Atlanta J.-Const.	[T]he Ladies Professional Golf Association arrives in Stockbridge this week for the $600,000 Atlanta Women's Championship.
1993	Atlanta J.-Const.	He arrives in Atlanta via impressive stints as a staff conductor with the [several symphonies.]
1993	Houston Chronicle	Neeson . . . stars as Oskar Schindler, a Nazi Party member who arrives in Krakow, Poland, shortly after the Nazi army crushes Polish resistance in 1939.
1993	Raritan	The brisk rhythm . . . builds up to this shot as an arresting point of confluence; the ship's entering frame as it arrives in the town harbor carries the accumulated charge of all that has been transpiring.
1993	Raritan	[Photo description:] The phantom ship entering frame as it arrives in the town harbor.
1993	Geographical Review	By the time the caravan arrives in Amazonia, the forest is

Year	Source	Content
		largely felled, the resources pillaged . . .
1993	Music Educators Journal	A new magazine of practical music teaching arrives in your mailbox this summer.
1994	Social Studies	Constance Hopkins arrives in the New World aboard the Mayflower and relates the early years of Plymouth Plantation from November 1620 to February 1626.
1994	CBS 60 Minutes	Boris Yeltsin arrives in the U.S. tonight for a summit meeting with President Clinton.
1994	CBS Special	This delegation arrives in a situation in which, by and large, the Haitian people, as best anyone can determine, are saying to themselves and anyone else who will listen, 'We just hope this thing gets over with.'
1994	ABC Day One	Nearly every week, a Chinese freighter arrives in the port of Long Beach, California.

Year	Source	Content
1994	CBS Eye to Eye	Last week [a package] arrives in New Jersey, where Jay Skidmore is a U.S. postal inspector.
1994	Gerald Rivera Show	When he arrives in the house, do you give him a kiss? MARGIE: No. (Audience-reaction).
1994	ABC Saturday News	[A] convoy of U.N. peacekeepers arrives in Gorazde after Bosnia's Serbs defy NATO's ultimatum and intensify their shelling.
1994	NPR Morning	[I]t's comforting to know that there is poetry out there worse than my poetry. And it arrives in the mail. . . .
1994	ABC Nightline	There is always a certain element of pomp and ceremony when a U.S. president arrives in a foreign capital, but it's essentially fluff.
1994	ABC Nightline	[Mr. Swing] will be hosting the high-powered delegation when it arrives in Haiti tomorrow.
1994	Literary Rev.	For instance, James Bond arrives in Munich and knows

Year	Source	Content
		where he can eat the best liverwurst in the city.
1994	Critical Matrix	[S]he sails around for several years . . . until she finally arrives in Britain, which has recently been conquered by a non-Christian people . . . [S]he succeeds in spreading the word of God among the Britons.
1994	North of Montana	She believes she is escaping those dead-end streets, but instead arrives in California with the phone number of an old high school boyfriend written out like a prescription.
1994	Cobb	Here comes Cobb with a recklessness beyond reason. And as the pitch arrives in the Catcher's hands, the Catcher digs in to take on Cobb.
1994	The Fist of God	A Mossad team arrives in London to mount an operation against a Palestinian undercover squad.
1994	Harpers Magazine	I have been avoiding the club where we had lunch. If a

Year	Source	Content
		package arrives in the mail, I shake it slightly.
1994	NY Times	[H]e arrives in Naples [for a summit] with the best economic performance of the participants.
1994	NY Times	Prime Minister John Major arrives in Naples [for a summit] in a curious position: Britain's economy is growing. . . .
1994	Associated Press	[L]arge artificial marshes . . . will be used to cleanse farm run-off before it arrives in the Everglades.
1994	Associated Press	The prevailing south winds are lashing gnarled mesquite trees as a visitor arrives in Rule, population 783.
1994	Associated Press	British Foreign Secretary Douglas Hurd arrives in Hanoi Wednesday to expand his country's trade and investment links.
1994	Washington Post	In one scene, a group of children arrives in England and is welcomed and hugged by peo-

Year	Source	Content
		ple they don't know but with whom they will live temporarily.
1994	San Francisco Chronicle	Johnny . . . is 27 and arrives in London in a stolen car, penniless but full of dire thoughts.
1994	San Francisco Chronicle	California Governor Wilson will be the latest visitor when he arrives in El Paso today to tour the border and see what lessons the blockade may hold for his state.
1994	Chicago Sun-Times	She was in love with Lime, who is seemingly killed just as Cotton arrives in Vienna.
1994	Chicago	A once-in-a-lifetime event arrives in Chicago and you might wind up with your nose pressed against the window.
1994	Armed Forces & Soc.	This is how Amnon expresses what it means to be scared when one arrives in Gaza for the first time.
1994	Sirens	When the exhibition arrives in London, the English will be convinced.

Year	Source	Content
1994	NPR Weekend	Here's a president who arrives in Moscow [for discussions] with no new money. The only amounts of money that are going to be given to help Russia have all been stipulated before.
1995	Metropolis	As they head into the apartment, the elevator arrives in the hall, bringing more people. Christoph ushers in this new group, then slips into the elevator.
1995	CBS Morning	Shirley Harris arrives in the emergency room at 2:00 PM with chest pain. She's immediately hooked up to a monitor.
1995	NPR Morning	Private hospitals, by law, have to treat anyone who arrives in the emergency room.
1995	Mass. Rev.	Meanwhile, I open a letter that arrives in the mail.
1995	Va. Quarterly Rev.	One week later, a letter to me arrives in the office mail. The return address is The New York Herald Tribune Book.
1995	Outbreak	[D]awn arrives in the Motaba Valley.

Year	Source	Content
1995	Sport Illustrated	Within 48 hours a representative of the testing agency used by Major League Baseball arrives in Binghamton, N.Y., home of the Mets' Double A affiliate, to collect a urine sample from Gooden.
1995	Astronomy	At certain separations, a light wave from one star arrives in sync with a light wave from the other star and adds to it.
1995	Christianity Today	U.S. Marines salute Pope John Paul II as he arrives in Queens.
1995	Associated Press	Pope John Paul II proclaims himself "a pilgrim of peace" as he arrives in the United States for a five-day visit.
1995	Washington Post	Indeed, before he arrives in the United States, Peres says he plans to develop a list of options. . . .
1995	Atlanta J.-Const.	Clayton County has become a multi-cultured and diverse community. When student-led prayer arrives in the classroom, it will include Hindu,

Year	Source	Content
		Muslim, Jewish and pagan chants.
1995	Atlanta J.-Const.	A tired young man arrives in Atlanta one evening. He has no relatives to support him. . . .
1995	Atlanta J.-Const.	Stoichkov could play more than 60 matches before he arrives in Atlanta.
1995	Atlanta J.-Const.	When the world arrives in our city next summer, challenging these barriers must be accomplished if Atlanta is to emerge as the next great international city for people with disabilities.
1995	San Francisco Chronicle	Levada arrives in San Francisco following several years of bitter protests over Quinn's decision to close more than a dozen churches.
1995	Symposium	As soon as she arrives in the village, a network that resembles a transparent web weaves itself around Samya.
1995	NPR Morning	The first among this new old breed of scary critters arrives

Year	Source	Content
		in Species, a sci-fi thriller that owes a lot to Alien.
1995	Mighty Morphin Power Ranger	[The] world famous coach Gunthar Scmidt arrives in Angel Grove today [to scout for his gymnastics team.]
1996	Smithsonian	[A man on a tour received increased media attention with] each successive stop. In fact, a few days from now, when he arrives in Buffalo, New York, for a Juneteenth Festival . . . he'll be greeted by 60,000 festival goers."
1996	Associated Press	Volkswagen's biggest car, the Passat, will see slicker styling and improved safety features when it arrives in the United States next spring.
1996	CBS 48 Hours	Two people…are the keepers of the [Olympic] flame . . . until it arrives in Atlanta [for the Olympics.]
1996	People Weekly	Runaway Jury, the story of a high-stakes lawsuit against a tobacco company, which arrives in bookstores this week.

Year	Source	Content
1996	Ark. Rev.: J. Delta Studies	Marcie arrives in Baton Rouge at six o'clock. When I open the door, she throws her arms around my neck.
1996	Ark. Rev.: J. Delta Studies	[She] goes right into a detailed description of how she plans to breed iguanas once she arrives in Texas.
1996	Fantasy & Sci. Fiction	It seems as if the 1992 elections just ended, and yet this magazine arrives in your mailbox at the beginning of primary season.
1996	House Mouse, Senate Mouse	Later in the story, the children's letter arrives in the House mail room.
1996	Basquiat	She balls up the drawing and puts it in her pocket. Gina arrives in the doorway, wearing a robe. The landlady's trapped between them.
1996	Popular Mechanics	What Mitsubishi's 40-in. glass-plasma display will actually look like and how it will be configured when it arrives in

Year	Source	Content
		stores in early 1997 are still mysteries.
1996	Esquire	Dan "the Beast" Severn arrives in the Octagon [with people who announce him for a wrestling match.]
1996	Field & Stream	[A] fish [changes] between the evening when it is caught and the next morning when the fisherman arrives in the local coffee shop to tell of his catch.
1996	Smithsonian	If this were a video game, the screen might first show a stranger. He arrives in a rainy city [and founds a school].
1996	Associated Press	[The] Cuban President arrives in Chile [for a summit.]
1996	USA Today	The flight arrives in Newark but is late, and the team must go to the other end of the airport to catch its connecting flight to Hartford.
1996	San Francisco Chronicle	Yet nothing is for sure now. Moceanu arrives in Atlanta with a four-centimeter stress

Year	Source	Content
		fracture in her tibia that kept her out of the Olympic Trials
1996	The Simpsons	Every month, Good Housekeeping arrives in my mailbox bursting with recipes.
1996	Chicago Sun-Times	None of this rich thematic material arrives in the form of dry discourse in *Arcadia*.
1996	Associated Press	The imported Catera arrives in small quantities this year in California, Oregon and Washington, then debuts in the Washington, D.C.-to-Boston area.

Table 2: 58 Uses of "Arrives in" to Describe When or How One Arrives

Year	Source	Content
1990	Nat'l Rev.	The obliging taxi driver who has taken us to a sung Latin Mass at St. Vitus's Gothic cathedral this morning arrives in time.
1990	Omni	Ninety percent of Hawaii's energy arrives in the form of imported oil.
1991	Atlanta J.-Const.	Bert Blyleven, also disabled, arrives in time before each home game to take a 90-minute bike ride around the stadium.
1990	San Francisco Chronicle	Moments after Hackman and his crony find Archer in a wilderness cabin, the mob arrives in a commando-style helicopter raid.
1990	Ethnology	Animals are slaughtered and a meal arrives in large brass trays.
1990	Rolling Stone	She arrives in a new red BMW, as well as in a wide-brimmed hat.

Year	Source	Content
1992	Passenger 57	Stuart Ramsay arrives in mid-conversation with a top executive.
1992	USA Today	A [BMW] 325is coupe arrives in March.
1992	USA Today	[The] [c]onvertible version of the 300ZX sports car arrives in April at about $39,000.
1992	USA Today	A station wagon arrives in September.
1992	Atlanta J.-Const.	Mussels and clams are average; chicken is chunks of white meat resembling the stuff that arrives in boxes, not on the bone; sliced chorizo sausage is so-so.
1992	Atlanta J.-Const.	[T]he daily stream of traffic arrives in 1994.
1992	Boston Coll. Env't Affairs L. Rev.	Perhaps the threat arrives in the form of a nearby sanitary landfill or a nuclear power plant.
1992	J. Info. Sys.	Since information arrives in time-sequenced, discrete event' packets, this is essen-

Year	Source	Content
		tially an optimal stopping problem.
1992	J. Info. Sys.	Since information arrives in discrete time-sequenced packets. . . .
1992	J. Info. Sys.	[A]ssume that S is updated in clusters of m=3 (e.g., it arrives in "bursts").
1993	ABS Sun News	A young girl is chosen to be the Rangeley angel and arrives in snowland style to light the tree.
1993	Babylon 5: The Gathering	[The four] governments have ambassadors here. Almost. The fourth arrives in two days.
1993	Kenyon Rev.	The lamb, a tiny, pure white female, arrives in a laundry basket. For Ariella it's love at first sight.
1993	Being Human	Hector's girlfriend Anna arrives in her car. It is a bright pink station wagon.
1993	Field & Stream	The Nobilem . . . is mechanically good and optically superb, comes with a leather neck strap that is too long, and arrives in a leather hard case

Year	Source	Content
		that is an object of great beauty.
1993	Compute!	Help arrives in the form of another undocumented feature.
1993	Omni	[T]he date Nostradamus named for the end of the world can be figured in several ways, depending on the chosen starting point, so that Armageddon arrives in the year 2000 or later, in 3797.
1993	Chicago Sun-Times	[A m]id-size, extra-roomy Sonata sedan arrives in March as [a] thoroughly revamped but inexpensive early 1995 model.
1993	Chicago Sun-Times	[This] Eclipse has [a] short production run because [the] redesigned 1995 model arrives in spring.
1994	Cobb	Wagner takes the throw as Cobb arrives in a spikes-up slide.
1994	Literary Rev.	[I]t never occurs to him that he arrives in a plaid suit and all others are wearing T-shirts.

Year	Source	Content
1994	Mass. Rev.	Then the Don, Death arrives in a big old Benz.
1994	Fantasy & Sci. Fiction	The ship arrives in midafternoon. Why don't we just wait for it?
1994	San Francisco Chronicle	As is now usual with Stone films, this one arrives in a highly marketable cloud of controversy.
1994	Chicago Sun-Times	Callaway arrives in midmorning, having read late into the night before.
1994	Giorgino	Professor Beaumont arrives in a moment.
1995	San Francisco Chronicle	The adulation arrives in torrents, gathering at Mike Tyson's feet in three-foot drifts.
1995	TIME	It will take an outsider to revive this troubled lot, and she arrives in the form of Bette Mack, a taciturn beauty in pink sneakers.
1995	Copycat	Ruben arrives in a taxi.
1995	Braveheart	The undertaker arrives in his hearse.

Year	Source	Content
1995	Feminist Studies	The boss always arrives in a bad mood, but he never has a reason for being angry with Mery Yagual.
1995	Chicago Sun-Times	Not to be outdone, the tiramisu arrives in a wine glass.
1995	Am. Studies Int'l	The great white buffalo heralded by Native prophesy arrives in the form of a white motor home. The medicine pipe is sold.
1995	Space: Above and Beyond	The miners are preparing to transfer ice ore to a heavily armed convoy which arrives in two days.
1996	Chicago Sun-Times	Amish-raised chicken arrives in a deep bowl, the pieces of chicken sharing space with chunks of roasted potatoes.
1996	NY Times	Sally Field arrives in a square Volvo wagon for the wild children's birthday party.
1996	NY Times	When Harrison Ford is called to the White House in *Clear and Present Danger*, he arrives in his Taurus station wagon.

Year	Source	Content
1996	Popular Sci.	If these procedures or any of the team's diagnostic tests indicate that an engine is malfunctioning, it's removed entirely, placed in a handsome aluminum shipping container, and replaced—straightaway—with another that arrives in a similar container.
1996	The Rock	The President arrives in three hours.
1996	Bicycling	Kestrel, the first production, one-piece, airfoil-designed carbon frame, arrives in '86.
1996	Beavis and Butt-head Do America	We pan back to the hotel as Muddy arrives in a cab.
1996	Saturday Evening Post	Sometimes a rescue squad arrives in time to revive the victim.
1996	USA Today	The front-wheel-drive S70 sedan arrives in fall as the successor to the midrange 800-series.
1996	USA Today	An all-new Accent arrives in fall.

Year	Source	Content
1996	USA Today	The sexy SLK roadster that's been making the rounds of the international auto shows arrives in early '97, with two key features.
1996	The Rock	Okay. Okay. The President arrives in three hours.
1996	USA Today	A redesigned version of the midsize Regal arrives in spring.
1996	USA Today	A successor to the compact Corsica sedan arrives in early 1997.
1996	USA Today	In addition, a successor to the Ciera, rebadged a Cutlass, arrives in early 1997.
1996	USA Today	A redesigned Maxima sedan arrives in fall.
1996	Raritan	And Auden's version of the faithful Sarah Young arrives in time to see what he is up to.
1996	ABA J.	This [comment] arrives in the ponderous, thoughtful tones you would expect from someone who has Higginbotham's

Year	Source	Content
		new life as an ombudsman for the American establishment.

BRESS, Circuit Judge, with whom GOULD, CALLAHAN, M. SMITH, IKUTA, BENNETT, R. NELSON, BADE, COLLINS, LEE, BUMATAY, and VANDYKE Circuit Judges, join, dissenting from the denial of rehearing en banc:

The panel majority in this case reached the remarkable conclusion that our asylum statute extends to undocumented aliens in Mexico ambiguously close to the United States border, "whichever side of the border they are standing on." *Al Otro Lado v. Exec. Office for Immigr. Rev.*, No. 22-55988, --- F.4th ---, Slip Op. at 22 (May 14, 2025), *as amended*. That holding violates clear statutory text, precedent, the presumption against extraterritoriality, and long-held understandings limiting application of the asylum and inspection laws to aliens "*in*" the United States—which aliens in Mexico of course are not. 8 U.S.C. §§ 1158(a)(1), 1225(a)(1). The panel's serious misreading of the statutory text then led it to an extraordinary result: after extending asylum protections to aliens who are physically *in Mexico*, the panel upheld an unprecedented district court order severely limiting the government's ability to manage the large flow of undocumented aliens trying to enter the United States at overrun ports of entry along the Mexican border. And that is surely only one of the many governmental efforts to manage the border that the panel's precedential opinion will affect going forward.

This long-running case has now spanned three presidential administrations, all of whom have strenuously opposed the panel's result and reasoning. I tried to head this off at the pass years ago, when the government sought emergency relief from the district court's preliminary injunction. *Al Otro Lado v. Wolf*, 952 F.3d 999, 1016 (9th Cir. 2020) (Bress, J., dissenting). Judge R.

Nelson in his panel dissent picked up where I left off, powerfully explaining why the majority's decision is fundamentally mistaken. *Al Otro Lado*, Amended Op. at 49 (R. Nelson, J., dissenting).

The panel's decision is clearly wrong and has created —and will continue to create—untold interference with the Executive Branch's ability to manage the southern border. I respectfully but strongly dissent from our court's decision not to rehear this matter en banc.

I

In 2016, and in response to a massive surge of undocumented aliens seeking admission to the United States at ports of entry along the U.S.-Mexico border, the Department of Homeland Security (DHS) and U.S. Customs and Border Protection (CBP) instituted the practice of "metering," or "queue management," to regulate the flow of undocumented aliens into border entry stations. Metering gives border officials the flexibility to limit the number of aliens without valid travel documents who can enter a port of entry for processing when the port is at capacity.

In 2017, a consortium of plaintiffs challenged this policy, which the district court declared unlawful after concluding that federal immigration statutes required CBP to inspect and process for asylum eligibility undocumented aliens *approaching* the U.S.-Mexico border. The district court also enjoined the United States from enforcing as to metered aliens a later (and now-rescinded) rule, sometimes called the Third Country Transit Rule, 8 C.F.R. § 208.13(c)(4) (2019), which required asylum-seekers at the southern border to first apply for asylum in another country through which they transited. The district court held that this Rule could not be applied to

non-Mexican asylum-seekers who, but for metering, would have entered the United States before the Rule's effective date. The Third Country Transit Rule was enacted after this lawsuit was filed, yet was still caught up in it.

The lengthy litigation continued. Ultimately, a Ninth Circuit panel largely affirmed the district court's sweeping declaratory and injunctive relief, adopting the district court's theory that our asylum and inspection statutes extend to aliens physically located in Mexican territory who are in the process of arriving in the United States. *Al Otro Lado v. Exec. Office for Immigr. Rev.*, 120 F.4th 606, 611, 614-21 (9th Cir. 2024). In connection with its order denying en banc review, the panel issued an amended opinion, which, if anything, is even more problematic than its original decision. *Al Otro Lado v. Exec. Office for Immigr. Rev.*, No. 22-55988, --- F.4th ---, Slip Op. (May 14, 2025), *as amended*.

A

The panel's decision is manifestly incorrect and will severely intrude on the Executive Branch's prerogative to manage our country's borders. *See Al Otro Lado*, 952 F.3d at 1016-45 (Bress, J., dissenting); *Al Otro Lado*, Amended Op. at 49-82 (R. Nelson, J., dissenting). The reason the panel's decision is wrong is straightforward: the United States did not unlawfully withhold any duty to inspect undocumented aliens at the border or refer them for asylum processing because these duties do not extend to aliens outside the territorial border of the United States.

Under 8 U.S.C. § 1158(a)(1), "[a]ny alien who is physically present in the United States or who arrives in the United States" may apply for asylum. Immigration of-

ficials must also inspect aliens "who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States." 8 U.S.C. § 1225(a)(3). The statute defines "an applicant for admission" as "[a]n alien present in the United States who has not been admitted or who arrives in the United States." *Id.* § 1225(a)(1). If an applicant for admission "who is arriving in the United States" expresses an intent to apply for asylum or a fear of persecution, the immigration officer shall refer the alien to an asylum officer for an interview. *Id.* § 1225(b)(1)(A)(ii), (B). Otherwise, if the alien is inadmissible, "the officer shall order the alien removed from the United States without further hearing or review." *Id.* § 1225(b)(1)(A)(i).

These statutes do not apply to undocumented aliens in Mexico, on the Mexico side of the border, for the simple reason that these persons are not "*in* the United States," as the statutory text requires. These aliens are obviously not "physically present in the United States." *Id.* § 1158(a)(1). Nor is an alien outside the territorial jurisdiction of the United States someone "who arrives in the United States." *Id.* As I explained previously, "[w]hen we say that a person 'arrives' in a location, we mean he *reaches* that location, not that he is somewhere on his travels toward it. An alien thus 'arrives in' the United States or he does not; there is no in-between." *Al Otro Lado*, 952 F.3d at 1028 (Bress, J., dissenting). Or as Judge R. Nelson explained using dictionary definitions and examples from common parlance, "arrive" means "to reach a destination or come to a particular place," and when used with the preposition "in," "a person 'arrives in' a country when she has reached its inner limits or bounds." *Al Otro Lado*, Amended Op. at 52-53 (R. Nelson, J., dissenting) (inter-

nal quotations and citations omitted). The text does not say "arrives at" or even just "arrives." It says "arrives *in*." And that phrase clearly means that the person must be "in" the United States to apply for asylum and be inspected for asylum eligibility.

Statutory context supports this plain reading of §§ 1158(a)(1) and 1225. Section 1225 provides for the expedited removal of aliens "from the United States." 8 U.S.C. § 1225(b)(1)(A)(i). Thus, "[f]or an alien to be 'removed from the United States,' the alien must of course have been *in* the United States in the first place." *Al Otro Lado*, 952 F.3d at 1031 (Bress, J., dissenting); *see also Al Otro Lado*, Amended Op. at 60 (R. Nelson, J., dissenting) ("[A] person not yet in the United States cannot be 'removed' from it."). Nor is there any suggestion that § 1225 inspections by immigration officers and related asylum proceedings could take place anywhere other than the place that aliens have arrived "in," namely, the United States. *Cf. Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173 (1993) (explaining that statutory provisions governing deportation and exclusion hearings in the predecessor statute "obviously contemplate that such proceedings would be held in the" United States).

The history of our immigration laws further supports the view that the asylum and inspection laws apply only to persons "in" the United States, not those "in" Mexico. The Refugee Act of 1980 originally ordered the Attorney General to accept asylum applications from any "alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status." 8 U.S.C. § 1158(a) (1980). Even with this potentially broader language—"at a land border"—no court treated

the asylum statute as covering aliens who were somewhere near the border but had not yet crossed into the United States. *See Al Otro Lado*, 952 F.3d at 1028-29 (Bress, J., dissenting); *Al Otro Lado*, Amended Op. at 64 (R. Nelson, J., dissenting). Instead, both the Supreme Court and this court explained that the 1980 Act applied to "refugees currently in the United States," *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 433 (1987), that is, "refugees *within* the United States," *Yang v. INS*, 79 F.3d 932, 938 (9th Cir. 1996). Indeed, that was a key objective of the 1980 Act, because "[p]rior to the 1980 amendments there was no statutory basis for granting asylum to aliens who applied from within the United States." *Cardoza-Fonseca*, 480 U.S. at 433.

Courts have long understood that § 1158 differs in this respect from § 1157, which concerns applications for admission from refugees who are outside of the United States (these are capped at certain numbers by statute). As the Supreme Court has succinctly stated, "Section 207, 8 U.S.C. § 1157, governs the admission of refugees who seek admission from foreign countries. Section 208, 8 U.S.C. § 1158, sets out the process by which refugees currently in the United States may be granted asylum." *Id.* Our court has made the same point: "Section 207 [8 U.S.C. § 1157] establishes the procedure by which an alien *not* present in the United States may apply for entry as a refugee. . . . Section 208 [8 U.S.C. § 1158], on the other hand, sets out procedures for granting asylum to refugees *within* the United States." *Yang*, 79 F.3d at 938. Many cases have drawn this same key distinction. *See Al Otro Lado*, 952 F.3d at 1028 (Bress, J., dissenting) (citing cases).

Finally, even if the statutory text were ambiguous, which it is not, it could not overcome the venerable presumption against extraterritoriality. "It is a longstanding principle 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." *Abitron Austria GmbH v. Hetronic Int'l Inc.*, 600 U.S. 412, 417 (2023) (quoting *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010)). For a statute to apply outside the United States, we ask "whether 'Congress has affirmatively and unmistakably instructed that' the provision at issue should 'apply to foreign conduct.'" *Id.* at 417-18 (quoting *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 335, 337 (2016)). Here, applying §§ 1158 and 1225 to aliens in Mexico is an extraterritorial application of the immigration laws, because the aliens are themselves outside of the United States. And it can hardly be said that §§ 1158(a)(1) and 1225—which refer to aliens "*in*" the United States—somehow reflect a "clear indication of an extraterritorial application," so as to overcome the presumption against extraterritoriality. *Morrison*, 561 U.S. at 255.

In short, unambiguous text, precedent, longstanding practice, and the presumption against extraterritoriality all demonstrate that the § 1158(a)(1) and § 1225 asylum and inspection provisions apply only to persons "in" the United States. Metering undocumented aliens approaching ports of entry thus cannot violate these statutes, which do not apply to persons outside the United States.

B

The panel majority nevertheless held that by using "arrives in," "Congress crafted a scheme for the inspec-

tion of noncitizens both physically present in the United States *and on its doorstep*." *Al Otro Lado*, 120 F.4th at 622 (emphasis added). In other words, according to the majority, the statutory text "encompasses those who encounter officials at the border, whichever side of the border they are standing on." *Al Otro Lado*, Amended Op. at 22. The majority thus endorsed the district court's view—entirely unclear in its scope—that "arrives in" refers to "the process of arriving in the United States." *Id.* at 17. And by that interpretation, the panel majority held that the United States owes various legal duties under § 1158(a)(1) and § 1225 to persons on the other side of the border in Mexico, rendering the CBP metering policies unlawful.[1]

It is hard to overstate the radical nature of the majority and district court's decisions. No other court has ever held that the asylum and inspection laws apply to persons who are not "in" the United States. *See id.* at 49 (R. Nelson, J., dissenting) ("No circuit court has ever reached such as trained conclusion. Not since the current act was adopted 30 years ago. Not under the prior act adopted 45 years ago which had even more permissive language."). And as set forth above, both the Su-

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[1] The panel's original opinion described its holding as applying to persons both physically present in the United States and on its "doorstep." *Al Otro Lado*,120 F.4th at 615, 619. The panel's amended opinion removes the word "doorstep." But its holding remains the same, still extending U.S. law to undocumented aliens on the other side of the Mexican border, "whichever side of the border they are standing on." Amended Op. at 22. Of course, if the amended opinion is now extending our asylum and inspection laws to persons in Mexico even further away from the United States' "doorstep," the amended opinion has only aggravated a core ambiguity about how far into Mexico the court's decision reaches.

preme Court and this court have said the opposite in distinguishing §§ 1157 and 1158. *See Cardoza-Fonseca*, 480 U.S. at 433; *Yang*, 79 F.3d at 938. Unsurprisingly, then, the majority's conclusion rests on a fundamentally flawed interpretation of the statutory text.

The majority's central argument is that because the statute uses the phrases "physically present in the United States" and "arrives in the United States," 8 U.S.C. § 1158(a)(1), we must read "arrives in" to mean something different than "physically present in" to avoid surplusage. *See Al Otro Lado*, Amended Op. at 21-23. The majority badly erred.

As an initial matter, there is nothing wrong with Congress using a belt-and-suspenders approach that creates surplus coverage, as "redundancies are common in statutory drafting." *Barton v. Barr*, 590 U.S. 222, 239 (2020). The Supreme Court has thus recognized that "'[s]ometimes the better overall reading of the statute contains some redundancy,'" and that "[r]edundancy in one portion of a statute is not a license to rewrite or eviscerate another portion of the statute contrary to its text." *Id.* (quoting *Rimini Street, Inc. v. Oracle USA, Inc.*, 586 U.S. 334, 346 (2019)); *see also Pugin v. Garland*, 599 U.S. 600, 609 (2023) (explaining that sometimes Congress wants "to be doubly sure"). That is especially the case here, when the claimed redundancy concerns merely two phrases in a broader statutory scheme. In short, any redundancy in §§ 1158(a)(1) and 1225 did not permit the majority's counter-textual reading that someone outside the United States has "arrive[d] *in* the United States." *See Al Otro Lado*, Amended Op. at 63 (R. Nelson, J., dissenting) ("The statute's ordinary meaning is clear, and the presump-

tion against surplusage does not justify rewriting it."). Undocumented aliens who are physically located "in" Mexico lack rights under our asylum laws as persons who are "in the United States." 8 U.S.C. § 1158(a)(1).

Regardless, there is not necessarily surplusage because Congress could have plausibly included the phrases "physically present in the United States" and "arrives in the United States" for distinct reasons. Immigration law has long operated under an "entry fiction" by which aliens who have arrived in a port of entry are not regarded as within the United States for some purposes. By this logic, "[w]hen an alien arrives at a port of entry —for example, an international airport—the alien is on U.S. soil, but the alien is not considered to have entered" the United States. *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 139 (2020); *see also Kaplan v. Tod*, 267 U.S. 228, 230 (1925); *Xi v. U.S. I.N.S.*, 298 F.3d 832, 837 (9th Cir. 2002). The majority's convoluted response notwithstanding, *Al Otro Lado*, Amended Op. at 24-26, Congress could have plausibly used "arrives in the United States," in addition to "physically present in the United States," to ensure that those aliens who arrived in ports of entry could apply for asylum, regardless of the legal fiction that they were "stopped at the border." *Thuraissigiam*, 591 U.S. at 139 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953)); *see also Al Otro Lado*, Amended Op. at 61 (R. Nelson, J., dissenting).

The majority's remaining reasoning is also seriously mistaken. The majority writes that "[f]or a person coming to the United States to seek asylum, the relevant destination is the U.S. border, where she can speak with a border official. A person who presents herself

to an official at the border has therefore reached her destination—she has 'arrive[d].'" *Al Otro Lado*, Amended Op. at 23. But the statutory text says "arrives *in the United States*." The majority thus completely rewrites the statute in holding that Congress crafted a scheme for the inspection of undocumented aliens "whichever side of the border they are standing on." *Id.* at 22.

The majority seemingly holds that the parenthetical phrase "at a designated port of arrival"—located in the statutory phrasing "arrives in the United States (whether or not at a designated port of arrival . . .)," 8 U.S.C. § 1158(a)(1)—suggests a broader construction. *Al Otro Lado*, Amended Op. at 23. But the majority again reads "arrives *in the United States*" out of the statute, regarding it as sufficient that someone has arrived *at the border*, which is not what the statute says. The statutory parenthetical about designated ports of arrival "clarifies that the statute applies to immigrants who arrived through designated entry ports and those who crossed the border elsewhere. It does not mean that immigrants who have yet to enter an arrival port have somehow arrived in the United States." *Id.* at 57 (R. Nelson, J., dissenting). Nor can the majority justify its interpretation on the theory that it will disincentivize asylum-seekers from crossing the border at places other than a port of entry. *See id.* at 23-24. There are already prohibitions against illegally entering the United States, and yet there are many people who nonetheless do so. A plain reading of "arrives in" does not change those dynamics.

C

The majority opinion also provides no plausible response to the presumption against extraterritoriality. Even if one were inclined to think that 8 U.S.C. §§ 1158(a)(1) and 1225(a)(1) could cover undocumented aliens in Mexico, as the panel majority does, the presumption against extraterritoriality creates an insurmountable hurdle to reaching that result.

In its original opinion, the panel agreed that the presumption against extraterritoriality applied—that by its decision, U.S. law would extend extraterritorially—but held that "§ 1158 and § 1225 contain a 'clear, affirmative indication' of extraterritorial reach." *Al Otro Lado*, 120 F.4th at 621 (quoting *RJR Nabisco*, 579 U.S. at 337). Specifically, the panel held that §§ 1158 and 1225 apply extraterritorially and rebut the presumption against extraterritoriality because "the arrival of noncitizens to the United States . . . 'almost always originates outside the United States.'" *Id.* at 622 (quoting *United States v. Ubaldo*, 859 F.3d 690, 700 (9th Cir. 2017)).

This original reasoning was plainly mistaken. Because "[i]mmigration always originates outside the United States," *id.* at 639 (R. Nelson, J., dissenting), the panel's original reasoning would effectively exempt all immigration laws from the presumption against extraterritoriality, a remarkable proposition with no basis in law. The panel's original analysis also contradicted the Supreme Court's decision in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 173-77 & n.29 (1993), which held that the former exclusion and deportation procedures in the Immigration and Nationality Act—including the predecessor to the current 8 U.S.C. § 1158(a)(1)—did not apply extraterritorially.

In a sudden about-face, the panel's amended opinion now drops its original extraterritoriality analysis and concludes that there is no extraterritoriality question in the first place. *Al Otro Lado*, Amended Op. 31-33. The panel now holds that "the presumption against extraterritoriality has no role to play here" after all, because the presumption "just begs the question: is the conduct at issue in this case a domestic application?" *Id.* at 32. According to the amended opinion, once the court has concluded that the phrase "arrives in the United States" applies to undocumented aliens in Mexico, the presumption against extraterritoriality is irrelevant because it "does not help address" that "threshold issue." *Id.* at 33.

The plaintiffs never made this argument, presumably because it is not correct. *See id.* at 67 n.11 (R. Nelson, J., dissenting). The effect of the majority's statutory interpretation is to extend the *legal* protections in §§ 1158 and 1225 to undocumented aliens in Mexico. But this does not and cannot change where these aliens are physically located: *in Mexico*. The presumption against extraterritoriality does not "beg the question," as the amended opinion asserts, *see id.* at 32, but is rather a required tool of statutory interpretation for *answering the question* of whether the statute can be read to cover persons beyond our borders. *See RJR Nabisco*, 579 U.S. at 335 (describing the presumption against extraterritoriality as "a canon of statutory construction"); *Morrison*, 561 U.S. at 255 ("a presumption about a statute's meaning").

We do not interpret statutes using an artificially limited set of interpretative tools, reach an answer, and then conclude that other relevant or required tools of in-

terpretation—here, a clear statement rule—need not be considered because we are satisfied with our own interpretation. The Supreme Court has emphasized that the presumption against extraterritoriality is based on vital considerations, namely, "avoid[ing] the international discord that can result when U.S. law is applied to conduct in foreign countries" and respecting the "commonsense notion that Congress generally legislates with domestic concerns in mind." *Abitron*, 600 U.S. at 417 (quoting *RJR Nabisco*, 579 U.S. at 335-36). The panel's amended opinion lays waste to these considerations, boldly concluding that it need not follow the Supreme Court's directions for interpreting statutes because those directions are, in the panel's view, apparently not "help[ful]." *Al Otro Lado*, Amended Op. at 33. The panel's amended opinion states that "[t]he presumption against extraterritoriality makes sense to consider if a litigant is asking a court to apply a federal statute to conduct occurring outside the United States." *Id.* at 32. But that is exactly what the plaintiffs in this case are asking for based on their conduct of arriving close to—but not *in*—the United States. In holding that the presumption against extraterritoriality is not even implicated here, the panel elides decades of Supreme Court precedent.[2]

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[2] The panel therefore badly errs in analogizing this case to a hypothetical based on the Supreme Court's *Morrison* decision, which involved trading on foreign exchanges. The amended opinion asserts that "if the dispute in *Morrison* had been whether the exchange on which the alleged transactions took place were a foreign or a domestic exchange, the presumption against extraterritoriality would have been of no help." *Al Otro Lado*, Amended Op. at 33. It is true that the presumption against extraterritoriality does not tell you where something is located. A transaction that

Equally mistaken is the amended opinion's apparent holding that there is no extraterritoriality question here because what matters is that U.S. officials acted from within the United States in applying the metering policy. The amended opinion thus states that "the entire question in this case is whether the U.S. officials' conduct of standing on the U.S. side of the border and stopping people right before they crossed the border is foreign or domestic." *Id.* This serious mis-framing of the case contradicts law and logic.

To determine "whether the suit seeks a (permissible) domestic or (impermissible) foreign application of the provision," "courts must start by identifying the 'focus of congressional concern' underlying the provision at issue." *Abitron*, 600 U.S. at 418 (quoting *RJR Nabisco*, 579 U.S. at 336). According to the Supreme Court, "[t]he focus of a statute is the object of its solicitude, which can include the conduct it seeks to regulate, as well as the parties and interests it seeks to protect or vindicate." *Id.* (quoting *WesternGeco LLC v. ION Geophysical Corp.*, 585 U.S. 407, 414 (2018)). And the Supreme Court has "repeatedly and explicitly held that courts must 'identif[y] the statute's focus *and* as[k] whether the *conduct relevant to that focus* occurred

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occurred on a domestic exchange would have fallen within the Securities Exchange Act of 1934's scope in *Morrison* because there would have been no extraterritorial application of that statute. *Morrison*, 561 U.S. at 266-67. But in this case, the physical location of the aliens is not the issue; they are indisputably in Mexico. The question is whether to read §§ 1158 and 1225 to extend to them. That is not a factual question about where certain conduct is taking place, but a legal question of statutory interpretation. It is to that interpretative inquiry that the presumption against extraterritoriality most definitely applies.

in United States territory.'" *Id.* (quoting *WesternGeco*, 585 U.S. at 413).

Although the panel completely failed to conduct the required analysis, in this case the "object" of §§ 1158's and 1225's "solicitude"—and the "parties and interests" they "seek[] to protect or vindicate"—are quite obviously the aliens "physically present in the United States or who arrive[] in the United States." 8 U.S.C. § 1158(a)(1). And the "conduct relevant to that focus" is the aliens entering into the United States, for it is that conduct that triggers the statutory protections and entitlements of §§ 1158(a)(1) and 1225. *See Al Otro Lado*, Amended Op. at 68 (R. Nelson, J., dissenting). Once again, although the majority's *legal* conclusion is that aliens on the threshold of the United States have "arrived in the United States," there is no dispute that as a factual matter, they are in Mexico. Thus, the conduct relevant to the statute's focus is occurring in Mexico, which means that the presumption against extraterritoriality must be overcome. Even if the panel's interpretation of "arrives in the United States" were plausible—it is not—the presumption against extraterritoriality would plainly foreclose that interpretation.

If anything, and although the panel's original extraterritoriality analysis was profoundly mistaken, its amended opinion is cause for equal if not greater concern. Whereas the original panel opinion exempted all immigration laws from the presumption against extraterritoriality by treating them as definitionally extraterritorial, the amended opinion treats the extraterritorial extension of immigration laws as definitionally domestic. On top of extending the asylum and inspection laws to aliens "in" Mexico, the panel's amended opinion

is now a blueprint for avoiding the presumption against extraterritoriality, contrary to Supreme Court case law.

II

In running roughshod over statutory text and decisional law through its unprecedented extension of §§ 1158 and 1225 to undocumented aliens outside the United States, the majority opinion creates major impediments to the Executive Branch's ability to manage our nation's borders. That is already a "daunting task" at our 1,900-mile border with Mexico, which involves high traffic and acute security concerns. *Hernandez v. Mesa*, 589 U.S. 93, 107 (2020). But the majority opinion only bedevils matters further given the large numbers of migrants at the southern border in recent years. This case thus easily presented a question of "exceptional importance," justifying en banc review. Fed. R. App. P. 40(b)(2)(D).

This litigation alone shows the enormous impact of the majority and district court's novel statutory interpretation, which produced a judicial declaration that metering is effectively illegal. *See Al Otro Lado*, Amended Op. at 39 ("The district court entered classwide declaratory relief stating that the metering policy violated § 1158 and § 1225."). The majority opinion says that the government might have complied with its (new) obligations as to aliens in Mexico if CBP officials had undertaken supposedly "minimal steps," such as "implementing and following a waitlist system or initiating the asylum process" for undocumented aliens on the Mexico side of the border. *Id.* at 38. But it would hardly be a "minimal" undertaking for the government to assume the extraordinary obligation of keeping track of the many thousands of undocumented aliens ap-

proaching our busy ports of entry across the entire southern border, to say nothing of interviewing aliens for asylum eligibility when they are not even in the United States. The majority opinion imposes on U.S. officials at the border vast court-created obligations that are nowhere in the statute. And more broadly, it creates uncertainty as to who is even covered by the statutes in the first place. *See Al Otro Lado*, 952 F.3d at 1030 (Bress, J., dissenting) ("The uncertainty of what it means to be 'in the process of arriving' raises a host of interpretative and practical issues that the majority does not address.").

The majority opinion also largely affirmed the district court's remarkable injunction preventing the government from applying the Third Country Transit Rule to aliens who had been metered and who would have otherwise entered the United States before that Rule took effect. *See Al Otro Lado*, Amended Op. at 45. This injunction required the government to identify these persons and notify them about their rights as members of the district court's certified class. *Id.* at 46. By plaintiffs' own telling, complying with this injunction required "time-consuming and expensive measures." D. Ct. Dkt. #842, at 5 (Dec. 27, 2024). In the meantime, the injunction created an unwieldy patchwork of immigration laws "frozen in time as of the point that the plaintiffs were first arriving at a port of entry (or, more accurately, in the process of arriving there)." *Al Otro Lado*, 952 F.3d at 1033 (Bress, J., dissenting). The example of the Third Country Transit Rule only underscores the degree to which the majority's erroneous statutory interpretation will cause major disruption in the uniform administration of the immigration laws. This lawsuit has now foiled border operations for years,

when the case should have been dismissed at the outset under Rule 12(b)(6).

Although the Third Country Transit Rule and metering policies are now no longer in place, the panel decision itself confirms that this case is not moot. As the panel majority explained, rescission of the metering policy did "not render this case moot because Plaintiffs sought (and the district court entered) equitable relief to ameliorate past and present harms stemming from the policy, and the relief ordered imposes ongoing obligations on the Government." *Al Otro Lado*, Amended Op. at 18 n.3. And because the panel decision is binding precedent in the Ninth Circuit, it will seemingly govern every future effort to limit the entry of undocumented aliens at important ports of entry on the U.S.-Mexico border.

Perhaps sensing the possibility of further judicial review of the panel's decision, the plaintiffs in this case have recently taken the highly unusual step of asking the district court to vacate its own injunction regarding the Third Country Transit Rule. D. Ct. Dkt. #842 (Dec. 27, 2024). The plaintiffs made this request ostensibly because the injunction has served its purposes and because of "the burdens" the injunction "places on the parties." D. Ct. Dkt. #842 (Dec. 27, 2024). Given that plaintiffs fought vigorously for this injunction for years, it is hard to understand this strange maneuver as anything other than an attempt to forestall further review of the panel's opinion. But even if the district court were to grant plaintiffs' request for an indicative ruling, that would not moot the case either, given the ongoing declaratory relief that will continue to impose binding obligations on the United States. *See Al Otro Lado*,

Amended Op. at 18 n.3 This case thus presented an entirely proper vehicle for en banc review. Nor did it make any sense to allow the panel opinion to remain in place, only to await the next case in which the majority's rule of decision will inevitably produce yet more interference with valid Executive Branch efforts to manage the border and limit the entry of undocumented aliens into the United States.

* * *

The majority opinion is gravely wrong, breaking through numerous guardrails of clear statutory text and precedent. In conferring asylum and inspection protections on persons "in the United States," 8 U.S.C. § 1158(a)(1), Congress did not impose on border officials nebulous obligations as to undocumented aliens on the other side of the border, yet close to it. The majority's decision will seriously harm our country's ability to manage its borders, and it has already resulted in years of unwarranted disruption of Executive Branch border operations. I sincerely regret that this decision remains the law of the Ninth Circuit.

BEA, Circuit Judge, [1] joined by WALLACE and O'SCANNLAIN, Circuit Judges, respecting the denial of rehearing en banc:

I write in agreement with Judge Bress's dissent from denial of rehearing en banc and with Judge R. Nelson's dissent to the panel's majority opinion. Their analyses of the decisive statutory language of 8 U.S.C. § 1158—"Any alien who is physically present in the United States or who arrives in the United States . . . "—is clear and conclusive. Its best reading and meaning is that an alien claiming asylum under that statute must be *in* the United States when the claim is made. I am deeply disappointed that we did not vote to rehear this problematic decision en banc.

[1] As a judge of this court in senior status, I cannot vote on calls for rehearing cases en banc or formally join a dissent from failure to rehear en banc. *See* 28 U.S.C. § 46(c); Fed. R. App. 35(a). However, I may participate in discussions of en banc proceedings pursuant to our court's general orders. *See* Ninth Circuit General Order 5.5(a).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
SOUTHERN DISTRICT OF CALIFORNIA SAN DIEGO

Nos. 22-55988
D.C. No. 3:17-cv-02366-BAS-KSC

AL OTRO LADO, A CALIFORNIA CORPORATION; ET AL.,
PLAINTIFFS-APPELLEES

v.

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW,
APPELLANT

AND

ALEJANDRO N. MAYORKAS, SECRETARY OF HOMELAND
SECURITY; ET AL., DEFENDANTS-APPELLANTS

Nos. 22-56036
D.C. No. 3:17-cv-02366-BAS-KSC

AL OTRO LADO, A CALIFORNIA CORPORATION; ET AL.,
PLAINTIFFS-APPELLANTS

v.

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW,
APPELLEE

ALEJANDRO N. MAYORKAS, SECRETARY OF HOMELAND
SECURITY; ET AL., DEFENDANTS-APPELLEES

Filed: Jan. 8, 2025

ORDER

Before: OWENS, FRIEDLAND, and R. NELSON, Circuit Judges.

A judge of this court has called for a vote to determine whether this case should be reheard en banc. The parties are directed to file simultaneous briefs setting forth their respective positions on whether this case should be reheard en banc. The briefs shall not exceed 15 pages unless they comply with the alternative length limitation of 4,200 words, and they shall be filed within twenty-one (21) days of the date of this order. *See* 9th Cir. R. 40-1.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 22-55988 and 22-56036
D.C. No. 3:17-cv-02366-BAS-KSC

AL OTRO LADO, A CALIFORNIA CORPORATION; ABIGAIL DOE; BEATRICE DOE; CAROLINA DOE; DINORA DOE; INGRID DOE; URSULA DOE; VICTORIA DOE; BIANCA DOE; JUAN DOE; ROBERTO DOE; CESAR DOE; MARIA DOE; EMILIANA DOE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

v.

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW,
APPELLANT/CROSS-APPELLEE,

AND

ALEJANDRO N. MAYORKAS, SECRETARY OF HOMELAND SECURITY; CHRISTOPHER MAGNUS, COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION (CBP); PETE FLORES, EXECUTIVE ASSISTANT COMMISSIONER OF CBP'S OFFICE OF FIELD OPERATIONS,
IN THEIR OFFICIAL CAPACITIES,
DEFENDANTS-APPELLANTS/CROSS-APPELLEES

Argued and Submitted: Nov. 28, 2023
San Diego Carter & Keep U.S. Courthouse
Filed: Oct. 23, 2024

Appeal from the United States District Court
for the Southern District of California
Cynthia A. Bashant, District Judge Presiding

OPINION

Before: JOHN B. OWENS, MICHELLE T. FRIEDLAND, and RYAN D. NELSON, Circuit Judges.

FRIEDLAND, Circuit Judge:

In 2016, Customs and Border Protection adopted a policy of "metering" asylum seekers at ports of entry along the border between Mexico and the United States. Under that policy, whenever border officials deemed a port of entry to be at capacity, they turned away all people lacking valid travel documents. Many of those people intended to seek asylum in the United States but were not allowed to even apply. They could try to come back some other time, but there was no guarantee that they would ever be processed.

The immigrant rights group Al Otro Lado and various individuals filed suit in federal district court challenging that metering policy on behalf of classes of asylum seekers. While the litigation was ongoing, the Government adopted a regulation, known as the "Asylum Transit Rule," that generally required persons traveling through a third country to apply for asylum there before seeking asylum in the United States. For many asylum seekers who already had been turned away under the metering policy, the Asylum Transit Rule effectively barred them from qualifying for asylum if they were ever able to apply—even though they would not

have been subject to the Rule if they had been processed when they first presented themselves at the border.

The district court ultimately declared the metering policy to be unlawful. As part of the remedy, the district court enjoined the Government from applying the Asylum Transit Rule to noncitizens turned away under the metering policy before the Rule's adoption. The court also ordered the Government to unwind past denials of asylum to such individuals.

We must evaluate the lawfulness of the metering policy to decide whether to uphold the district court's remedy, even though the Government rescinded the metering policy years ago. We largely affirm.

I.

Under federal law, asylum protects noncitizens who face persecution in their home countries because of their race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. §§ 1158(b)(1)(A), 1101(a)(42)(A). A noncitizen is eligible to apply for asylum if she is "physically present in the United States" or if she "arrives in the United States." *Id.* § 1158(a)(1).

People seeking to lawfully enter the United States via the southern border generally must present themselves for processing at a designated port of entry. 8 C.F.R. § 235.1(a). By statute, immigration officials are required to inspect all noncitizens "present in the United States who [have] not been admitted," noncitizens who "arrive[] in the United States," and noncitizens "otherwise seeking admission." 8 U.S.C. § 1225(a)(1), (3). If, during inspection at a port of entry, a noncitizen expresses an intent to apply for asylum or a fear of per-

secution, the inspecting border official must refer the noncitizen to an asylum officer for an interview to determine whether the noncitizen has a credible fear of persecution. *Id.* § 1225(b)(1)(A)(ii), (B). Otherwise, and if the noncitizen is inadmissible within the meaning of the statute, the official shall order her removed "without further hearing or review." *Id.* § 1225(b)(1)(A)(i).

Until 2016, noncitizens seeking asylum at ports of entry on the U.S.-Mexico border would cross over onto U.S. soil and then wait in line to be inspected. In 2016, citing capacity constraints, Customs and Border Protection ("CBP") officials began taking steps to prevent asylum seekers from entering port buildings or otherwise joining an inspection queue. In November 2016, the Department of Homeland Security ("DHS"), which includes CBP, approved "metering," allowing border officials who deemed a port of entry to be at capacity to turn away all people lacking valid travel documents. CBP gave ports of entry flexibility to implement metering based on "what [worked] best operationally and whether it [was] required on any given day or [at] any specific location." At some ports of entry, people were stepping onto U.S. soil before being turned back. CBP soon determined that it could not send such people back to Mexico without processing them, so it directed officials to implement metering at "the actual boundary line." Officials standing on the U.S. side of the border therefore stopped people right before they crossed the border.

The Government formalized its metering policy in the spring of 2018. In an April 2018 guidance memorandum, CBP authorized border officials to "meter the flow of travelers at the land border" based on "the port's pro-

cessing capacity." The memorandum specifically permitted officials to "establish and operate physical access controls at the borderline." It further stated that officers "may not provide tickets or appointments or otherwise schedule any person for entry" and that "[o]nce a traveler is in the United States, he or she must be fully processed." The DHS Secretary publicly explained that the metering policy meant "that if we don't have the resources to let them in on a particular day, they are going to have to come back." A June 2018 guidance memorandum from the DHS Secretary stated that the agency was prioritizing other components of its mission, such as national security and trade, above "[p]rocessing persons without documents required by law for admission arriving at the Southwest Border."

Due to the metering policy, asylum seekers began to accumulate on the Mexico side of the border. Many camped near the bridges at ports of entry. In an attempt to impose some order, Mexican government officials and nonprofits made lists of people waiting to be processed. U.S. border officials sometimes coordinated informally with those keeping lists, but they did not keep lists of their own.

Asylum seekers waited in Mexico for days, weeks, or months. Many were subject to persecution and crime, and they often lacked adequate food and shelter. Some were murdered in Mexico while waiting for an opportunity to be processed by U.S. officials. Some attempted to reach U.S. soil by other means, such as running down vehicle lanes at ports of entry, so that they could apply for asylum. Others, including young children, tried to swim across the Rio Grande River and drowned.

The immigrant rights organization Al Otro Lado, Inc., and thirteen individual asylum seekers (collectively "Plaintiffs") challenged the lawfulness of the metering policy in a putative class action in the United States District Court for the Southern District of California. They named as defendants the DHS Secretary, the CBP Commissioner, and the Executive Assistant Commissioner of CBP's Office of Field Operations (collectively "the Government").

Plaintiffs asserted five claims, each presenting a different legal theory for why the metering policy was unlawful. One claim alleged that metering violated § 706(1) of the Administrative Procedure Act ("APA"), which prohibits agencies from unlawfully withholding or unreasonably delaying action that they are required by law to take. Another claim alleged that the Government violated § 706(2) of the APA by acting "in excess of [its] statutorily prescribed authority." Plaintiffs also alleged that metering violated the Immigration and Nationality Act ("INA"), the Alien Tort Statute, and the Due Process Clause of the Fifth Amendment. Plaintiffs sought the same relief for each claim: classwide declaratory and injunctive relief ending the Government's metering policy.[1]

The Government moved to dismiss the Complaint, and the district court denied the motion in relevant part.

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[1] In addition to challenging the metering policy, Plaintiffs alleged that border officials used misrepresentations, threats, and coercion to deny noncitizens the opportunity to seek asylum. On appeal, the parties do not raise issues related to those other allegations and instead focus only on the formalized metering policy. We therefore also focus only on that policy.

Al Otro Lado, Inc. v. McAleenan, 394 F. Supp. 3d 1168 (S.D. Cal. 2019).

At around the same time, DHS and the Department of Justice jointly adopted the Asylum Transit Rule as an interim final rule. That Rule rendered ineligible for asylum nearly any noncitizen "who enter[ed], attempt[ed] to enter, or arrive[d] in the United States across the southern land border on or after July 16, 2019, after transiting through at least one country" unless she first applied for protection in that other country and received a final denial. *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33829, 33843 (July 16, 2019), *codified at* 8 C.F.R. § 208.13(c)(4) (2019).

Plaintiffs moved for provisional class certification and for a preliminary injunction blocking application of the Asylum Transit Rule to the provisional class. They asserted that, without an injunction, tens of thousands of people who had been turned away under the metering policy would be denied asylum under the Asylum Transit Rule. Plaintiffs argued that people unable to seek asylum because of the metering policy should not be subjected to asylum rules that they would not have faced had they been processed when they first presented themselves at the border. The district court provisionally certified a "Preliminary Injunction Class" ("P.I. class"), represented by named Plaintiff Roberto Doe, consisting of "all non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. [port of entry] before July 16, 2019[,] because of the U.S. Government's metering policy, and who continue to seek access to the U.S. asylum process." The court granted the requested preliminary injunction as to that class.

The court later clarified that the preliminary injunction required the Government to reopen past denials of class members' asylum applications that were based on the Asylum Transit Rule. The court also clarified that the preliminary injunction bound the Executive Office of Immigration Review ("EOIR"), which is the division of the Department of Justice that includes immigration judges ("IJs") and the Board of Immigration Appeals ("BIA"). Although EOIR was not a named defendant, the court held that EOIR was bound by the injunction because it operated in concert with the named defendants.[2]

A final version of the Asylum Transit Rule took effect in January 2021. *See Asylum Eligibility and Procedural Modifications*, 85 Fed. Reg. 82260 (Dec. 17, 2020). The accompanying statement in the Federal Register "clari[fied]" that DHS and the Department of Justice intended the Rule to apply to noncitizens subject to metering prior to the Rule's promulgation. *Id.* at 82268 & n.22. The district court entered a temporary restraining order against application of the Final Rule to mem-

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[2] The Government filed two interlocutory appeals regarding the preliminary injunction. The first appeal challenged the district court's initial entry of the preliminary injunction. Our court denied a stay pending appeal, noting without deciding that Plaintiffs' statutory analysis was "likely correct." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1013-16 (9th Cir. 2020). The second appeal challenged the district court's order clarifying the scope of the preliminary injunction. We again denied a stay pending appeal. Order, *Al Otro Lado v. Wolf*, No. 20-56287 (9th Cir. Jan. 14, 2021), ECF No. 30. Both interlocutory appeals were later dismissed as moot when the district court entered final judgment. *Al Otro Lado v. Wolf*, No. 19-56417, 2022 WL 15399693 (9th Cir. Sept. 20, 2022); *Al Otro Lado v. Wolf*, No. 20-56287, 2022 WL 17369223 (9th Cir. Sept. 20, 2022).

bers of the P.I. class. The parties stipulated to the conversion of that temporary restraining order into a second preliminary injunction.

As the litigation progressed, the district court certified an additional class consisting of "all noncitizens who seek or will seek to access the U.S. asylum process by presenting themselves at a Class A [port of entry] on the U.S.-Mexico border, and were or will be denied access to the U.S. asylum process by or at the instruction of [CBP] officials on or after January 1, 2016."

The parties filed cross-motions for summary judgment. The district court granted summary judgment in favor of the Government on the INA and Alien Tort Statute claims. It granted summary judgment in favor of Plaintiffs on the APA § 706(1) and due process claims and concluded that it did not need to reach the APA § 706(2) claim. It then ordered the parties to brief the appropriate remedy.

Shortly thereafter, in November 2021, CBP rescinded the metering policy. CBP issued new guidance stating that "[a]bsent a [port of entry] closure, officers . . . may not instruct travelers that they must return to the [port of entry] at a later time."

About a year after the district court ruled on the parties' summary judgment motions, it entered declaratory and injunctive relief in favor of Plaintiffs and entered final judgment. The declaratory relief stated that the "denial of inspection or asylum processing to [noncitizens] who have not been admitted or paroled, and who are in the process of arriving in the United States at Class A Ports of Entry, is unlawful regardless of the purported justification for doing so."

The court entered permanent injunctive relief as to the P.I. class. The permanent injunction replaced the two preliminary injunctions and similarly prohibited the application of the Asylum Transit Rule to members of the P.I. class. The district court's permanent injunction order further clarified the scope of the Government's obligations under the injunction by summarizing (and largely approving) the Government's ongoing efforts to comply with the preliminary injunctions. Those efforts included identifying possible class members, notifying them of the injunction, and reopening and reconsidering P.I. class members' asylum denials that were based on the Asylum Transit Rule.

The parties timely cross-appealed. We heard oral argument at the end of November 2023. The parties then engaged in six months of mediation, but their efforts to reach a settlement ultimately failed.

II.

The district court exercised jurisdiction under 28 U.S.C. § 1331. We have jurisdiction over this appeal under 28 U.S.C. § 1291.[3]

"We review legal questions de novo." *Romero v. Garland*, 7 F.4th 838, 840 (9th Cir. 2021). We review the scope of a permanent injunction for abuse of discre-

[3] The rescission of the metering policy does not render this case moot because Plaintiffs sought (and the district court entered) equitable relief to ameliorate past and present harms stemming from the policy, and the relief ordered imposes ongoing obligations on the Government. Because that relief could be modified, it is possible for us to "grant any effectual relief whatever to the prevailing party," preventing this appeal from being moot. *Edmo v. Corizon, Inc.*, 935 F.3d 757, 782 (9th Cir. 2019) (quoting *Shell Offshore Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 628 (9th Cir. 2016)).

tion. *United States v. Washington*, 853 F.3d 946, 962 (9th Cir. 2017). "A district court abuses its discretion when it makes an error of law." *Native Ecosystems Council v. Marten*, 883 F.3d 783, 789 (9th Cir. 2018).

III.

Section 706(1) of the Administrative Procedure Act provides that a court shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). A claim under § 706(1) can reach only "discrete agency action" that an agency is "required to take." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (emphasis omitted). The Government acknowledges that border officials have a mandatory duty to process noncitizens, including allowing them to apply for asylum. But the Government contends that the metering policy did not violate § 706(1) because border officials lack any duty to noncitizens who have not stepped across the border. The Government also contends that even if the officials' mandatory duty extends to such noncitizens, the metering policy did not constitute withholding of that duty within the meaning of § 706(1).

We disagree on both fronts.

A.

The extent of the Government's duty turns on two interacting statutes. One statute, 8 U.S.C. § 1158, defines the rights of noncitizens to apply for asylum. Another statute, 8 U.S.C. § 1225, governs the obligations of border officials to process noncitizens. We begin with the statute defining the right to apply for asylum because, as a practical matter, the Government's obligation to process a noncitizen stopped at the border only

matters here if that noncitizen is eligible to apply for asylum. We agree with Plaintiffs that a noncitizen stopped at the border is eligible to apply for asylum under § 1158. We next conclude that a border official must process such a noncitizen under § 1225. We reject the Government's contrary interpretations, including its argument based on the presumption that statutes do not apply extraterritorially.

1.

The right of a noncitizen to apply for asylum is codified at 8 U.S.C. § 1158(a)(1), which states 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.

The parties agree that a noncitizen stopped by officials right at the border is not yet "physically present in the United States." They disagree about whether such a person is covered by the language "arrives in the United States."

In the Government's view, a noncitizen stopped on the United States' doorstep is not eligible to apply for asylum because she is not covered by the phrase "arrives in the United States." The Government's position is that one only "arrives in the United States" upon stepping across the border.

The Government improperly reads a fragment of statutory text in isolation. "Statutory language 'cannot be construed in a vacuum. It is a fundamental

canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016) (quoting *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012)). And another "cardinal principle of statutory construction [is] that we must 'give effect, if possible, to every clause and word of a statute.'"[4] *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). Section 1158(a)(1) covers a noncitizen who is *either* "physically present in the United States *or* who arrives in the United States" (emphasis added).[5]

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[4] The dissent criticizes our consideration of these commonsense canons of statutory interpretation as "skip[ping]" a step, Dissent at 49, but until we look at the language of the provision—the whole provision—and figure out what it means, we cannot simply announce that Congress "says in [the] statute what it means and means in [the] statute what it says," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). Contrary to the dissent, Dissent at 49 n.1, our reliance on context here neither replaces the statute's ordinary meaning nor imposes a meaning it cannot bear. *See King v. Burwell*, 576 U.S. 473, 486 (2015) ("[O]ftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.'" (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000))).

[5] The dissent engages in a corpus linguistics analysis even though no party or amicus made a corpus linguistics argument in this case. Whether or not this could be a helpful interpretive methodology, the relevant question to ask the database would be how the phrase "physically present in the United States or who arrives in the United States" has been used. Because the corpus linguistics database tool is incapable of performing this search, it has limited utility in this case. The dissent's narrow focus on the two words "arrives in," Dissent at 50-55, wrenches these words out of the context in which they are used in the statute, *see Sturgeon*, 577 U.S. at 438; *Abuelhawa v. United States*, 556 U.S. 816, 819 (2009) ("[S]tat-

We therefore must endeavor to give the phrase "arrives in the United States" a meaning that is not completely subsumed within the phrase "physically present in the United States." *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174 (1993) (refusing to adopt an interpretation of the word "return" that would make the word "deport" redundant in another INA statute that uses both words). The Government's interpretation fails to do so because it reads the phrase "arrives in the United States" to apply only to those who are also "physically present in the United States."[6]

Considering the provision's "text and context," *Pulsifer v. United States*, 601 U.S. 124, 141 (2024), we conclude that it is possible to give nonredundant meaning to those two categories. The phrase "physically present in the United States" encompasses noncitizens within our borders, and the phrase "arrives in the United States" encompasses those who encounter officials at the bor-

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utes are not read as a collection of isolated phrases."). We also note that the database the dissent consults does not contain statutes, which would seem to limit any value it has for determining how Congress uses particular terms. *See, e.g.*, *Peter v. Nantkwest, Inc.*, 589 U.S. 23, 32 (2019) (looking to how two terms were used "across various statutes" to indicate how "Congress understands" the terms).

[6] The dissent all but concedes that the Government's reading renders the phrase "arrives in the United States" redundant with the phrase "physically present in the United States," calling that redundancy a "belt-and-suspenders approach." Dissent at 59. The dissent notes that "[s]ometimes the better overall reading of the statute contains some redundancy." *Id.* at 61 (quoting *Barton v. Barr*, 590 U.S. 222, 239 (2020)). But the Government's reading does not merely create "some redundancy" in the statutory scheme. It creates *total* redundancy between two phrases that Congress enacted side by side.

der, whichever side of the border they are standing on. 8 U.S.C. § 1158(a)(1). The two categories overlap, because one might be both physically present in the United States (that is, standing on U.S. soil) while presenting oneself to a border official at a port of entry. But each category includes people not included in the other, such that every clause and word of the provision has meaning.

Start with the text. The statute refers to any noncitizen "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)." *Id.* Although the statute does not define what it means to "arrive[] in the United States," that phrase plainly pertains to the border. To "arrive" means "to reach a destination." *Arrive*, Merriam-Webster's Collegiate Dictionary (10th ed. 1996). For a person coming to the United States to seek asylum, the relevant destination is the U.S. border, where she can speak with a border official. A person who presents herself to an official at the border has therefore reached her destination—she has "arrive[d]." Although it is possible to imagine that the prepositional phrase "in the United States" means that she must both present herself to a border official *and* get one of her feet onto U.S. soil, that is not the best reading of the phrase. The lengthy parenthetical that follows the phrase "arrives in the United States" specifies that the phrase covers those "at a designated port of arrival." A noncitizen who presents herself to a border official at a port of entry has "arrive[d] in the United States . . . at a designated port

of arrival," whether she is standing just at the edge of the port of entry or somewhere within it.[7]

Our construction of the statute's language also comports with the larger context of the immigration system. In particular, it avoids creating a "perverse incentive to enter at an unlawful rather than a lawful location." *DHS v. Thuraissigiam*, 591 U.S. 103, 140 (2020); *see also* 8 C.F.R. § 235.1(a) ("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."). Under the Government's reading, an asylum seeker who knows she will be turned away at a port of entry before being allowed to apply for asylum may well be better off circumventing the official channels for entering the United States. If she manages to surreptitiously cross the border, she will be able to apply for asylum. We do not think Congress would have created that incentive.

The Government proposes an alternative theory for why § 1158(a)(1) refers to both a noncitizen "physically present in the United States" and a noncitizen who "arrives in the United States." It argues that the lan-

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[7] The dissent's corpus linguistics examples actually illustrate how the phrases surrounding "arrives in" provide useful context to help understand its meaning. For example, the dissent relies on the phrase "greeted with a ticker-tape parade" to infer that "arrives in New York" means that Nelson Mandela must be "inside the Empire State" because he is "parad[ing] through New York." Dissent at 52. But imagine if the sentence instead read "arrives in New York at Ellis Island." That would describe a person who had reached Ellis Island, even if he might technically be standing on the New Jersey side. Similarly, here, the phrase "at a designated port of arrival" provides important context to understand the meaning of "arrives in the United States."

guage "arrives in the United States" is necessary to address the "entry fiction," a concept in immigration law that deems noncitizens physically within the United States, but not legally admitted, to be outside the United States for some legal purposes. *See Lin Guo Xi v. INS*, 298 F.3d 832, 837 (9th Cir. 2002). For instance, the Supreme Court has explained that noncitizens "who arrive at ports of entry—even those paroled elsewhere in the country for years pending removal—are 'treated' for due process purposes 'as if stopped at the border.'" *Thuraissigiam*, 591 U.S. at 139 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953)). To give another example, the Supreme Court once held that a woman paroled into the United States pending a determination on her assertion of U.S. citizenship was not "within the United States" within the meaning of an INA provision that would have allowed the Attorney General to withhold her deportation. *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958). According to the Government, the entry fiction means that some noncitizens, such as those who have just crossed the border into the United States, are not "physically present in the United States," so Congress added the phrase "arrives in the United States" to allow them to apply for asylum.

The Government's explanation is unpersuasive. Other language in § 1158(a)(1) already makes clear that the entry fiction does not interfere with a noncitizen's right to apply for asylum. The statute grants that right to noncitizens "*physically* present in the United States." *Id.* (emphasis added). The entry fiction means that certain noncitizens who are physically present are nonetheless not legally present, but it does not change the fact that they are physically present. *See, e.g.*, *Leng May Ma*, 357 U.S. at 188 (stating that

"the detention of an alien in custody pending determination of his admissibility does not *legally* constitute an entry [into the United States] though the alien is *physically* within the United States" (emphasis added)). By specifying "physically present," Congress instructed courts not to apply the entry fiction when interpreting § 1158(a)(1). Moreover, both the "physically present" and "arrives in" categories are modified by the phrase "irrespective of such alien's status." *Id.* The entry fiction applies only to those who lack lawful immigration "status." *See, e.g.*, *Leng May Ma*, 357 U.S. at 190 (explaining that because parole into the United States does not "affect an alien's status," a paroled person was still not "within the United States" under the entry fiction). It would have been very strange for Congress to define two categories essentially based on immigration status and then modify both with the phrase "irrespective of such alien's status." Given those other features of the statutory text, there is no reason to think that the phrase "arrives in the United States" serves the purpose suggested by the Government.

Furthermore, if the rest of the statutory language in § 1158(a)(1) were insufficient to ensure that someone potentially subject to the entry fiction can apply for asylum, the phrase "arrives in the United States" would not do so either. The Government contends that a person standing on U.S. soil at a port of entry, waiting to be inspected by an immigration officer, is not yet "physically present in the United States" because of the entry fiction. According to the Government, the phrase "arrives in the United States" fills that gap. But if we thought that the entry fiction required us to conclude that such a person on U.S. soil was not "physically present *in the United States*," then to be consistent we

would also have to conclude that she had not yet "arrive[d] *in the United States*," either. The Government's interpretation therefore does not make sense as a way to address the entry fiction.

We note that our interpretation of § 1158 is not breaking new ground. A prior version of § 1158 provided, "The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum." 8 U.S.C. § 1158(a) (1980).[8] It is indisputable that a noncitizen stopped at a border is "at a land border" whether or not they have stepped across. So our interpretation of the current "arrives in" category does not radically expand the right to apply for asylum—it gives that category essentially the same scope as the previous "at a land border" category. Indeed, the Government's reading would reflect a radical contraction of the right to apply for asylum because it would give the Executive Branch vast discretion to prevent people from applying by blocking them at the border.[9]

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[8] The dissent suggests that this prior version of § 1158 contained the phrase "arrives at," Dissent at 50, but it did not. The dissent also suggests that the italicized part of the phrase "an alien physically present in the United States or *at a land border* or port of entry" (emphasis added) somehow "compel[s] th[e] conclusion" that it was only discussing people "in the United States." *Id.* at 63. That not only ignores the meaning of "or," but it also makes the entire italicized phrase surplusage—far from compelling the meaning the dissent offers.

[9] Congress adopted the current text of § 1158(a)(1) in a 1996 omnibus bill . Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, tit. VI, subtit. A, § 604, 110 Stat. 3009, 3009-690 to -694 (1996). The dissent argues that "the [amendment] history

The Government contends that interpreting § 1158 to apply to persons stopped right before the border misses the distinction between asylum under § 1158 and refugee resettlement under 8 U.S.C. § 1157. Section 1157 empowers the Attorney General to "admit any refugee who is not firmly resettled in any foreign country" (subject to numerical limitations and other restrictions). 8 U.S.C. § 1157(c)(1). In *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the Supreme Court explained that § 1157 "governs the admission of refugees who seek admission from foreign countries" while § 1158 "sets out

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suggests the opposite" of our interpretation. Dissent at 62 (alteration in original) (quoting *Trump v. Hawaii*, 585 U.S. 667, 692 (2018)). But, as the dissent notes, Congress "amend[ed] the [INA] in dozens of important but technical ways." *Id.* (alterations in original) (quoting *Renteria-Gonzalez v. INS*, 322 F.3d 804, 809 (5th Cir. 2002)). This situation is therefore unlike *Trump v. Hawaii*, where Congress "borrow[ed] 'nearly verbatim' from the pre-existing statute," aside from "one critical alteration." 585 U.S. at 692. Nor is this case like *Stone v. INS*, 514 U.S. 386, 397 (1995), where Congress amended the INA to add a brand-new exception to the Hobbs Act procedures.

We have recognized that "[t]he mere fact of an amendment itself does not [always] indicate that the legislature intended to change a law." *United States v. Pepe*, 81 F.4th 961, 978 (9th Cir. 2023) (alterations in original) (quoting *Callejas v. McMahon*, 750 F.2d 729, 731 (9th Cir. 1985)), *cert. denied*, 144 S. Ct. 2565 (2024). Indeed, at least one part of the legislative history indicates that the revisions to § 1158 were not understood to substantively change the scope of the right to apply for asylum. A committee report described the new language as "provid[ing] that any alien who is physically present in the United States or at the border of the United States, regardless of status, is eligible to apply for asylum." H.R. Rep. No. 104-469, pt. 1, at 259 (1996). In other words, the report understood the new phrase, "arrives in the United States," to be essentially equivalent to the old phrase, "at a land border or port of entry."

the process by which refugees currently in the United States may be granted asylum." *Id.* at 433. We made a similar statement in *Yang v. INS*, 79 F.3d. 932 (9th Cir. 1996), where we explained that § 1157 "establishes the procedure by which an alien *not* present in the United States may apply for entry as a refugee" and that § 1158 "sets out procedures for granting asylum to refugees *within* the United States." *Id.* at 938. Relying on those statements, the Government contends that the noncitizens stopped at the border under the metering policy remained within the ambit of § 1157 because they were still in Mexico, and that they therefore did not fall within § 1158.

Cardoza-Fonseca and *Yang* do not support the Government's position. Neither case concerned people presenting themselves on the United States' doorstep. The sentences seized upon by the Government were general background summaries of § 1157 and § 1158. Nothing about the analysis in those cases suggested that either the Supreme Court or our court was trying to define which statute would apply to someone seeking protection at the border. Moreover, both cases were referencing the prior version of § 1158, which covered both noncitizens "physically present in the United States" and noncitizens "at a land border or port of entry." *Cardoza-Fonseca*, 480 U.S. at 427; *Yang*, 79 F.3d. at 934 & n.2. The cases' willingness to gloss § 1158 the way they did indicates that someone "at a land border" is "in the United States" for purposes of asylum. That is consistent with our conclusion that someone "arrives in

the United States" under the current version of § 1158 when she encounters officials at a land border.[10]

We therefore conclude that a noncitizen stopped by U.S. officials at the border is eligible to apply for asylum under § 1158(a)(1).

2.

The responsibilities of officials with respect to noncitizens at the border are set out in 8 U.S.C. § 1225. That section defines as an "applicant for admission" any noncitizen "present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters)." *Id.* § 1225(a)(1). Border officials must "inspect[]" such applicants for admission—essentially, process them to determine their admissibility. *Id.* § 1225(a)(3). If, during inspection, a noncitizen "indicates either an intention to apply for asylum . . . or a fear of persecution, the officer shall refer" her for an asylum interview. *Id.* § 1225(b)(1)(A)(ii).

The definition of an "applicant for admission" in § 1225(a)(1) is nearly identical to the language of § 1158(a)(1). The minor ways in which the relevant lan-

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[10] The dissent argues that the Fourth Circuit "disagrees" with our conclusion. Dissent at 64 n.9 (citing *Cela v. Garland*, 75 F.4th 355, 361 n.9 (4th Cir. 2023)). But just as in *Cardoza-Fonseca* and *Yang*, the Fourth Circuit in *Cela* provided background on the asylum and refugee statutes; it did not address whether § 1158 applies to someone stopped at the border. *Cela*'s discussion of the relationship between the asylum and refugee statutes is entirely consistent with our holding here.

guage of § 1225(a)(1) differs from § 1158(a)(1) all relate to the fact that § 1225(a)(1) is solely about people seeking admission to the country. Accordingly, for the same reasons we just articulated regarding § 1158(a)(1), we conclude that a noncitizen stopped by officials at the border is an "applicant for admission" under § 1225(a)(1) because she "arrives in the United States." That is consistent with our prior en banc holding that § 1225(a)(1) "ensures that all immigrants who have not been lawfully admitted, regardless of their physical presence in the country, are . . . 'applicant[s] for admission.'" *Torres v. Barr*, 976 F.3d 918, 928 (9th Cir. 2020) (en banc) (quoting 8 U.S.C. § 1225(a)(1)).

Our conclusion comports with the Government's own reference in a regulation to 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). Here, the Government contends that a person "attempting to come into the United States" cannot be an applicant for admission because she has not yet succeeded in crossing the border. But that would mean its own regulation erroneously refers to just such a person: "an applicant for admission . . . attempting to come into the United States." *Id.* It may be that the Government was wrong when it drafted its regulation and that it is right today, but we "may consider the consistency of an agency's views when we weigh the persuasiveness of any interpretation it proffers in court." *Bittner v. United States*, 598 U.S. 85, 97 (2023). We think that the Government had it right when it drafted its regulation, before the question became the subject of this litigation.

Our reading of § 1225(a)(1) is bolstered by the surrounding statutory text, which indicates that Congress did not intend to impose strict limits on which noncitizens at the border must be inspected. The statute requires inspection not only of "applicants for admission" but also of noncitizens "otherwise seeking admission or readmission to or transit through the United States." 8 U.S.C. § 1225(a)(3). The statute also provides that even a stowaway on a ship, who "[i]n no case may . . . be considered an applicant for admission," is subject to "inspection by an immigration officer" and must be referred for an asylum interview if the stowaway states an intention to apply for asylum or a fear of persecution. *Id.* § 1225(a)(2). Given that Congress took care to provide for the inspection of both the catch-all category of noncitizens "otherwise seeking admission" and stowaways, we are confident that Congress did not define the category of "applicant[s] for admission" to exclude those stopped by U.S. officials right before the border.

Because noncitizens stopped right before the border are "applicant[s] for admission" under § 1225(a)(1), border officials have a mandatory duty to inspect them under § 1225(a)(3).

3.

The presumption against extraterritorial application of statutes does not change our interpretation of § 1158 or § 1225. Although "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States," we presume 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 Am. Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S.

281, 285 (1949)). The presumption against extraterritorial application of statutes serves two primary purposes. First, it "protect[s] against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* Second, the presumption guards against unintended applications of U.S. laws by giving force to "the commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993).

The Supreme Court has set out "a two-step framework for analyzing extraterritoriality issues." *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 337 (2016). At the first step, a court must ask whether the statute in question "gives a clear, affirmative indication that it applies extraterritorially," such that the presumption is rebutted. *Id.* If so, the scope of the statute's extraterritorial application "turns on the limits Congress has (or has not) imposed" in the statutory text. *Id.* at 337-38. If not, then the court must proceed to the second step and ask if the case at hand involves a "permissible domestic application" of the statute. *Id.* at 337.

We conclude that § 1158 and § 1225 contain a "clear, affirmative indication" of extraterritorial reach. *RJR Nabisco*, 579 U.S. at 337. A "dispositive" indication of extraterritorial reach may come from context. *Id.* at 340. No magic words are required. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010). For instance, we have concluded that Congress intended laws criminalizing the illegal importation of weapons to apply extraterritorially because those laws target "conduct that almost always originates outside the United States." *United States v. Ubaldo*, 859 F.3d 690, 700 (9th Cir.

2017) (examining 18 U.S.C. § 922(l) and 22 U.S.C. § 2778(b)(2)). Sections 1158 and 1225 likewise address "conduct"—the arrival of noncitizens to the United States—"that almost always originates outside the United States." *Ubaldo*, 859 F.3d at 700. That indication of extraterritorial reach, which is evident in both the statutes' text and context, is sufficient indication to rebut the presumption against extraterritoriality.

That does not mean that § 1158 and § 1225 extend worldwide. When the presumption is rebutted, we are left to apply the "limits Congress has . . . imposed" in the statutory text. *RJR Nabisco*, 579 U.S. at 337-38. As we explained in our foregoing analysis of those sections, Congress crafted a scheme for the inspection of noncitizens both physically present in the United States and on its doorstep.[11]

B.

Section 706(1) of the APA provides that "[t]he reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The Government offers two theories why, even if § 1158 and § 1225 create a mandatory duty to inspect noncitizens stopped at the border, the metering

[11] The dissent suggests that our decision conflicts with the Supreme Court's decision in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993). Dissent at 65-66. In *Sale*, the Coast Guard was going "beyond the territorial sea of the United States" to intercept vessels on the high seas. 509 U.S. at 158-59 (quotation marks omitted). By contrast, here, noncitizens were stopped on the United States' doorstep. There are significant differences between those two scenarios.

policy did not withhold that required action within the meaning of § 706(1).

First, the Government contends that the duty was not withheld because the metering policy did not result in universal denial of the opportunity to apply for asylum, given that some noncitizens were processed in some instances. But even if the Government processed other noncitizens, the district court certified classes of people who were not processed. The Government does not argue on appeal that class certification was inappropriate, and whether other people were processed does not affect whether the Government fulfilled its obligations to the class members here.

Second, the Government argues that the duty to inspect was merely delayed as to each person, not withheld. The distinction between agency withholding and delay is important. If an agency withholds a required action, it violates § 706(1) regardless of its reason for doing so. But if an agency delays a required action, it violates § 706(1) only if the delay is "unreasonabl[e]." *Id.* The reasonableness of any delay is a fact-intensive inquiry analyzed under "the so-called *TRAC* factors." *Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) (citing *Telecomms. Rsch. & Action Ctr. v. FCC*, 750 F.2d 70, 79-80 (D.C. Cir. 1984)).[12]

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[12] The *TRAC* factors are:

> (1) the time agencies take to make decisions must be governed by a "rule of reason"[;] (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason[;] (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake[;]

The Tenth Circuit has articulated an apparently categorical rule that agency action can be considered "withheld" only if there is "a date-certain deadline" by which the agency must act—otherwise the failure to act is evaluated for unreasonable delay. *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999). If we were to apply that rule, we would have to analyze the metering policy for unreasonable delay because § 1158 and § 1225 do not include specific deadlines.

But our court has taken a different approach from that of the Tenth Circuit. In *Vietnam Veterans of America v. CIA*, 811 F.3d 1068 (9th Cir. 2016), we considered a regulation that "unequivocally command[ed] the Army to provide former [chemical-weapons] test subjects with current information about their health." *Id.* at 1076. The regulation imposed no deadline for carrying out that duty, stating only that the Army was required to provide test subjects with "newly acquired information . . . when that information becomes available." *Id.* We concluded that the Army's obligations were enforceable under § 706(1) of the APA, and we affirmed the district court's decision to enter an injunction requiring the Army to provide such information. *Id.* at 1071, 1078-80. We did not state explic-

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> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority[;] (5) the court should also take into account the nature and extent of the interests prejudiced by the delay[;] and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."

Indep. Mining Co., 105 F.3d at 507 n.7 (alterations in original) (quoting *Telecomms. Rsch. & Action Ctr.*, 750 F.2d at 80).

itly whether the Army's failure to comply with the regulation constituted withholding or delay under the APA. *See id.* at 1078-80. But we did not evaluate the *TRAC* factors or otherwise consider the reasonableness of the Army's failure to act, *id.*, as would have been required before we could affirm the injunction if agency action had been delayed instead of withheld. Our decision therefore must have rested on a conclusion that the Army's failure to act constituted withholding. Under that precedent, then, the fact that 8 U.S.C. § 1158 and § 1225 do not include a specific deadline does not resolve whether the Government's failure to act in this case constitutes withholding.[13]

We hold that when an agency refuses to accept, in any form, a request that it take a required action, it has "withheld" that duty within the meaning of § 706(1). That holding is informed by a provision of the APA that requires an agency to "conclude a matter presented to

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[13] The dissent would set aside *Vietnam Veterans* based on the briefing in that case and would instead rely on *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166 (9th Cir. 2002). Dissent at 70-73. But *Badgley* holds only that where there is a statutory deadline, failure to comply by that deadline constitutes unlawful withholding of agency action. 309 F.3d at 1177-78, 1177 n.11. It does not say that an agency can have withheld action only if there is a statutory deadline. In other words, *Badgley* holds that violating a statutory deadline is a sufficient condition for concluding that agency inaction constitutes withholding, but nothing in *Badgley* suggests it is a necessary condition. The same is true of the D.C. Circuit and Fourth Circuit cases on which the dissent relies. Indeed, the Fourth Circuit described "an agency's failure to meet a hard statutory deadline" as only one example of when agency action can be "unlawfully withheld" under 5 U.S.C. § 706(1), indicating that such a deadline is not a necessary condition. *South Carolina v. United States*, 907 F.3d 742, 760 (4th Cir. 2018).

it" "within a reasonable time." 5 U.S.C. § 555(b). By refusing to accept a matter at all, an agency indicates that it will not "conclude" it at any time in the future. In other words, it withholds action entirely. *See Viet. Veterans*, 811 F.3d at 1079 (treating as withholding a "situation where a federal agency refuses to act in disregard of its legal duty to act" (quoting *EEOC v. Liberty Loan Corp.*, 584 F.2d 853, 856 (8th Cir. 1978))).

Our interpretation of the difference between withholding and delay in § 706(1) comports with the ordinary meaning of those terms. When an action is delayed, one expects that, with the passage of time (maybe even an unreasonable amount of time), the action eventually will be completed. By contrast, when an action has been withheld, no amount of waiting can be expected to change the situation. With patience, one can wait out delay, but even with superhuman patience, one cannot wait out withholding.

Consider someone who heads to the post office to mail a package shortly before the holidays. The postal workers tell the person that they will not accept her package that day because they are very busy, but that she is welcome to come back the next day. They do not give her an appointment, and they warn her that tomorrow they are likely to be just as busy as today. Just keep coming back, they say—eventually, perhaps within a few days or a few weeks or a few months, the post office might accept her package. Have the postal workers delayed carrying out the task of mailing her package? No, they have withheld their services. That is true even though the person could come back the next day to try to mail the package again. If the postal employees gave the customer an appointment to come back

when they would accept her package, then their conduct would amount to delay. So too if they made a waitlist of customers and guaranteed they would work through it. If the postal workers accepted the package but were unable to ship it promptly, that too would be delay, not withholding. But it is not mere delay to tell a person requesting an action that her current request will not be entertained but that she is welcome to make the request again another time.

We accordingly conclude that the metering policy constituted withholding of agency action, not delay. Under the metering policy, border officials turned away noncitizens without taking any steps to keep track of who was being turned away or otherwise allowing them to open asylum applications. Such a wholesale refusal to carry out a mandatory duty—leaving the responsibility to try again in each noncitizen's hands—cannot be called delay within the meaning of § 706(1). Nor did the Government's informal and sporadic coordination with Mexican government officials or nonprofits keeping waitlists transform the metering policy into delay rather than withholding. Organizing by interested third parties did not satisfy the *Government's* obligation to inspect asylum seekers. If anything, it indicates that the Government was not fulfilling its obligations.

We stress that our decision leaves the Government with wide latitude and flexibility to carry out its duties at the border. Our role as a court is not to superintend the Executive Branch's decisions about how to carry out its many obligations. Our role is only to enforce the requirements enacted into law by Congress. Even minimal steps by the Government, such as implementing and following a waitlist system or initiating the asylum pro-

cess, would shift the § 706(1) analysis of any challenge from the withholding category into the delay category. But because the Government in this case did not take any such steps, we need not (and cannot) reach the question whether any delay would have been reasonable. Sections 1158 and 1225 require border officials to inspect noncitizens seeking asylum at the border, and the metering policy withheld that duty.

IV.

Because we affirm the district court's conclusion that the metering policy violated § 706(1) of the APA, we need not reach the other merits claims. Plaintiffs acknowledge that, if they prove a § 706(1) violation, nothing about the scope or validity of the district court's relief turns on whether they also prevail on any of the other claims in their Complaint. We accordingly construe Plaintiffs' cross-appeal on the § 706(2), INA, and Alien Tort Statute claims as merely presenting alternative grounds for affirmance, which we decline to reach. *See, e.g.*, *Townsel v. Contra Costa County*, 820 F.2d 319, 320 (9th Cir. 1987). We also vacate the district court's entry of judgment for Plaintiffs on the constitutional due process claim without further analysis of the parties' arguments as to that claim. "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988). That principle requires courts "to determine, before addressing [a] constitutional issue, whether a decision on that question could have entitled [the plaintiffs] to relief beyond that to which they were entitled on their statutory claims." *Id.* at 446. "If no additional

relief would have been warranted, a constitutional decision" is "unnecessary and therefore inappropriate." *Id.* When we are persuaded that a district court's constitutional holding was "unnecessary," we may "simply vacate the relevant portions of the judgment . . . without discussing the merits of the constitutional issue." *Id.* We do so here.

V.

We turn finally to the appropriateness of the declaratory and injunctive relief entered by the district court.

A.

The district court entered classwide declaratory relief stating that the metering policy violated § 1158 and § 1225. Such relief was proper under the Declaratory Judgment Act, 28 U.S.C. § 2201(a). The Government presents only one argument to the contrary: that the classwide declaratory relief is prohibited by 8 U.S.C. § 1252(f)(1), which provides that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation" of specified immigration statutes on a classwide basis. As the Government concedes, however, that argument is foreclosed by circuit precedent holding that § 1252(f)(1) does not "bar classwide declaratory relief." *Rodriguez v. Hayes*, 591 F.3d 1105, 1119 (9th Cir. 2010). We therefore affirm the district court's entry of classwide declaratory relief.[14]

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[14] The Supreme Court recently declined to reach the question whether § 1252(f)(1) prohibits classwide declaratory relief. *Garland v. Aleman Gonzalez*, 596 U.S. 543, 551 n.2 (2022). Because the Supreme Court's reservation of a question is not clearly irreconcilable with a precedent of our court that resolves the same ques-

B.

The district court entered a permanent injunction prohibiting application of the Asylum Transit Rule to members of the P.I. class—who were prevented by the metering policy from applying for asylum before the Rule took effect—and requiring the Government to unwind past denials of P.I. class members' asylum applications based on the Rule. The Government asserts that the permanent injunction violates 8 U.S.C. § 1252(f)(1), which, as explained, prohibits courts other than the Supreme Court from entering classwide injunctive relief regarding the operation of specified immigration statutes. We summarize the requirements of the district court's injunction before addressing the meaning of § 1252(f)(1) and its application here.

1.

The permanent injunction includes both negative injunctive relief (prohibiting the Government from taking certain actions) and affirmative injunctive relief (requiring the Government to take certain actions). The negative injunctive relief prohibits the application of the Asylum Transit Rule to asylum applications by P.I. class members. The affirmative injunctive relief has three components. First, the Government "must make all reasonable efforts to identify" P.I. class members. Second, the Government must notify identified P.I. class members "in administrative proceedings before United States Citizenship and Immigration Services or EOIR, or in DHS custody, of their class membership, as well as

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tion, we follow our binding precedent. *Mont. Consumer Couns. v. FERC*, 659 F.3d 910, 920 (9th Cir. 2011) (citing *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)).

the existence and import of the" injunction. Finally, DHS and EOIR "must take immediate affirmative steps to reopen or reconsider past determinations that potential [P.I. class members] were ineligible for asylum based on the [Asylum Transit Rule], for all potential [P.I. class members] in expedited or regular removal proceedings." The district court specified that "[s]uch steps include identifying affected [P.I. class members] and either directing immigration judges or the Board of Immigration Appeals to reopen or reconsider their cases or directing DHS attorneys representing the government in such proceedings to affirmatively seek, and not oppose, such reopening or reconsideration."[15]

2.

The Government contends that the injunction is prohibited by 8 U.S.C. § 1252(f)(1), which provides in full:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter [8 U.S.C. chapter 12, subchapter II], as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ["IIRIRA"], other

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[15] The district court's permanent injunction order detailed how the Government was complying with its obligations under the materially identical preliminary injunctions. Order, *Al Otro Lado, Inc. v. Mayorkas*, No. 17-cv-2366 (S.D. Cal. Aug. 5, 2022), ECF No. 816. The district court largely concluded that the Government's actions were adequate, so we accept the parties' understanding that the court's recitation of those actions defined the details of the injunction's requirements. It is not necessary for us to recount all those details here to resolve this appeal.

> than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

That provision poses no bar to injunctions concerning § 1158, the asylum statute, which falls within part I (not part IV) of the relevant subchapter. But the provision prohibits certain injunctions affecting the operation of expedited removal proceedings under § 1225 and regular removal proceedings under § 1229a, both of which do fall within part IV of the relevant subchapter.[16] We therefore must decide whether any of the injunction's requirements "enjoin or restrain the operation of" those statutory sections.

Precedent offers some guidance. The Supreme Court explained in *Aleman Gonzalez* that § 1252(f)(1) "generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions" with respect to an entire class. 596 U.S. at 550. Such an injunction is barred even if a court determines that the Government's "operation" of a covered provision is unlawful or incorrect. *Id.* at 552-54. Applying § 1252(f)(1), the Supreme Court concluded that the provision prohibits classwide injunctions requiring the Government to hold bond hearings for individuals detained

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[16] We have explained that § 1252(f)(1) does not apply to every section codified within the specified portion of the U.S. Code, but rather applies only to such sections that are also part of the INA. *Galvez v. Jaddou*, 52 F.4th 821, 829-31 (9th Cir. 2022). That wrinkle makes no difference here because § 1225 and § 1229a are part of the INA. *See* Ira J. Kurzban, Kurzban's Immigration Law Sourcebook 2400 (17th ed. 2020-21).

pending removal pursuant to a covered statutory provision. *Id.* at 551. The Court explained that such an injunction improperly "require[s] officials to take actions that (in the Government's view) are not required" by the detention provision "and to refrain from actions that (again in the Government's view) are allowed by" that provision. *Id.* One clear lesson of *Aleman Gonzalez* is that § 1252(f)(1) prohibits courts from awarding injunctive relief that directly adds a new procedural step to the Government's operation of covered provisions.

What else § 1252(f)(1) may prohibit is a more difficult question. Our court has repeatedly held that § 1252(f)(1) does not prohibit an injunction simply because of collateral effects on a covered provision. In *Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007), we held that an injunction regarding "the unlawful application of statutory provisions regarding adjustment of status" was not barred by § 1252(f)(1). *Gonzales v. DHS*, 508 F.3d at 1233. We explained that a court may enter a classwide injunction regarding adjustment of status even though adjustment of status can change the outcome of a removal proceeding under a covered provision. *Id.* We observed that the injunction would have at most a "collateral" effect on DHS's operation of proceedings under covered provisions, and that the injunction "directly implicate[d]" a non-covered provision. *Id.* We reasoned that a "one step removed" effect on a covered provision did not bring the injunction within the scope of § 1252(f)(1). *Gonzales v. DHS*, 508 F.3d at 1233.

More recently, in *Gonzalez v. ICE*, 975 F.3d 788 (9th Cir. 2020), we considered an injunction concerning the issuance of "immigration detainers," with which federal officials request that law enforcement agencies tempo-

rarily keep a noncitizen in custody so that DHS can assume custody and initiate removal proceedings. *Id.* at 797-99. We concluded that the injunction in that case did not run afoul of § 1252(f)(1) because DHS's authority to issue such detainers arises out of a section not covered by § 1252(f)(1). *Gonzalez v. ICE*, 975 F.3d at 812-15, 814 n.17. Although the detainers served to facilitate DHS's authority to arrest and detain noncitizens pending removal proceedings—an authority that *does* arise from statutory sections covered by § 1252(f)(1)—any effect on that authority was collateral. *See Gonzalez v. ICE*, 975 F.3d at 815 & n.19.

The Supreme Court acknowledged our collateral-effect rule in *Aleman Gonzalez* and left it undisturbed. 596 U.S. at 553 n.4 (citing *Gonzales v. DHS*, 508 F.3d at 1233).

3.

Applying those precedents here, the negative injunctive relief entered by the district court is not barred by § 1252(f)(1). That relief, which prohibits the Government from applying the Asylum Transit Rule to P.I. class members, concerns asylum eligibility under § 1158, which is not covered by § 1252(f)(1). The Asylum Transit Rule was promulgated under § 1158(b)(2)(C) and § 1158(d)(5)(B), which allow the Attorney General to establish additional substantive and procedural requirements for obtaining asylum. *See* 84 Fed. Reg. 33829, 33830 (July 16, 2019). The negative injunctive relief therefore "directly implicates" asylum eligibility under § 1158. *Gonzales v. DHS*, 508 F.3d at 1233. Even though asylum eligibility may change the outcome of a removal proceeding under a covered provision, such an effect is collateral under our precedents. In litiga-

tion concerning the validity of a different rule excluding some people from eligibility for asylum, we explained that "[a]t best, the law governing asylum is collateral to the process of removal" because noncitizens "can apply and be eligible for asylum and never encounter any of the statutory provisions governing removal." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 667 (9th Cir. 2021). Although in that case we were not addressing § 1252(f)(1), our reasoning that asylum eligibility is collateral to removal is equally applicable here. The negative injunctive relief prohibiting the application of the Asylum Transit Rule to P.I. class members' asylum applications is therefore permissible.

That conclusion is not affected by the fact that an asylum application can arise within an expedited removal proceeding under § 1225 or a regular removal proceeding under § 1229a (which are covered provisions). The text of § 1225 repeatedly makes clear that applications for asylum raised within expedited removal proceedings are nevertheless made "under section 1158." 8 U.S.C. § 1225(a)(2), (b)(1)(A)(i)-(ii), (b)(1)(B)(v), (b)(1)(C). An asylum officer acting under § 1225 essentially predicts whether a noncitizen "could establish eligibility for asylum under section 1158." *Id.* § 1225(b)(1)(B)(v). Section 1229a likewise refers to asylum as relief "under section[] 1158." *Id.* § 1229a(c)(7)(C)(ii). In evaluating the merits of a noncitizen's application for "relief or protection from removal," *id.* § 1229a(c)(4)(A), an IJ applies "the applicable eligibility requirements," *id.* § 1229a(c)(4)(A)(i), which for asylum are set out under § 1158.[17] None of

[17] Although § 1229a also suggests that asylum relief might arise under 8 U.S.C. § 1231(b)(3), that provision merely states that the Government cannot remove a noncitizen to a country where the

those provisions shift asylum determinations out from § 1158, which is not covered by § 1252(f)(1).

The first two components of the affirmative injunctive relief, which require the Government to identify possible P.I. class members and notify them about their class membership and the significance of the injunction, are also permissible under § 1252(f)(1). Those requirements do not "enjoin or restrain the operation" of any covered provision. *Id.* § 1252(f)(1). Indeed, the Government offers no specific argument to the contrary.

The final portion of the affirmative injunctive relief requires the Government either to "direct[] immigration judges or the Board of Immigration Appeals to reopen or reconsider" asylum determinations sua sponte for P.I. class members denied asylum under the Asylum Transit Rule or to "direct[] DHS attorneys representing the government in such proceedings to affirmatively seek, and not oppose, such reopening or reconsideration." According to the Government, that requirement is barred by § 1252(f)(1) because it "affirmatively requires the Government to disturb determinations that have already been made" under covered removal provisions.

We agree that, in requiring the Government to take the initiative to revisit determinations in removal proceedings even absent a motion by the noncitizen, the injunction "require[s] officials to take actions that (in the Government's view) are not required by" the covered removal provisions. *Aleman Gonzalez*, 596 U.S. at 551.

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noncitizen's "life or freedom would be threatened" because of his or her "race, religion, nationality, membership in a particular social group, or political opinion."

In effect, that requirement forces the Government to add a new procedural step within the removal process with respect to the P.I. class. It "thus interfere[s] with the Government's efforts to operate" the covered removal provisions. *Id.* Because that interference cannot be categorized as a collateral effect under our precedents, we must narrow the district court's injunction in the following way: The injunction may not require the Government, *on its own initiative*, to reopen or reconsider (or to move to reopen or reconsider) an asylum officer, IJ, or BIA decision in a removal proceeding.

That said, the *negative* injunctive relief properly prohibits the Government from applying the Asylum Transit Rule to a P.I. class member, even if it permissibly applied the Rule to that person in the past. For instance, if an IJ has denied a P.I. class member's asylum application on the basis of the Asylum Transit Rule, and the P.I. class member moves for reconsideration by the IJ, the negative injunctive relief prohibits the IJ from relying on the Asylum Transit Rule to deny the motion (although the IJ may deny the motion if there is a different valid ground). Likewise, if that P.I. class member appeals to the BIA, the BIA may not use the Asylum Transit Rule to affirm the IJ's decision (although the BIA may affirm if there is a different valid ground). And if the BIA reverses the IJ's decision and remands, the IJ may not apply the Asylum Transit Rule on remand. The same principle applies if a P.I. class member moves to reopen her removal proceeding: The IJ or the BIA may not use the Asylum Transit Rule to deny the motion (although they may deny the motion on a different valid ground). In each of those scenarios, the negative injunctive relief operates under § 1158 and has

only collateral effects on the operation of the immigration statutes covered by § 1252(f)(1), as explained above.

VI.

For the foregoing reasons, we affirm the judgment in favor of Plaintiffs on the APA § 706(1) claim, vacate the judgment in favor of Plaintiffs on the constitutional due process claim, affirm the declaratory relief, and affirm the injunctive relief other than the requirement that the Government reopen or reconsider (or move to reopen or reconsider) past determinations on its own initiative.

AFFIRMED IN PART, VACATED IN PART.

R. NELSON, J., dissenting:

In 1996, Congress provided that an alien may apply for asylum when she "arrives in the United States." 8 U.S.C. § 1158(a)(1). That can mean only one thing: the alien must be physically present in the United States. After years of litigation, plaintiffs have not identified a single example of when "arrives in" means anything besides physically reaching a destination. The majority does not provide an example, either. For good reason. A basic corpus linguistic analysis shows that no English speaker uses the term "arrives in" to mean anything but being physically present in a location. This statutory language is as unambiguous as it gets.

Yet the majority concludes that aliens currently in Mexico have "arrive[d] in the United States" and can apply for asylum. No circuit court has ever reached such a strained conclusion. Not since the current act was adopted 30 years ago. Not under the prior act adopted 45 years ago which had even more permissive language. At oral argument, Plaintiffs' counsel acknowledged that in several years of legal research, she could not find a single judicial precedent supporting this interpretation. And the motions panel majority four years ago entered an injunction without deciding that Plaintiffs' strained statutory argument was likely correct. *Al Otro Lado v. Wolf*, 952 F.3d 999, 1013 (9th Cir. 2020) (concluding it "need not decide" the issue).

The majority's holding is wrong, troubling, and breathtaking. In its struggle to create ambiguity in the statutory language, the majority skips over the statute's plain meaning, ignores a common-sense understanding of the English language, misapplies a semantic

canon, disregards the typical presumption against extraterritoriality, and usurps Congress' authority to make law. By so doing, the majority strikes Congress's selected language ("arrives in the United States," whether or not "at a designated port of arrival") and replaces it with language of the majority's choosing ("stopped on the United States' doorstep"). Maj. at 31 n.11; *see also id.* at 18, 26, 31. As a result, it imposes on the federal government—for the first time—an obligation to interview asylum seekers who are still in Mexico. Finally, perhaps recognizing the breathtaking consequences of its ruling, the majority tries to limit its practical impact —not by correcting its interpretation of "arrives in," but by misinterpreting yet another statute: the APA.

Because a person standing on Mexican soil has not "arrive[d] in the United States" or "at a designated port of arrival," I dissent.

I

8 U.S.C. § 1158(a)(1) allows an alien who is "physically present in the United States" or who "arrives in the United States" to apply for asylum. A different statute, 8 U.S.C. § 1225(a)(1), provides that aliens who are unadmitted but "present" in the United States or who "arrive[] in the United States" can apply for admission. An applicant for admission must, in turn, be inspected. Asylum officers then interview inspected aliens to determine whether they have a credible fear of persecution. *Id.* § 1225(b)(1)(B). The statute imposes no deadline on these obligations.

All agree that "physically present in the United States" refers to those located in the United States. *Id.* § 1158(a)(1). As the majority explains, this phrase

"encompasses noncitizens within our borders." Maj. at 20. That reading is supported by our precedent. *Barrios v. Holder*, 581 F.3d 849, 863 (9th Cir. 2009) ("physically present" means "corporeally being in the place in question or under consideration" (cleaned up)).

A

We disagree on whether an alien who has not "stepped across the border," Maj. at 17, "arrives in the United States." Text, history, precedent, and common sense show that she has not—even if that means that "arrives in the United States" and "physically present in the United States" have nearly identical meanings.

1

Begin with the text. When, as here, "a statute does not define a term, we typically give the phrase its ordinary meaning." *FCC v. AT&T Inc.*, 562 U.S. 397, 403 (2011) (quotation omitted). The ordinary meaning is not merely a *possible* meaning. "[S]tatutes, no matter how impenetrable, do—in fact, must—have a single, best meaning." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024). Our role as judges is to "use every tool at [our] disposal to determine th[at] best reading." *Id.* "The starting point for statutory interpretation is the actual language of the statute"—what the words mean to an ordinary American. *United States v. Yankowski*, 184 F.3d 1071, 1072 (9th Cir. 1999). The majority skips this important and basic first step—which is dispositive here.[1]

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[1] The majority claims that it cannot interpret "arrives in" without looking to the whole statute. *See* Maj. at 18 n.4. True, words must be understood in context. *Taniguchi v. Kan Pac. Saipan,*

The first term is the verb "arrive." Since at least the 14th Century, the word "arrive" has meant to "reach[] a destination." John Ayto, *Dictionary of Word Origins* 36 (2011). Its meaning remained the same in 1996, when the statute was enacted. Then, as now, "arrive" meant to "reach a destination" or "come to a particular place." *The American Heritage Illustrated Encyclopedic Dictionary* 102 (1987). Other dictionaries confirm that a person "arrives" somewhere when she "come[s] to a certain point in the course of travel" or "reach[es] [her] destination." *Random House Webster's Unabridged Dictionary* 116 (2001).

Thus, to "arrive at" a place means to reach it after traveling. *Id.*; *see also Al Otro Lado*, 952 F.3d at 1028 (Bress, J., dissenting) (collecting examples from other dictionaries).[2] Had Congress used the term "arrive at," perhaps the majority's ambiguity argument would have some plausible force. But Congress didn't use "arrives at"—it used "arrives in." Indeed, in 1996, Congress changed the statutory language from "at" to "in." And *that* is the language we interpret.

Ltd., 566 U.S. 560, 569 (2012). But context is a tool to understand a law's ordinary meaning, not a tool to replace it. *See id.* We cannot use context to impose a meaning that a term cannot bear. *See id.* (using context only after determining that a term "can encompass" two meanings); *see also King v. Burwell*, 576 U.S. 473, 500-01 (2015) (Scalia, J., dissenting). The majority's proposed interpretation is not only unnatural, but unheard of.

[2] For example, the term "at" is used with the "verb[] of motion" "arrive" to "indicat[e] attainment of a position." 1 *Oxford English Dictionary* 739 (2d ed. 1989). So a person could "arrive at" the border on either side, depending on which direction they are coming from.

"Arrive in," the term Congress used, has a clearer meaning—it is used "[w]hen the place of arrival is the object." *Webster's Dictionary of English Usage* 120 (1989). Consider the preposition "in." "*In* has remained in use with verbs of motion" for hundreds of years. *Id.* at 533. It describes being "[w]ithin the limits or bounds of" a place with "material extension." 7 *Oxford English Dictionary* 759 (2d ed. 1989). Accordingly, it is typically used "with the proper names of . . . countries." *Id.* Putting those two terms together, a person "arrives in" a country when she has reached its inner limits or bounds.

Real-life experience bears this out. Imagine, for example, that Apple says a new iPhone will "arrive in stores" on January 2. Hearing this, you would expect the phone to be on the shelves on January 2—not in an unloaded semitrailer behind the store. Or imagine that Amazon tells you a package will "arrive in your mailbox" on June 3. On June 3, you would expect the package to be inside your mailbox—not at the local post office, ready for delivery. As these common-sense examples show, to "arrive in" a location means to be physically within the premises. Not at the border, or in the process of arriving.

Linguistic data confirms that these are not isolated examples. *See Wilson v. Safelite Grp.*, 930 F.3d 429, 440 (6th Cir. 2019) (Thapar, J., concurring in part) (courts "ought to embrace" corpus linguistics as "another tool to ascertain the ordinary meaning"). The Corpus of Contemporary American English is a database of over one billion words spoken in everyday contexts between 1990 and 2010. Within that database, "arrives in" was used to describe a destination 161 times

between 1990 and 1996 (when the statute was enacted).[3] Appendix 1. Of those, 160—the overwhelming majority—referenced someone or something physically within the destination. And not once was the phrase clearly used to mean standing at the destination's border.

A few examples are illustrative. One source describes a plane that "arrives in Newark but late," forcing the passengers to rush through the airport to catch their connections.[4] Did the plane "arrive" when, circling miles above the city, the captain announced that the plane was cleared to begin its descent? Of course not. The plane "arrive[d] in Newark" when it touched Newark ground. After all, the passengers could not rush through the airport until the plane physically landed.

Other sources describe dignitaries who "arrive[d] in" a city to attend a summit. To attend the summit, of course, the dignitaries must have been physically present. Nelson Mandela, for example, "arrives in New York" and is "greeted with a ticker-tape parade and

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[3] This search can be replicated by searching "arrives in" on english-corpora.org/coca. Restrict results to those occurring before 1996. That yields 219 results. But 58 are irrelevant. The statute uses "arrives in" to describe *where* immigrants are located. By contrast, 58 results use "arrives in" to describe either *when* something arrives ("arrives in two hours") or *how* it arrives ("arrives in a bad mood"). Setting aside those 58, 161 results use "arrives in" to describe a location. *See* Appendix 1.

[4] Valerie Lister, *Road Trip: The Women's Pro Basketball Way*, USA Today (1996), *relevant text available at Corpus of Contemporary American English*, https://www.english-corpora.org/coca (last accessed Sep. 18, 2024).

crowds of thousands."[5] Clearly, to parade through New York, Mandela was inside the Empire State—not standing just across the river in Jersey City.

Finally, consider an example from the great American sport: "As the pitch arrives in the catcher's hands, the catcher digs in to take on [the runner]."[6] A pitch "arrives in" the catcher's hands when it physically lands in the mitt. Not when leaving the pitcher's hand, flying through the air, or even spinning inches from the catcher's outstretched mitt.

We could go on and discuss all 161 usages. But the underlying point is clear. English speakers use "arrives in" to mean standing within a destination, not outside.[7] The majority does not identity a counterexample. Nor does it deny what this linguistic data sug-

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[5] Barbara Reynolds, *Mandela's Visit*, USA Today (1990), *relevant text available at Corpus of Contemporary American English*, https://www.english-corpora.org/coca (last accessed Sep. 18, 2024).

[6] *Cobb* (1994), *relevant text available at Corpus of Contemporary American English*, https://www.english-corpora.org/coca (last accessed Sep. 18, 2024).

[7] Of the 161 examples, one usage is arguable. A TV script said, "the elevator arrives in the hall, bringing more people." *Metropolis* (1995), *relevant text available at Corpus of Contemporary American English*, https://www.english-corpora.org/coca (last accessed Sep. 18, 2024). Perhaps one could argue that elevators are at a hall's border, not physically inside. But even so, one ambiguous example out of 161 does not show that "arrives in" *ordinarily* means to stand at a destination's border. If anything, the (arguable) exception proves the rule. To "arrive in" a location is unambiguous and means only one thing: to be physically inside.

gests: its interpretation of "arrives in" is not only unnatural, but unheard of.[8] *See* Maj. at 19 n.5.

Instead, the majority emphasizes that statutory language must be understood in context. *Id.* at 19 n.5, 21 n.7. I agree. Statutory interpretation must determine how words are ordinarily understood, and ordinary English speakers leverage context to convey and interpret meaning. It's because of context, after all, that we easily distinguish "drove the sheep into the pen" from "used the pen to sign a contract." But context never justifies giving a term a meaning that it cannot bear. *See Taniguchi*, 566 U.S. at 569 (using context only after determining a term "can encompass" two meanings); *see also King*, 576 U.S. at 500-01 (Scalia, J., dissenting). That is why the sentence "used the corral to sign the contract" leaves readers scratching their heads. Unlike "pen," the term "corral" simply does not mean a writing instrument, even if all the context suggests it might.

So too here. Dictionaries catalogue the possible uses of "arrives in," and linguistic evidence indicates which of those uses are ordinary. Together, these tools confirm that "arrives in" simply cannot mean standing outside a destination's border. No amount of context

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[8] The majority notes that neither party relied on corpus linguistics. Maj. at 19 n.5. But both parties extensively briefed the ordinary meaning of "arrives in." And when interpreting a statute, we are not limited to the tools the parties cite, just as we are not limited to the caselaw cited by the parties when evaluating a legal proposition. *See Muscarello v. United States*, 524 U.S. 125, 129 (1998) (relying on corpus linguistics when neither party briefed the tool).

can change that linguistic fact. *See Taniguchi*, 566 U.S. at 569.

Here, moreover, the context supports the plain meaning. I discuss other contextual clues below, *see infra* at 57-58, but two points are worth emphasis here. First, contrary to the majority's suggestion, the fact that the statute covers an alien "who arrives in the United States *(whether or not at a designated port of arrival)*" does not alter the plain meaning of "arrives in." Maj. at 20-21 & n.7. The parenthetical clarifies that the statute applies to immigrants who arrived through designated entry ports and those who crossed the border elsewhere. It does not mean that immigrants who have yet to enter an arrival port have somehow arrived in the United States. *Contra id.* Because entry ports are part of the United States, an immigrant "arrives in the United States" whether she stands on Ellis Island or in rural Texas. But either way, the immigrant does not "arrive in" until she steps onto United States soil.

Second, the majority suggests that because "arrives in" appears in the context of a statute, the only relevant linguistic evidence is other statutory language. Maj. at 19 n.5. Why would that be? Congress presumably uses words "in their natural sense." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 71 (1824). So evidence of how "arrives in" is used in everyday contexts is highly probative. *See Muscarello*, 524 U.S. at 129 (citing dictionaries and "searching computerized newspaper databases" to determine a word's ordinary meaning); *United States v. Costello*, 666 F.3d 1040, 1044 (7th Cir. 2012) (Posner, J.) (relying on dictionaries and a Google search). Even so, other statutes use "arrives in" in its ordinary sense.

See 22 U.S.C. § 2507a(c) (providing for training "[o]nce a volunteer has arrived in" a country). One provision, for example, states that aliens who arrive in the United States at undesignated times or locations are inadmissible. 8 U.S.C. § 1182(a)(6)(A)(i). Are immigrants who approach border agents after hours therefore inadmissible? What about Mexican citizens who come within 20 feet of an undesignated portion of the border? Of course not. Congress, like ordinary English speakers, uses "arrives in" to mean those physically present, not those standing in Mexico—or as the majority calls it—"on the United States' doorstep." Maj. at 31 n.11.

In sum, the linguistic data confirms what dictionaries and intuition suggest: for a person to "arrive in the United States," she must arrive "in the United States"—"there is no in-between." *Al Otro Lado*, 952 F.3d at 1028 (Bress, J., dissenting).

Today, the majority divines an "in-between." Moving forward, a person who "encounter[s] officials at the border," Maj. at 20, is "on the United States' doorstep," Maj. at 31 n.11, or is "in the process of arriving" in the United States, Maj. at 15, 46, may apply for asylum.

The majority leaves each phrase ambiguously open-ended. At any rate, none of these phrases appears in the text. The statute does not say "encounter officials at the border." It does not say "on the United States' doorstep." Nor does it say "in the process of arriving." It says "arrives in." No amount of context justifies the majority's redlining of Congress's statutory language.

In a half-hearted attempt to change the statutory text, the majority cites a single dictionary definition for "arrive." Maj. at 20-21. But, again, the statute says

"arrives in," not just "arrive." And why credit that single definition over all the other evidence discussed above? The majority does not say. Nor does the majority explain how "arrives in" can mean "at the border," "on the doorstep," or "in the process of arriving" when each phrase has a historically different meaning.

More than being wrong, the majority's conclusion is harmful. Judicial redlining of statutes, as the majority does here, undercuts Congress's authority, eliminates citizens' ability to rely on the law, and erodes democracy, allowing unelected judges to revise the decisions of the People's representatives.

There is more. Borders define the very bounds of a nation's sovereign power. Border, *Black's Law Dictionary* (12th ed. 2024) ("The boundary between one country (or a political subdivision) and another."). They also protect a country from those outside it and are, by their nature, exclusionary. Thus, the Supreme Court has recognized a "longstanding concern for the protection of the integrity of the border." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). So strong is that interest that even constitutional rights yield when "[b]alanced against the sovereign's interests at the border." *Id.* at 539. The majority subverts these interests. It treats those in Mexico — but ambiguously close to the border—as if they were "in" the United States. And it assumes that Congress implicitly set aside constitutional principles that, for centuries, have uniformly been applied to protect our border.

The statutory language forecloses the majority's interpretation. A person at the border, but on the Mexican side, might be close to the United States. She

might have arrived *at* the United States border. But until she crosses the border, she has not arrived in the United States. This is not just the best reading of the statute; it is the only reading. The majority has not pointed to any example in which "arrives in" means anything besides crossing the border into the destination. We would expect Congress to use clearer language to subvert long-established border protections.

2

The statute's context reinforces the unambiguous plain meaning. Another provision, § 1225, provides for the expedited removal of noncitizens "*from* the United States." 8 U.S.C. § 1225(b)(1)(A)(i) (emphasis added). As the Supreme Court has explained, § 1225 allows applicants for admission to "avoid expedited removal by claiming asylum." *DHS v. Thuraissigiam*, 591 U.S. 103, 109 (2020); *see also United States v. Gambino-Ruiz*, 91 F.4th 981, 985 (9th Cir. 2024). We have explained that the statute "ensures that all immigrants who have not been lawfully admitted, regardless of their physical presence in the country, are . . . 'applicant[s] for admission.'" *Torres v. Barr*, 976 F.3d 918, 928 (9th Cir. 2020) (en banc) (quoting § 1225(a)(1)).

The majority reads "regardless of their physical presence in the country" to mean that the expedited removal protections can be avoided even when an alien is outside the country. But that line is better understood to make asylum available to those subject to expedited removal regardless of whether they are in a port of entry or elsewhere within the country. After all, a person not yet in the United States cannot be "removed" from it.

This conclusion further follows from the fact that Congress provided separate protections for immigrants who have not yet arrived in the United States. *See* 8 U.S.C. § 1157. The Supreme Court has explained that § 1157, and not § 1158, "governs the admission of refugees who seek admission from foreign countries." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 433 (1987). The majority's reading places aliens on the Mexican side of the border in a penumbral zone where they can apply for refugee status under § 1157 or for asylum under § 1158. Thus, while the statutory scheme applies different protections to an alien based on her location—either in the United States or out of it—the majority's reading creates a fiction where these aliens are entitled to both.

In no other statute has Congress provided more asylum protection to aliens outside the United States than those inside. On the contrary, Congress consistently provides foreign aliens fewer protections, as § 1157 demonstrates. Thus, it makes sense that § 1158 applies only to those physically within the United States.

3

History and precedent further support this conclusion. We have long treated aliens who arrive at a port of entry "as if stopped at the border" even if they are "on U.S. soil." *Thuraissigiam*, 591 U.S. at 139 (quotation omitted). This is called the "entry fiction." Maj. at 22-23. For at least a century, our immigration laws have treated those at ports of entry as though they have not "entered the country." *Thuraissigiam*, 591 U.S. at 139. An alien who arrived at Ellis Island, for example, "was to be regarded as stopped at the boundary line and kept there unless and until her right to enter should be declared." *Kaplan v. Tod*, 267 U.S. 228, 230 (1925).

So it makes sense that in § 1158, Congress listed both those who "arrive in the United States" and those already "physically present." By so doing, Congress clarified that, despite the entry fiction, those who just crossed the border can apply for asylum on the same terms as someone who is otherwise "physically present."

The majority resists this conclusion. It notes that the entry fiction is just that—a fiction. Whether or not aliens in ports of entry are legally deemed to be outside the country, they are nonetheless physically present. That is true. But that is hardly a reason to set aside the statute's plain meaning. And, given the entry fiction's long history, Congress can hardly be faulted for going out of its way to respond to it. Congress clarified that the two categories of aliens contemplated in § 1158 and § 1225—those physically present and those just arriving in the United States—can apply for asylum. This belt-and-suspenders approach makes sense, and it cleanly supports the statute's plain meaning.

Thus, text, history, and precedent all point in one direction. An alien "arrives in the United States" only when she crosses the border into it.

B

The majority ignores or diminishes this text, history, and precedent. It engages in "textual backflips to find some way[,] any way," *Fischer v. United States*, 144 S. Ct. 2176, 2195 (2024) (Barrett, J., dissenting), to conclude that aliens in Mexico have arrived in the United States. Each attempt fails.

The majority begins with the rule against surplusage. Because the majority deems it "possible to give nonredundant meaning to those two categories," it concludes it must give "arrives in the United States" a different meaning than "physically present in the United States." Maj. at 20.

But as I have already suggested, there is no surplusage. The phrase "arrives in" addresses the entry fiction, ensuring that those in ports of entry can apply for asylum just like those who are otherwise physically present in the United States. Thus, "arrives in" does not totally overlap with "physically present;" it plays a meaningful, independent role in the statute. *Contra* Maj. at 20 n.6.

Even if the majority were right that "arrives in" and "physically present" totally overlap, *id.*, that would not justify disregarding the statute's plain meaning. True, courts often presume that ordinary speakers of English avoid surplusage. But the presumption is just that—a presumption. As anyone who has read a contract or deed knows, surplusage is common. *Moskal v. United States*, 498 U.S. 103, 120 (1990) (Scalia, J., dissenting) ("give, grant, bargain, sell, and convey" (quotation omitted)); *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012). And, in any case, the presumption "should not be used to distort ordinary meaning." *Moskal*, 498 U.S. at 120 (Scalia, J., dissenting). "Sometimes the better overall reading of the statute contains some redundancy." *Barton v. Barr*, 590 U.S. 222, 239 (2020) (quotation omitted). Courts should "tolerate a degree of surplusage rather than adopt a textually dubious construction." *United States v. Atl. Rsch. Corp.*, 551 U.S.

128, 137 (2007); A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 177-78 (2012). After all, ordinary meaning—not nonduplicative meaning—is the lodestar in statutory interpretation. The statute's ordinary meaning is clear, and the presumption against surplusage does not justify rewriting it.

2

The majority next turns to the 1980 version of the statue. The majority urges that its interpretation is not "breaking new ground" because that prior version allowed aliens "at a land border or port of entry" to apply for asylum. Maj. at 24 (quoting 8 U.S.C. § 1158(a) (1980)). Because this forty-five-year-old statute used language that—in the majority's view—allowed aliens on the Mexican side of the border to apply for asylum, the majority argues that its interpretation of the current statute "does not radically expand" the asylum right. *Id.*

No court, however, interpreted the 1980 statute like the majority does now. *Al Otro Lado*, 952 F.3d at 1029 (Bress, J., dissenting). That concern aside, the meaning of the 1980 statute cannot change the meaning of the 1996 statute now before us.

"If anything, the [amendment] history suggests the opposite" of what the majority suggests. *Trump v. Hawaii*, 585 U.S. 667, 692 (2018). That Congress replaced "at a land border" with "arrives in the United States" suggests that it understood the terms to have different meanings. After all, when Congress amends a statute, "we presume it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995). Thus, the better view is that Congress

resolved whatever ambiguity existed in "at" by using "in" in the 1996 statute. *See supra* at 49-51.

The majority suggests that the 1996 act did not substantively change the law. Maj. at 24-25 & n.9. But Congress used language in 1996 that differs in meaning from the 1980 statute. We cannot disregard a statute's amendment history simply by declaring that the statute's new terms—though quite different—mean the same thing as the old terms. Yet that is what the majority does. It claims the amendment had no practical impact. And it provides no textual analysis to support this *ipse dixit*.

Moreover, we have already rejected the majority's suggestion that the 1996 amendments were minor. As we have noted, those amendments made "large scale changes to the INA." *Gonzales v. DHS*, 508 F.3d 1227, 1229 (9th Cir. 2007). Other circuits agree. *Groccia v. Reno*, 234 F.3d 758, 759 (1st Cir. 2000) ("In 1996, Congress made massive changes to the immigration laws."); *Acevedo v. Barr*, 943 F.3d 619, 623 n.6 (2d Cir. 2019) (enacted "comprehensive immigration reform"); *Prestol-Espinal v. Att'y Gen. of U.S.*, 653 F.3d 213, 216, 222 n.9 (3d Cir. 2011) ("significant changes"); *Renteria-Gonzalez v. INS*, 322 F.3d 804, 809 (5th Cir. 2002) ("amend[ed] the [INA] in dozens of important but technical ways"). That overhaul went only one direction—the 1996 act was "widely regarded as placing important new limits on immigration." *Al Otro Lado*, 952 F.3d at 1029 (Bress, J., dissenting). So even that major overhaul did not, as the majority concludes, collapse § 1158 into § 1157 and drastically expand asylum protections.

In any case, the majority is of two minds with respect to the reach of the 1980 statute. When citing it as evi-

dence of the 1996 statute's meaning, it assures the public that the 1996 amendments were minor. Everything changes when the majority claims the 1996 amendments abrogated two binding cases. Maj. at 26-27. In *INS v. Cardoza-Fonseca*, 480 U.S. at 433, the Supreme Court explained that § 1158 sets out the process by which refugees "currently in the United States" can get asylum. We recognized the same in *Yang v. INS*, 79 F.3d 932, 938 (9th Cir. 1996). After waiving away those unambiguous statements as mere "general background summaries," the majority says these cases are not helpful anyway because they reference the prior version of § 1158. Maj. at 26. But this just shows that the Supreme Court thought even the prior version of § 1158, which used the much broader "at a land border" applied only on our side of the border. Further, if the majority is correct that the 1996 changes were "minor," then it is hard to say that those changes extended the statute's protections to aliens in another country.

In any event, the majority errs in waiving away the clear language of *Cardoza-Fonseca* and *Yang*. Those cases recognized that § 1158 applied only to people "in the United States" because the statute's plain meaning compelled that conclusion. Never has our court—or any other court—concluded that § 1158 applies to aliens who seek admission from foreign countries. The reason is clear. As discussed above, such aliens—including Plaintiffs—can seek refugee status under § 1157.[9]

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[9] At least one of our sister circuits disagrees with the majority's conclusion that Congress silently collapsed the differences between § 1157 and § 1158. *See Cela v. Garland*, 75 F.4th 355, 361 n.9 (4th Cir. 2023) ("Unlike aliens granted asylum—who are physically present in the United States or arrive in the United States

Cardoza-Fonseca, 480 U.S. at 433. So if anything, the 1996 amendments confirm that aliens can apply for asylum only when they have entered the United States.

3

Even if the majority could show that "arrives in the United States" ordinarily references those just outside the United States, its analysis still falls short. For at most, the majority could show that "arrives in" is ambiguous. And the Supreme Court has instructed us to apply a presumption against extraterritoriality to ambiguous statutes.

"Congress ordinarily legislates with respect to domestic, not foreign, matters." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010). Thus, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id.*

True, Congress need not enact an "express statement of extraterritoriality" to overcome the presumption. *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 340 (2016). But it must provide "a clear indication of extraterritorial effect." *Id.* Only the "rare statute" will meet this standard without "an express statement of extraterritoriality." *Id.*

The majority skirts this presumption. After laying out the rule, the majority rejects it in a single paragraph. In the process, the panel so "eliminat[es] or water[s] down the presumption" that the "result[] i[s] purposivism." Scalia & Bryan, *supra*, at 272.

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when they seek asylum—aliens admitted as refugees seek admission to the United States from foreign countries." (citing *Cardoza-Fonseca*, 480 U.S. at 433)).

The majority suggests that Sections 1158 and 1225 contain an "indication of extraterritorial reach" because they do not expressly limit their reach to those inside the United States. Maj. at 30-31. But this flips the presumption on its head. Rather than presuming that these provisions lack extraterritorial effect, the majority presumes that they apply in Mexico because Congress did not say otherwise. Worse, perhaps recognizing the limitless reach of § 1158 and § 1225 in the presumption's absence, the majority artificially limits its interpretation by saying that the statutes "do[] not . . . extend worldwide." *Id.* The majority assures the public that the statutes reach only those noncitizens that are "on [the United States'] doorstep." *Id.* This line drawing finds no harbor in any interpretive tool, let alone the statute's text. The majority just makes it up.

Next, the majority relies on our cases involving "conduct that almost always originates outside the United States." *United States v. Ubaldo*, 859 F.3d 690, 700 (9th Cir. 2017). Immigration always originates outside the United States. So, applying *Ubaldo*, the majority eliminates the presumption against extraterritoriality from the entire immigration code. *Ubaldo* cannot bear this weight. If *Ubaldo* exempted all immigration law from the presumption, some case—any case—would have noted that remarkable result. None does. To the contrary, the Supreme Court has stated the opposite: statutes applying extraterritorially without an express statement are "rare." *RJR Nabisco*, 579 U.S. at 340.

The majority's reliance on *Ubaldo* departs from how the Supreme Court has applied the presumption to other provisions of the INA—all of which, under the ma-

jority's new *Ubaldo* reading, would have extraterritorial effect. For example, in *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173-74 (1993), the Supreme Court decided that § 243(h)(1) of the INA lacked extraterritorial effect. At the time, that provision forbade the Attorney General from "deport[ing] or return[ing] any alien . . . to a country" if that alien qualified as a refugee. 8 U.S.C. § 1253(h)(1) (1988). Despite that clear statutory mandate, the President "directed the Coast Guard to intercept vessels illegally transporting passengers from Haiti to the United States and to return those passengers to Haiti without first determining whether they may qualify as refugees." *Sale*, 509 U.S. at 158. In holding that § 243(h)(1)'s statutory mandate did not apply on the high seas, the Court explained that the presumption against extraterritoriality applies with "special force when . . . construing . . . statutory provisions that may involve foreign and military affairs for which the President has unique responsibility." *Id.* at 188.

As *Sale* makes clear, the INA—which sets our Nation's immigration's policies—is one such statute. Later cases make this point more forcefully. In *Trump v. Hawaii*, the Supreme Court reversed our court after we failed to recognize that "the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" 585 U.S. at 702 (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

That fundamental sovereign attribute applies here with just as much "special force" as in *Sale* given the executive's "unique responsibility" to govern immigration. The majority provides no reason to the contrary—it just

says that there are "significant differences" between the high seas and the border. Maj. at 31 n.11. But the majority takes no pains to explain why those differences affect the presumption against extraterritoriality. Nor could it. Despite those differences, the Supreme Court "has generally treated the high seas *the same* as foreign soil for purposes of the presumption against extraterritorial application." *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 121 (2013) (emphasis added) (citing *Sale* as an example). Thus, the Supreme Court has expressly rejected the majority's attempt to distinguish *Sale*. Maj. at 31 n.11.

Even if there were ambiguity in the statute (there is not), the majority cannot overcome the presumption against extraterritoriality. That presumption confirms that § 1158 applies only to aliens who have crossed the border.

4

The majority next argues that its interpretation is necessary to avoid a perverse incentive for aliens to enter the United States somewhere other than a designated port of entry. Maj. at 21-22 (quoting *Thuraissigiam*, 591 U.S. at 140).[10] This argument is grounded in the presumption against ineffectiveness, which provides that interpretations that "further[] rather than ob-

[10] *Thuraissigiam* addresses perverse incentives in a single sentence and only after the Supreme Court had rejected all other textual arguments. 591 U.S. at 140. That case provides weak support for the majority's reliance on the presumption against ineffectiveness, particularly because the majority uses the presumption to avoid the text's plain meaning.

struct[] the document's purpose" are to be favored. *See* Scalia & Garner, *supra*, at 63.

This presumption prevents interpretations that would "enable offenders to elude its provisions in the most easy manner." *Garland v. Cargill*, 602 U.S. 406, 428 (2024) (quoting *The Emily*, 22 U.S. (9 Wheat.) 381, 389 (1824)). But like all presumptions, it is rebuttable. The majority's reliance on this presumption is misplaced for at least two reasons. First, as with the other interpretive canons, the presumption only applies to textually permissible interpretations. Scalia & Garner, *supra*, at 63. As already explained, the majority's interpretation is not textually permissible.

Second, the presumption does not allow courts to supplant or "rewrite statutory text" just because a bad actor might evade the statute to avoid an interpretation that its plain text requires. *Cargill*, 602 U.S. at 428 (quotation omitted).

Cargill illustrates this principle. There, the Supreme Court considered whether semiautomatic rifles equipped with a bump-stock device are machineguns as defined by statute. 26 U.S.C. § 5845(b) defines machineguns as weapons that can fire more than one shot "automatically . . . by a single function of the trigger." Bump stocks allow a semiautomatic rifle to fire quickly, but they still require a shooter to "reset the trigger between every shot." *Cargill*, 602 U.S. at 415. Faced with these facts, the Supreme Court concluded that, although bump-stock-equipped semiautomatic rifles can fire at rates that approach those of true machineguns, they were not machineguns as defined in the statute. In so concluding, the Court rejected arguments grounded in the presumption against ineffective-

ness. *Id.* at 427-28. The Court applied the statute's plain meaning—even if that meaning would undermine the statute's overall purpose in some applications.

As in *Cargill*, adopting the statute's plain meaning may well have perverse consequences. And those consequences may well undermine the very purpose of the INA—to regulate the border in an orderly fashion. But those consequences exist under any interpretation of the statute. The several hoops through which aliens must jump when seeking admission to the United States already encourage millions to enter the country at unlawful locations. And even though laws require those procedures, "it remains relatively easy for individuals to enter the United States," and often "without detection." *United States v. Martinez-Fuerte*, 428 U.S. 543, 552 (1976). Our cases are full of examples of aliens doing just that. *See United States v. Gambino-Ruiz*, 91 F.4th 981, 983-84 (9th Cir. 2024) (discussing one alien who repeatedly illegally crossed the border at various points). This reality does not give the majority a blank check to cash any atextual interpretation. Nor may the majority adopt a textually impermissible interpretation just to avoid perverse incentives.

In sum, the statute's plain text precludes the majority's interpretation. But even if the statute were ambiguous, the presumption against extraterritoriality, properly applied, supports the plain meaning. The majority's attempts to find a workaround fail. All roads lead to the same conclusion: an alien "arrives in the United States" only when she crosses the border.

II

After erroneously holding that the government has a duty to process asylum seekers in Mexico, the majority narrowly defines what it means for the government to "withh[old]" that duty. *See* 5 U.S.C. § 706(1). The majority assures the government that it retains broad discretion to decide how to process asylum seekers in Mexico. And it suggests that the government could comply with its duty simply by keeping a list of potential asylum seekers. Maj. at 36.

The majority's narrow interpretation of "withholding" limits the practical impact of its opinion. Indeed, because the government retains broad discretion to limit access to asylum, plaintiffs just across the border likely will still not get any relief—despite the majority's expansive reading of "arrives in." That is a salutary effect. But the way the majority gets there—narrowly interpreting "withholding"—is wrong. And two wrongs do not make a right.

Section 706(1) of the APA requires us to compel agency action if it is either "withheld or unreasonably delayed." 5 U.S.C. § 706(1). Under this section, "the only agency action that can be compelled under the APA is action legally *required*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (emphasis in original). Even when an organic statute requires agency action, it may not require *immediate* agency action. Unless the statute imposes a deadline, agencies need only complete their statutory duties "within a reasonable time." 5 U.S.C. § 555(b).

We have held that agency action is "withheld" when "Congress has specifically provided a deadline for per-

formance." *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 n.11 (9th Cir. 2002). We explained that the "failure to complete" the required agency action "within the mandated time frame compelled the court to grant injunctive relief."[11] *Id.* at 1178.

Other circuits follow a similar approach. In the D.C. Circuit, agency action is withheld when "agency inaction violates a clear duty to take a particular action by a date certain." *Sierra Club v. Thomas*, 828 F.2d 783, 794 (D.C. Cir. 1987).[12] The Fourth Circuit similarly recognizes that "an agency's failure to meet a hard statutory deadline" is withholding. *South Carolina*, 907 F.3d at 760. So too the Tenth Circuit, which has concluded that agency action is withheld only if "Congress imposed a date-certain deadline on agency action" that the agency fails to meet. *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999).

The weight of authority—including our opinion in *Badgley*—thus provides that agency action is withheld only when an agency fails to act by a statutory deadline. Rather than create a circuit split, we should follow this

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[11] Although we did not analyze the text of § 706(1) in *Badgley*, the Fourth Circuit correctly recognized that, by declining to apply the unreasonable-delay factors, we necessarily concluded that the agency action was "unlawfully withheld." *South Carolina v. United States*, 907 F.3d 742, 760 (4th Cir. 2018) (citing *Badgley*, 309 F.3d at 1176-77 & n.11).

[12] The D.C. Circuit recognizes that "[a]n agency's own timetable for performing its duties in the absence of a statutory deadline is due 'considerable deference.'" *Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001) (quoting *Sierra Club v. Gorsuch,* 715 F.2d 653, 658 (D.C. Cir. 1983)). This suggests that it is difficult, if not impossible, for an agency to withhold an action in the absence of a statutory deadline.

clear consensus. Applying that standard here, the government did not withhold one of its duties. The statute does not impose any deadline on the government's obligation to process asylum seekers (assuming an obligation exists). So not even the majority argues that the government "withheld" agency action under this standard.

Instead, the majority concludes that we have already rejected this standard. It reaches this conclusion based on a questionable reading of *Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068, 1081 (9th Cir. 2016). There, we granted relief under the APA under a statute that did not impose a deadline. The majority concludes that, because we did not address whether agency action was unreasonably delayed, we must have decided that the government "withheld" its obligations.

At the start, *Vietnam Veterans* was decided more than a decade after *Badgley*. To the extent there is any conflict, *Badgley*—which held that a missed deadline was withholding, not delay—controls.[13]

In any event, the majority overreads *Vietnam Veterans*. It concedes that *Vietnam Veterans* did not analyze "whether the Army's failure to comply with the regulation constituted withholding or delay under the

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[13] To circumvent Badgley, the majority notes that Badgley held a statutory deadline was a sufficient (but not necessary) condition for withholding. Maj. at 34 n.13. But the majority fails to identify another case addressing the distinction between withholding and delay. Badgley is the closest we have. Even so, the relevant question is not whether a statutory deadline is necessary or sufficient for withholding. The relevant question is instead whether the government "withheld" an obligation (rather than "delayed" it) when it told aliens to come back later.

APA." Maj. at 33. Rather, we held that the Army had a mandatory obligation enforceable under § 706(1)—without deciding whether the Army withheld or delayed action. Thus, *Vietnam Veterans* cannot have defined what it means for agency action to be "withheld."

The majority concludes otherwise, arguing that the only possible conclusion in *Vietnam Veterans* was that the "failure to act constituted withholding." *Id.* This cannot withstand scrutiny. First, for a century, the Supreme Court has cautioned that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). We have applied that rule to issues lurking in our own cases. *See Schram v. Robertson*, 111 F.2d 722, 725 (9th Cir. 1940). And it should govern with greater force here. The briefing in *Vietnam Veterans* suggests that the issue litigated was not whether a duty was withheld or delayed, but whether there was a duty at all.[14] In Badgley, by contrast, the government argued—and we rejected—that any deviation from the statutorily mandated deadline was reasonable delay. 309 F.3d at 1177 n.11. Thus *Badgley*, not *Vietnam Veterans*, governs whether agency inaction constitutes withholding.

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[14] *See generally* Opening Brief of Appellants, Vietnam Veterans, 811 F.3d at 1068; Opening Brief for Defendants-Appellees/Cross-Appellants, Vietnam Veterans, 811 F.3d at 1068; Appellants'/Cross-Appellees' Reply Brief and Opposition to Cross-Appeal, Vietnam Veterans, 811 F.3d at 1068; Reply Brief for Defendants-Appellees/Cross-Appellants, Vietnam Veterans, 811 F.3d at 1068.

Second, Vietnam Veterans is distinguishable. Here, the government told Plaintiffs—like it told all other metered aliens—to come back to the overwhelmed port of entry for processing later. The Army in Vietnam Veterans, by contrast, gave no indication that it would ever take the actions the plaintiffs sought. See generally Vietnam Veterans, 811 F.3d at 1068. Unlike in Vietnam Veterans, the government has not "withheld" any duty to process asylum applications. At most, it has delayed that duty.

Unmoored from precedent, the majority's sweeping new rule—that the government withholds a duty whenever it "refuses to accept, in any form, a request that it take a required action" for any period is indefensible. Maj. at 34. The majority's rule swallows the distinction between "withheld" and "delayed" agency action. After all, the government did not say it would never process Plaintiffs. It merely told those aliens who were turned away to come back when the Ports of Entry were not overwhelmed. That is a far cry from "refus[ing] to accept" a duty to interview those aliens.

In any event, as even *Vietnam Veterans* recognizes, "the operation of § 706(1) is restricted to discrete actions that are unequivocally compelled by statute or regulation." *Vietnam Veterans*, 811 F.3d at 1081. That obligation must be "so clearly set forth that it could traditionally have been enforced through a writ of mandamus." *Id.* at 1076 (quoting *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010)). The majority does not even try to explain how its withholding rule satisfies this standard.

To the contrary, the majority suggests the government would not have "withheld" its duty to process al-

iens if it had kept a waitlist or immediately initiated the asylum process. Maj. at 36. But under *Vietnam Veterans*, we can grant § 706(1) relief only if the statute "unequivocally compels" those actions. The relevant statute says nothing about a waitlist or immediate processing. Thus, the majority imposes on agencies a requirement to do "that which [they are] not required to do." *In re A Cmty. Voice*, 878 F.3d 779, 784 (9th Cir. 2017). Section 706(1) gives the majority no such authority. *See Norton*, 542 U.S. at 63.

The good news is the majority's error is limited. If—as the majority concludes—"[e]ven minimal steps," such as keeping a waitlist, would evade the majority's rule and "shift the § 706(1) analysis . . . from the withholding category into the delay category," then the majority's rule is good for this case only. Maj. at 36. But the narrowness of the majority's conclusion only limits its harm; it does not make it legally correct. We should reverse the grant of summary judgment to Plaintiffs on their § 706(1) claim and vacate the corresponding injunction.

III

Plaintiffs' other claims also fail.

A

The majority properly vacates the injunction based on Plaintiffs' Due Process claim. It does so, however, on constitutional avoidance grounds. Maj. at 37. I would reject the claim on the merits.

"[M]ore than a century of precedent" establishes that aliens denied entry have no Due Process rights beyond "the procedure authorized by Congress." *Thuraissigiam*, 591 U.S. at 138-39 (quotation omitted). In other

words, arriving noncitizens' procedural rights "are purely statutory in nature and are not derived from, or protected by, the Constitution's Due Process Clause." *Mendoza-Linares v. Garland*, 51 F.4th 1146, 1167 (9th Cir. 2022). Plaintiffs thus warrant no relief on their Due Process claim.

B

Plaintiffs also raise a claim under § 706(2) of the APA. The district court did not reach this claim. But I would dismiss this claim as moot because the memoranda promulgating the metering policy were rescinded years ago. *See Akiachak Native Cmty. v. Dep't of Interior*, 827 F.3d 100, 113 (D.C. Cir. 2016) ("[W]hen an agency has rescinded and replaced a challenged regulation, litigation over the legality of the original regulation becomes moot.").

Even if the § 706(2) claim remained live, it fails on the merits. The metering policy was a lawful exercise of the government's authority to "[s]ecur[e] the borders," 6 U.S.C. § 202(2), (8), and the ability to admit aliens falls within the Executive's inherent powers, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). The government's exercise of its inherent authority was reasonable given the pressures it faced at the border when it enacted the metering policy.

C

Finally, Plaintiffs raise a claim under the Alien Tort Statute (ATS), arguing that the metering policy violated the international-law norm of non-refoulement. This claim also lacks merit.

The ATS gives district courts "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. This modest statute is an ordinary jurisdictional statute. It does not say when an action violates the law of nations or a federal treaty. Nor does it say which torts properly fall within its reach.

In *Sosa v. Alvarez-Machain*, the Supreme Court established a path for "recogni[zing] . . . new causes of action" under the ATS. *Doe v. Cisco Sys., Inc.*, 73 F.4th 700, 714 (9th Cir. 2023) (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004)). Gratefully, that path is exceedingly narrow. The bar for recognizing a new cause of action is "high." *Sosa*, 542 U.S. at 727. The ATS creates a cause of action only for "violations of international law norms that are 'specific, universal, and obligatory.'" *Kiobel*, 569 U.S. at 117 (citing *Sosa*, 542 U.S. at 732).[15] But even identifying such a norm is not enough—once identified, courts then apply a second, "extraordinarily strict" step of asking whether there is "even one" reason to think that Congress might "doubt the efficacy or necessity of the new remedy." *Nestle USA, Inc. v. Doe*, 593 U.S. 628, 637 (2021) (plurality op.) (quotation omitted). If the answer to the second question is "yes," then "courts must refrain from creating [a] remedy" for even a specific, universal, and obligatory norm. *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 264 (2018) (quotation omitted).

Since both steps must be met, private rights of action under the ATS are available only "in very limited cir-

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[15] This test "bears a marked resemblance to the 'clearly established law' standard in qualified immunity analysis." Gerald Weber, *The Long Road Ahead: Sosa v. Alvarez-Machain and "Clearly Established" International Tort Law*, 19 Emory Int'l L. Rev. 129, 132 (2005).

cumstances." *Nestle*, 593 U.S. at 631 (plurality op.). Indeed, the Supreme Court has "yet to find [the two-part test] satisfied." *Id.* at 637. The Court's reluctance to expand the ATS beyond *Sosa* underscores its commitment to ending the "*ancien regime*" when the Court "ventur[ed] beyond Congress's intent" to create rights of action that were—at best—only implied. *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). A plurality of the Court has already suggested that it will not infer any rights of action beyond "the three historical torts identified in *Sosa*": "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Nestle*, 593 U.S. at 635, 637 (plurality op.). Reading between the lines, we should *never* infer additional causes of action under the ATS. The three torts identified in *Sosa*, and no more.

Finally, even if plaintiffs allege violations of one of the three torts identified in *Sosa*, they must go a step further and show that the violation took place in the United States. That is because the ATS lacks extraterritorial effect. Any claim alleging "violations of the law of nations occurring outside the United States is barred." *Kiobel*, 569 U.S. at 124.

Plaintiffs' ATS claim founders on all these shoals. Extraterritoriality is a good place to start. Plaintiffs seek a remedy under the ATS for actions that occurred in Mexico. Because "the presumption against extraterritoriality applies to claims under the ATS," *id.*, their claim cannot succeed even if non-refoulement is a "specific, universal, and obligatory" norm.

Besides seeking to give extraterritorial effect to the ATS, Plaintiffs also seek to elevate non-refoulement to a universal status it does not have. Assume Plaintiffs

are right to define non-refoulement as they do: non-refoulement "encompass[es] any measure . . . which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened[.]" UNHCR Exec. Comm., Note on International Protection, ¶ 16, U.N. Doc. A/AC.96/951 (Sept. 13, 2001). Even on that definition, the metering policy is not nonrefoulement. The United States did not accept any metered aliens into the United States. So how could it have returned asylum-seekers or refugees anywhere?

In any event, assuming that the metering policy was nonrefoulement, Plaintiffs' arguments remain unpersuasive. Plaintiffs argue that non-refoulement has reached *jus cogens* status, meaning that it is binding on the United States regardless of whether it has consented to it. *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 714-17 (9th Cir. 1992). Because finding that a norm has *jus cogens* status is harsh medicine, only the rarest of norms will achieve that status. *Jus cogens* norms must be "so universally disapproved by other nations" that they are "automatically unlawful." *Sosa*, 542 U.S. at 751 (Scalia, J., concurring in part). The list of such norms is so small that the Restatement (Third) of the Foreign Relations Laws of the United States enumerates them: only norms prohibiting "official torture," "genocide, slavery, murder or causing disappearance of individuals, prolonged arbitrary detention, and systematic racial discrimination" have achieved that status. *Siderman de Blake*, 965 F.2d at 717. The refoulement of aliens who have never entered the United States is a far cry from that status.

As the district court correctly recognized, many European countries and Australia have policies that belie any claim that the non-refoulement standard universally applies extraterritorially. Indeed, some countries have policies that mirror the metering policy here. That is unsurprising. Most countries, including the United States, respect and protect their borders. Only the Ninth Circuit —which is not a sovereign nation—seems to reject this nearly universal goal of national border security. Plaintiffs cannot identify the "general assent of civilized nations" necessary to create a cause of action under the ATS. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 254 (2d Cir. 2009).

But even if non-refoulement were as universally disapproved as Plaintiffs suggest, a cause of action would still not exist under the ATS. Under the second prong of the Court's ATS test, there are countless sound reasons to think that Congress would doubt the efficacy or necessity of a remedy under the ATS. *Jesner*, 584 U.S. at 264.

I offer just one—the ATS "has not been held to imply any waiver of sovereign immunity." *Tobar v. United States*, 639 F.3d 1191, 1196 (9th Cir. 2011). "A waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Id.* at 1195 (quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980)). Thus, recognizing an ATS claim *against the United States* for violating a norm of nonrefoulement would require us to find that Congress, which generally legislates against the backdrop of existing law, *see Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994), silently waived the Nation's sovereign immunity in cases brought by any alien not immediately processed at the border. Nothing

Plaintiffs identify would support such a drastic departure from precedent, particularly in a case that would open the federal coffers to aliens who have never stepped foot in the United States.

In sum, for a host of reasons, Plaintiffs' ATS claim, which would mark a drastic expansion of *Sosa*, fails.

IV

The majority's interpretation of "arrives in the United States" is indefensible. It twists the statutory language, ignores history, flips multiple presumptions, and ignores common-sense English usage. The majority also erroneously concludes that the government "withheld" a statutory duty (rather than merely delaying it) by telling aliens to come back later. We should have rejected Plaintiffs' claims, including those that the majority saves for another day. I dissent.

APPENDIX 1

Table 1: 161 Uses of "Arrives in" to Describe a Destination

Year	Source	Content
1990	Christian Science Monitor	Transplanted from her West Indian home, the 19-year-old arrives in a large East Coast city . . . to work as an au pair.
1990	USA Today	Nelson Mandela, who arrives in New York today, is being greeted with a tickertape parade and crowds of thousands.
1990	Christian Science Monitor	Mr. Gorbachev arrives in Washington [for a summit].
1990	Washington Post	Prime Minister Tadeusz Mazowiecki, the diffident, sad-faced leader of Poland's Solidarity-controlled government, arrives in Washington [to meet with President Bush].
1990	Washington Post	When the new Congress arrives in Washington in January, it will face a major piece of unfinished business.

Year	Source	Content
1990	J. of Am. Ethnic History	[She] used to think that money was got on the streets here, but if ever she arrives in this country she will find it quite different, as there is nothing got here by idleness.
1990	Ethnology	A vendor arrives in the market with a small supply of capital and knowledge of market trade.
1990	World Affairs	Soviet leader Mikhail Gorbachev arrives in Beijing for the first Sino-Soviet summit in thirty years.
1990	Style	When Roderick arrives in London, he must concoct a voice with which to advance his career.
1990	American Heritage	In "Squaring the Circle," a mountain man from Kentucky arrives in Manhattan and is made vertiginous by its pitiless rush forward.
1990	American Heritage	[Photo description:] Lajos Kossuth arrives in America in 1851, with the Guardian Genius of Hungary in attendance.

Year	Source	Content
1990	White Hunter: Black Heart	You can leave if you want. I'm staying. The company arrives in Entebbe the day after tomorrow [to film a movie].
1990	USA Today	Ragged arrives in an era of declining rock' n' roll, a drift that hasn't alarmed Young.
1990	Newsweek	[Photo description:] Ambassador to Kuwait Nathaniel Howell arrives in Germany.
1990	ABC	Mikhail Gorbachev arrives in Washington next Wednesday evening [for a summit].
1990	CNN Specials	[We have to design the equipment so that it] is lighter and able to get there and then do a different job when it arrives in the arena.
1990	CNN Crossfire	And your view is that . . . let[ting] food supplies go into Kuwait would be an excellent idea? . . . The moment that food arrives in Kuwait, it will be taken by the Iraqis.
1990	PBS Newshour	Mandela arrives in New York on Wednesday for a 12-day visit to the U.S.

Year	Source	Content
1990	PBS Newshour	Each day a new harvest of inmates arrives in The Crosses [where they are detained for months, waiting for investigations to finish.]
1990	PBS Newshour	I think he is positioning himself also to improve the chances for his foreign minister, Teraq Aziz, when he arrives in Washington [for negotiations].
1990	ABC Nightline	Furthermore, he said when Perez de Cuellar arrives in Amman, they are not arriving with any proposals for the secretary general.
1990	Atlantic	As first light arrives in a beech and hemlock forest, setting the birds sounding their chaotic vowels . . .
1990	Interior Landscapes	I am the one by whom my past arrives in this world.
1990	Good Fellas	A bedraggled Henry arrives in his brother, Michael's, room. Michael is all dressed and sitting in his wheelchair, ready to go.

Year	Source	Content
1990	Newsweek	Hence, productivity begins even before the worker arrives in the office.
1990	Newsweek	This child . . . is the grandson of . . . a Russian Jew who arrives in Baltimore on the Fourth of July, 1914, and declares it the most beautiful place he's ever seen.
1990	U.S. News & World Report	Until the supertanker arrives in the U.S., no one knows the price its oil cargo will bring.
1990	Changing Times	[A cruise ship], for example, leaves Miami on Saturdays and after two days at sea arrives in St. Martin/St. Maarten, which is half French and half Dutch.
1990	Weatherwise	[T]he Count, disguised as a large, black dog, arrives in England. Fortunately for His Excellency, immigration and quarantine laws were much less strict then than now.
1990	TIME	If you think of the telephone purely as a secular voice thrower, it arrives in the mind at its most irritating.

Year	Source	Content
1991	ABC Special	On November 15th, a second ambassador arrives in the United States to help Nomura, the current ambassador, who's been negotiating for almost a year.
1991	ABC Special	[T]he note is seen as an ultimatum. The same day Hull's note arrives in Japan, the Japanese fleet departs from Japan.
1991	PBS Newshour	Terry Anderson arrives in Germany [to begin his first full day of freedom at an American military base]
1991	ABC Nightline	James Baker arrives in Saudi Arabia tonight [to meet with Kuwait's leader.]
1991	ABC Nightline	Once the food arrives in the port, yes, there will have to be some work done on the roads.
1991	ABC Nightline	He will likely tell the President which way it's going to go before he arrives in Moscow for the summit with Mr. Gorbachev, July 30th, 31st.

Year	Source	Content
1991	JFK	Six months after he arrives in Russia, Francis Gary Powers' U2 spy flight goes down in Russia.
1991	Forbes	[I]f the wine is likely to cost at least 20%-25% more when it arrives in the U.S. 18 to 24 months later.
1991	Nat'l Rev.	Her calculation is shown in one sequence in Truth or Dare when her tour arrives in Toronto and she is told that the police are prepared to arrest her if [she performs a specific bit.]
1991	Saturday Evening Post	In New York City, only 32 cents of every education dollar arrives in the classroom.
1991	Compute!	The robot will sell for less than $1,000 when it arrives in stores and catalogs next February.
1991	Compute!	When the shuttle arrives in space, the crew reconfigures the computers for orbital operations.
1991	Weatherwise	[Photo description:] An ore carrier bearded with the frozen

Year	Source	Content
		spray of the Great Lakes arrives in Superior, Wisconsin, in a -15 degrees F deep freeze.
1991	NY Times	She gives one party each summer for about 400 Saratogians, even before the racing crowd arrives in town.
1991	Christian Science Monitor	Gorbachev decided to speed it up and finish everything before the delegation arrives in Vilnius. . . . Then the delegation will arrive to find 'order' restored.
1991	Associated Press	First Egyptian contingent arrives in Saudi Arabia. Iraqi President Saddam Hussein urges Arabs to sweep "emirs of oil" from power.
1991	USA Today	The Giffords will be reunited temporarily Friday. Kathie Lee arrives in Tampa to tape Regis & Kathie Lee.
1991	USA Today	John Major is expected to brief President Bush on the positions of Britain, Italy, France and Germany when he arrives in the United States Wednesday for a three-day visit.

Year	Source	Content
1991	USA Today	His new album, Dangerous, arrives in stores Tuesday.
1992	Houston Chronicle	Uher said he would support a rules change requiring the Calendars Committee to schedule a bill for floor debate within 30 days after it arrives in Calendars.
1992	ABC Business	President Bush arrives in Japan on Tuesday on a mission to open Japanese markets to American products.
1992	ABC Special	As Clinton arrives in Albuquerque, New Mexico, it is very late at night and [local supporters are gathered to meet him.]
1992	NPR All Things Considered	The vice president arrives in Tokyo on Tuesday to take part in a ceremony.
1992	CNN	One drawback to electing a governor President is that he arrives in the White House with little foreign policy experience.
1992	ABC Nightline	President Bush arrives in Japan with a demand: Japanese

Year	Source	Content
		markets must be opened to American-made goods.
1992	NPR Weekend	Boris Yeltsin arrives in Washington, DC, on Tuesday [for a summit.]
1992	Batman 2	Descending the stone stairs, Alfred arrives in the Batcave.
1992	Batman 2	Frick arrives in the doorway [to speak to someone.]
1992	Jennifer Eight	[A man] spits gum at the sink as he arrives in the kitchen.
1992	Jennifer Eight	[She] hurr[ies] into her dressing gown with a similar urgency to get out. She arrives in the living room as the figure is clambering through the window.
1992	Newsweek	[Photo description:] A shipload of Somali refugees arrives in Yemen
1992	America	The hero of *And You, Too* arrives in France [to study]
1992	Christian Science Monitor	A young senator, Jefferson Smith, arrives in the nation's capital [to serve his term]

Year	Source	Content
1992	Associated Press	Churchill arrives in Cairo, disturbed by a telegram from Gen. Auchinlek saying Britain's 8th Army will not have the strength to make new attacks.
1992	Associated Press	Churchill arrives in Moscow to tell Stalin no second front will be opened in Europe in 1942.
1992	Washington Post	The first installment of her $60 million, multimedia deal with Time Warner arrives in stores today.
1992	Washington Post	The Subway Finally Arrives in Woodbridge and Waldorf[, expanding] the Metro into the outer counties.
1992	Washington Post	Hillary Clinton arrives in town today still in the process of figuring out how to be an impeccable
1992	Atlanta J.-Const.	Joel Fleischman, a whiny New Yorker, arrives in Alaska to fulfill his obligation under a state program that had paid his tuition

Year	Source	Content
1992	San Francisco Chronicle	His co-star, Susan Strasberg, portrays a naive deaf woman who arrives in the Haight looking for her missing brother. She's quickly befriended.
1992	World Affairs	The first Mainland Chinese to visit Taiwan arrives in Taipei.
1993	ABC 20/20	Three days before Kennedy arrives in Dallas, [Lee Harvey Oswald is] given a gift on a silver platter. Jack Kennedy's going to pass in front of the Depository.
1993	NPR All Things Considered	But Clinton arrives in Tokyo [for negotiations] with his stature as an international leader tarnished by his performance over the last four months.
1993	NPR Morning	Bosnia's President Alija Izetbegovic arrives in New York today. He'll address the U.N. tomorrow.
1993	ABC Nightline	The President arrives in Tampa, Florida, a medium-sized city where one out of five people has no health insurance. [The President is interviewed.]

Year	Source	Content
1993	CNN	A young English nurse, a new bride, arrives in Africa with a man that she met while working as a nurse during the war . . . [and] sought out friends among the local Africans.
1993	CNN	A package arrives in the mail. You open it . . .
1993	Southern Review	Mariana of Austria is not yet queen the day that Mari Barbola arrives in Madrid: someone else fills that role, an Isabella.
1993	So I Married an Axe Murderer	Charlie runs across the dance floor, fighting for an exit to the outside. He arrives in someone's arms on his way [and says,] 'I need your help.'
1993	NY Times	William Nathaniel Showalter III arrives in Fort Lauderdale, Fla., for spring training today.
1993	NY Times	When Mr. Clinton arrives in Des Moines, he will join Mr. Harkin for a helicopter tour.
1993	Christian Science Monitor	One-and-a-half hours northeast of the Salvadoran capital . . . , one arrives in Ilobasco,

Year	Source	Content
		marked by its red-tiled roofs. Here, the combination of fine-grained clay and local talent has produced a cottage industry of ceramic crafts.
1993	Christian Science Monitor	But when our renga arrives in the morning mail, I find that the wind that climbs the pine hill behind David's house is stirring the apple boughs behind me.
1993	Associated Press	The flight from Miami arrives in Iquitos, Peru, late at night and you get on the boat immediately. . . .
1993	Washington Post	The first, a nonstop from Ocean City to Washington, departs Ocean City at 8 a.m. daily and arrives in Washington at 1:50 p.m.
1993	Washington Post	The second departs Ocean City at 11:20 a.m., stops in Rehoboth Beach at 12:05 p.m. and arrives in Washington at 3:55.
1993	Washington Post	The last bus, also a nonstop, leaves Ocean City at 5 p.m. and arrives in Washington at 10:45.

Year	Source	Content
1993	Atlanta J.-Const.	[T]he Ladies Professional Golf Association arrives in Stockbridge this week for the $600,000 Atlanta Women's Championship.
1993	Atlanta J.-Const.	He arrives in Atlanta via impressive stints as a staff conductor with the [several symphonies.]
1993	Houston Chronicle	Neeson . . . stars as Oskar Schindler, a Nazi Party member who arrives in Krakow, Poland, shortly after the Nazi army crushes Polish resistance in 1939.
1993	Raritan	The brisk rhythm . . . builds up to this shot as an arresting point of confluence; the ship's entering frame as it arrives in the town harbor carries the accumulated charge of all that has been transpiring.
1993	Raritan	[Photo description:] The phantom ship entering frame as it arrives in the town harbor.
1993	Geographical Review	By the time the caravan arrives in Amazonia, the forest is

Year	Source	Content
		largely felled, the resources pillaged . . .
1993	Music Educators Journal	A new magazine of practical music teaching arrives in your mailbox this summer.
1994	Social Studies	Constance Hopkins arrives in the New World aboard the Mayflower and relates the early years of Plymouth Plantation from November 1620 to February 1626.
1994	CBS 60 Minutes	Boris Yeltsin arrives in the U.S. tonight for a summit meeting with President Clinton.
1994	CBS Special	This delegation arrives in a situation in which, by and large, the Haitian people, as best anyone can determine, are saying to themselves and anyone else who will listen, 'We just hope this thing gets over with.'
1994	ABC Day One	Nearly every week, a Chinese freighter arrives in the port of Long Beach, California.

Year	Source	Content
1994	CBS Eye to Eye	Last week [a package] arrives in New Jersey, where Jay Skidmore is a U.S. postal inspector.
1994	Gerald Rivera Show	When he arrives in the house, do you give him a kiss? MARGIE: No. (Audience-reaction).
1994	ABC Saturday News	[A] convoy of U.N. peacekeepers arrives in Gorazde after Bosnia's Serbs defy NATO's ultimatum and intensify their shelling.
1994	NPR Morning	[I]t's comforting to know that there is poetry out there worse than my poetry. And it arrives in the mail. . . .
1994	ABC Nightline	There is always a certain element of pomp and ceremony when a U.S. president arrives in a foreign capital, but it's essentially fluff.
1994	ABC Nightline	[Mr. Swing] will be hosting the high-powered delegation when it arrives in Haiti tomorrow.
1994	Literary Rev.	For instance, James Bond arrives in Munich and knows

Year	Source	Content
		where he can eat the best liverwurst in the city.
1994	Critical Matrix	[S]he sails around for several years . . . until she finally arrives in Britain, which has recently been conquered by a non-Christian people . . . [S]he succeeds in spreading the word of God among the Britons.
1994	North of Montana	She believes she is escaping those dead-end streets, but instead arrives in California with the phone number of an old high school boyfriend written out like a prescription.
1994	Cobb	Here comes Cobb with a recklessness beyond reason. And as the pitch arrives in the Catcher's hands, the Catcher digs in to take on Cobb.
1994	The Fist of God	A Mossad team arrives in London to mount an operation against a Palestinian undercover squad.
1994	Harpers Magazine	I have been avoiding the club where we had lunch. If a

Year	Source	Content
		package arrives in the mail, I shake it slightly.
1994	NY Times	[H]e arrives in Naples [for a summit] with the best economic performance of the participants.
1994	NY Times	Prime Minister John Major arrives in Naples [for a summit] in a curious position: Britain's economy is growing. . . .
1994	Associated Press	[L]arge artificial marshes . . . will be used to cleanse farm run-off before it arrives in the Everglades.
1994	Associated Press	The prevailing south winds are lashing gnarled mesquite trees as a visitor arrives in Rule, population 783.
1994	Associated Press	British Foreign Secretary Douglas Hurd arrives in Hanoi Wednesday to expand his country's trade and investment links.
1994	Washington Post	In one scene, a group of children arrives in England and is welcomed and hugged by peo-

Year	Source	Content
		ple they don't know but with whom they will live temporarily.
1994	San Francisco Chronicle	Johnny . . . is 27 and arrives in London in a stolen car, penniless but full of dire thoughts.
1994	San Francisco Chronicle	California Governor Wilson will be the latest visitor when he arrives in El Paso today to tour the border and see what lessons the blockade may hold for his state.
1994	Chicago Sun-Times	She was in love with Lime, who is seemingly killed just as Cotton arrives in Vienna.
1994	Chicago	A once-in-a-lifetime event arrives in Chicago and you might wind up with your nose pressed against the window.
1994	Armed Forces & Soc.	This is how Amnon expresses what it means to be scared when one arrives in Gaza for the first time.
1994	Sirens	When the exhibition arrives in London, the English will be convinced.

Year	Source	Content
1994	NPR Weekend	Here's a president who arrives in Moscow [for discussions] with no new money. The only amounts of money that are going to be given to help Russia have all been stipulated before.
1995	Metropolis	As they head into the apartment, the elevator arrives in the hall, bringing more people. Christoph ushers in this new group, then slips into the elevator.
1995	CBS Morning	Shirley Harris arrives in the emergency room at 2:00 PM with chest pain. She's immediately hooked up to a monitor.
1995	NPR Morning	Private hospitals, by law, have to treat anyone who arrives in the emergency room.
1995	Mass. Rev.	Meanwhile, I open a letter that arrives in the mail.
1995	Va. Quarterly Rev.	One week later, a letter to me arrives in the office mail. The return address is The New York Herald Tribune Book.
1995	Outbreak	[D]awn arrives in the Motaba Valley.

Year	Source	Content
1995	Sport Illustrated	Within 48 hours a representative of the testing agency used by Major League Baseball arrives in Binghamton, N.Y., home of the Mets' Double A affiliate, to collect a urine sample from Gooden.
1995	Astronomy	At certain separations, a light wave from one star arrives in sync with a light wave from the other star and adds to it.
1995	Christianity Today	U.S. Marines salute Pope John Paul II as he arrives in Queens.
1995	Associated Press	Pope John Paul II proclaims himself "a pilgrim of peace" as he arrives in the United States for a five-day visit.
1995	Washington Post	Indeed, before he arrives in the United States, Peres says he plans to develop a list of options. . . .
1995	Atlanta J.-Const.	Clayton County has become a multi-cultured and diverse community. When student-led prayer arrives in the classroom, it will include Hindu,

Year	Source	Content
		Muslim, Jewish and pagan chants.
1995	Atlanta J.-Const.	A tired young man arrives in Atlanta one evening. He has no relatives to support him. . . .
1995	Atlanta J.-Const.	Stoichkov could play more than 60 matches before he arrives in Atlanta.
1995	Atlanta J.-Const.	When the world arrives in our city next summer, challenging these barriers must be accomplished if Atlanta is to emerge as the next great international city for people with disabilities.
1995	San Francisco Chronicle	Levada arrives in San Francisco following several years of bitter protests over Quinn's decision to close more than a dozen churches.
1995	Symposium	As soon as she arrives in the village, a network that resembles a transparent web weaves itself around Samya.
1995	NPR Morning	The first among this new old breed of scary critters arrives

Year	Source	Content
		in Species, a sci-fi thriller that owes a lot to Alien.
1995	Mighty Morphin Power Ranger	[The] world famous coach Gunthar Scmidt arrives in Angel Grove today [to scout for his gymnastics team.]
1996	Smithsonian	[A man on a tour received increased media attention with] each successive stop. In fact, a few days from now, when he arrives in Buffalo, New York, for a Juneteenth Festival . . . he'll be greeted by 60,000 festival goers."
1996	Associated Press	Volkswagen's biggest car, the Passat, will see slicker styling and improved safety features when it arrives in the United States next spring.
1996	CBS 48 Hours	Two people…are the keepers of the [Olympic] flame . . . until it arrives in Atlanta [for the Olympics.]
1996	People Weekly	Runaway Jury, the story of a high-stakes lawsuit against a tobacco company, which arrives in bookstores this week.

Year	Source	Content
1996	Ark. Rev.: J. Delta Studies	Marcie arrives in Baton Rouge at six o'clock. When I open the door, she throws her arms around my neck.
1996	Ark. Rev.: J. Delta Studies	[She] goes right into a detailed description of how she plans to breed iguanas once she arrives in Texas.
1996	Fantasy & Sci. Fiction	It seems as if the 1992 elections just ended, and yet this magazine arrives in your mailbox at the beginning of primary season.
1996	House Mouse, Senate Mouse	Later in the story, the children's letter arrives in the House mail room.
1996	Basquiat	She balls up the drawing and puts it in her pocket. Gina arrives in the doorway, wearing a robe. The landlady's trapped between them.
1996	Popular Mechanics	What Mitsubishi's 40-in. glass-plasma display will actually look like and how it will be configured when it arrives in

Year	Source	Content
		stores in early 1997 are still mysteries.
1996	Esquire	Dan "the Beast" Severn arrives in the Octagon [with people who announce him for a wrestling match.]
1996	Field & Stream	[A] fish [changes] between the evening when it is caught and the next morning when the fisherman arrives in the local coffee shop to tell of his catch.
1996	Smithsonian	If this were a video game, the screen might first show a stranger. He arrives in a rainy city [and founds a school].
1996	Associated Press	[The] Cuban President arrives in Chile [for a summit.]
1996	USA Today	The flight arrives in Newark but is late, and the team must go to the other end of the airport to catch its connecting flight to Hartford.
1996	San Francisco Chronicle	Yet nothing is for sure now. Moceanu arrives in Atlanta with a four-centimeter stress

Year	Source	Content
		fracture in her tibia that kept her out of the Olympic Trials
1996	The Simpsons	Every month, Good Housekeeping arrives in my mailbox bursting with recipes.
1996	Chicago Sun-Times	None of this rich thematic material arrives in the form of dry discourse in *Arcadia*.
1996	Associated Press	The imported Catera arrives in small quantities this year in California, Oregon and Washington, then debuts in the Washington, D.C.-to-Boston area.

Table 2: 58 Uses of "Arrives in" to Describe When or How One Arrives

Year	Source	Content
1990	Nat'l Rev.	The obliging taxi driver who has taken us to a sung Latin Mass at St. Vitus's Gothic cathedral this morning arrives in time.
1990	Omni	Ninety percent of Hawaii's energy arrives in the form of imported oil.
1991	Atlanta J.-Const.	Bert Blyleven, also disabled, arrives in time before each home game to take a 90-minute bike ride around the stadium.
1990	San Francisco Chronicle	Moments after Hackman and his crony find Archer in a wilderness cabin, the mob arrives in a commando-style helicopter raid.
1990	Ethnology	Animals are slaughtered and a meal arrives in large brass trays.
1990	Rolling Stone	She arrives in a new red BMW, as well as in a wide-brimmed hat.

Year	Source	Content
1992	Passenger 57	Stuart Ramsay arrives in mid-conversation with a top executive.
1992	USA Today	A [BMW] 325is coupe arrives in March.
1992	USA Today	[The] [c]onvertible version of the 300ZX sports car arrives in April at about $39,000.
1992	USA Today	A station wagon arrives in September.
1992	Atlanta J.-Const.	Mussels and clams are average; chicken is chunks of white meat resembling the stuff that arrives in boxes, not on the bone; sliced chorizo sausage is so-so.
1992	Atlanta J.-Const.	[T]he daily stream of traffic arrives in 1994.
1992	Boston Coll. Env't Affairs L. Rev.	Perhaps the threat arrives in the form of a nearby sanitary landfill or a nuclear power plant.
1992	J. Info. Sys.	Since information arrives in time-sequenced, discrete event' packets, this is essen-

Year	Source	Content
		tially an optimal stopping problem.
1992	J. Info. Sys.	Since information arrives in discrete time-sequenced packets. . . .
1992	J. Info. Sys.	[A]ssume that S is updated in clusters of m=3 (e.g., it arrives in "bursts").
1993	ABS Sun News	A young girl is chosen to be the Rangeley angel and arrives in snowland style to light the tree.
1993	Babylon 5: The Gathering	[The four] governments have ambassadors here. Almost. The fourth arrives in two days.
1993	Kenyon Rev.	The lamb, a tiny, pure white female, arrives in a laundry basket. For Ariella it's love at first sight.
1993	Being Human	Hector's girlfriend Anna arrives in her car. It is a bright pink station wagon.
1993	Field & Stream	The Nobilem . . . is mechanically good and optically superb, comes with a leather neck strap that is too long, and arrives in a leather hard case

Year	Source	Content
		that is an object of great beauty.
1993	Compute!	Help arrives in the form of another undocumented feature.
1993	Omni	[T]he date Nostradamus named for the end of the world can be figured in several ways, depending on the chosen starting point, so that Armageddon arrives in the year 2000 or later, in 3797.
1993	Chicago Sun-Times	[A m]id-size, extra-roomy Sonata sedan arrives in March as [a] thoroughly revamped but inexpensive early 1995 model.
1993	Chicago Sun-Times	[This] Eclipse has [a] short production run because [the] redesigned 1995 model arrives in spring.
1994	Cobb	Wagner takes the throw as Cobb arrives in a spikes-up slide.
1994	Literary Rev.	[I]t never occurs to him that he arrives in a plaid suit and all others are wearing T-shirts.

Year	Source	Content
1994	Mass. Rev.	Then the Don, Death arrives in a big old Benz.
1994	Fantasy & Sci. Fiction	The ship arrives in midafternoon. Why don't we just wait for it?
1994	San Francisco Chronicle	As is now usual with Stone films, this one arrives in a highly marketable cloud of controversy.
1994	Chicago Sun-Times	Callaway arrives in midmorning, having read late into the night before.
1994	Giorgino	Professor Beaumont arrives in a moment.
1995	San Francisco Chronicle	The adulation arrives in torrents, gathering at Mike Tyson's feet in three-foot drifts.
1995	TIME	It will take an outsider to revive this troubled lot, and she arrives in the form of Bette Mack, a taciturn beauty in pink sneakers.
1995	Copycat	Ruben arrives in a taxi.
1995	Braveheart	The undertaker arrives in his hearse.

Year	Source	Content
1995	Feminist Studies	The boss always arrives in a bad mood, but he never has a reason for being angry with Mery Yagual.
1995	Chicago Sun-Times	Not to be outdone, the tiramisu arrives in a wine glass.
1995	Am. Studies Int'l	The great white buffalo heralded by Native prophesy arrives in the form of a white motor home. The medicine pipe is sold.
1995	Space: Above and Beyond	The miners are preparing to transfer ice ore to a heavily armed convoy which arrives in two days.
1996	Chicago Sun-Times	Amish-raised chicken arrives in a deep bowl, the pieces of chicken sharing space with chunks of roasted potatoes.
1996	NY Times	Sally Field arrives in a square Volvo wagon for the wild children's birthday party.
1996	NY Times	When Harrison Ford is called to the White House in *Clear and Present Danger*, he arrives in his Taurus station wagon.

Year	Source	Content
1996	Popular Sci.	If these procedures or any of the team's diagnostic tests indicate that an engine is malfunctioning, it's removed entirely, placed in a handsome aluminum shipping container, and replaced—straightaway—with another that arrives in a similar container.
1996	The Rock	The President arrives in three hours.
1996	Bicycling	Kestrel, the first production, one-piece, airfoil-designed carbon frame, arrives in '86.
1996	Beavis and Butt-head Do America	We pan back to the hotel as Muddy arrives in a cab.
1996	Saturday Evening Post	Sometimes a rescue squad arrives in time to revive the victim.
1996	USA Today	The front-wheel-drive S70 sedan arrives in fall as the successor to the midrange 800-series.
1996	USA Today	An all-new Accent arrives in fall.

Year	Source	Content
1996	USA Today	The sexy SLK roadster that's been making the rounds of the international auto shows arrives in early '97, with two key features.
1996	The Rock	Okay. Okay. The President arrives in three hours.
1996	USA Today	A redesigned version of the midsize Regal arrives in spring.
1996	USA Today	A successor to the compact Corsica sedan arrives in early 1997.
1996	USA Today	In addition, a successor to the Ciera, rebadged a Cutlass, arrives in early 1997.
1996	USA Today	A redesigned Maxima sedan arrives in fall.
1996	Raritan	And Auden's version of the faithful Sarah Young arrives in time to see what he is up to.
1996	ABA J.	This [comment] arrives in the ponderous, thoughtful tones you would expect from someone who has Higginbotham's

Year	Source	Content
		new life as an ombudsman for the American establishment.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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

AL OTRO LADO, INC.; ABIGAIL DOE, BEATRICE DOE, CAROLINA DOE, DINORA DOE, INGRID DOE, ROBERTO DOE, MARIA DOE, JUAN DOE, VICTORIA DOE, BIANCA DOE, EMILIANA DOE, AND CESAR DOE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

ALEJANDRO MAYORKAS, SECRETARY U.S. DEPARTMENT OF HOMELAND SECURITY, IN HIS OFFICIAL CAPACITY; TROY A. MILLER, ACTING COMMISSIONER, U.S. CUSTOMS AND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY; WILLIAM A. FERRERA, EXECUTIVE ASSISTANT COMMISSIONER, OFFICE OF FIELD OPERATIONS, U.S. CUSTOMS AND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY, DEFENDANTS[1]

Filed: Aug. 23, 2022

FINAL JUDGMENT

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[1] Because all Defendants are sued in their official capacities, the successors for these public offices are automatically substituted as Defendants per Fed. R. Civ. P. 25(d).

Having decided this matter on summary judgment, after consideration of the parties' cross-motions for summary judgment, oral argument on the parties' cross-motions for summary judgment, and the parties' subsequent briefing on remedies, this Court enters final judgment, resolving all claims in the operative Second Amended Complaint (ECF No. 189), in accordance with its opinions and orders entered on September 2, 2021 (ECF No. 742) and on August 5, 2022 (ECF Nos. 816 and 817), as follows:

Judgment is entered in favor of Defendants on Plaintiffs' First Claim for Relief ("Violation of the Right to Seek Asylum Under the Immigration and Nationality Act") and Fifth Claim for Relief ("Violation of the Non-Refoulement Doctrine").

Judgment is entered in favor of Plaintiffs and the Class[2] on their Second Claim for Relief ("Violation of Section 706(1) of the Administrative Procedure Act") and Fourth Claim for Relief ("Violation of Procedural Due Process").

Plaintiffs' Third Claim for Relief ("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") is **DISMISSED** as **MOOT**.

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[2] The "Class" is the class certified by this Court on August 6, 2020, defined as "all noncitizens who seek or will seek to access the U.S. asylum process by presenting themselves at a Class A [Port of Entry] on the U.S.-Mexico border, and were or will be denied access to the U.S. asylum process by or at the instruction of [U.S. Customs and Border Protection] officials on or after January 1, 2016" (ECF No. 513).

The Court grants the following relief concerning Plaintiffs' Second and Fourth Claims for Relief:

(1) The Court **ORDERS** Defendants to restore the *status quo ante* for the named Plaintiffs prior to Defendants' unlawful conduct, including by taking the necessary steps to facilitate Beatrice Doe's entry into the United States, including issuing any necessary travel documents to allow her to travel to the United States (by air if necessary) and to ensure her inspection and asylum processing upon arrival.

(2) The Court **DECLARES** that, absent any independent, express, and lawful statutory authority, Defendants' denial of inspection or asylum processing to Class Members who have not been admitted or paroled, and who are in the process of arriving in the United States at Class A Ports of Entry, is unlawful regardless of the purported justification for doing so.

(3) The Court **CONVERTS** its prior preliminary injunctive-relief orders (ECF Nos. 330, 605, 671, 674) to a **PERMANENT INJUNCTION**, as follows:

   a. Defendants and the Executive Office for Immigration Review ("EOIR") are permanently **ENJOINED** from applying the interim final rule entitled "Asylum Eligibility and Procedural Modifications," 84 Fed. Reg. 33,829 (July 16, 2019) (the "Interim Final Transit Rule") or the final rule entitled Asylum Eligibility and Procedural Modifications, 85 Fed. Reg. 82,260 (Dec. 17, 2020) ("Final

Transit Rule") to members of the "Preliminary Injunction Class"—defined as "all non-Mexican asylum seekers who were unable to make a direct asylum claim at a U.S. [Port of Entry] before July 16, 2019 because of the U.S. Government's metering policy, and who continue to seek access to the U.S. asylum process"—and **ORDERED** to return to the pre-Transit Rule practices for processing the asylum applications of members of the Preliminary Injunction Class.[3]

b. The Department of Homeland Security ("DHS") and EOIR must take immediate affirmative steps to reopen or reconsider past determinations that potential Preliminary Injunction Class Members were ineligible for asylum based on the Interim Final Transit Rule, for all potential Preliminary Injunction Class Members in expedited or regular removal proceedings. Such steps include

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[3] Defendants suggest in their proposed Final Judgment that by this Court's order at ECF No. 815, it did not convert to a permanent injunction the preliminary injunction enjoining the Final Transit Rule, entered at ECF No. 674. This Court had temporarily restrained application of the Final Transit Rule to the Preliminary Injunction Class Members on January 18, 2021, reasoning that this Rule was, in essence, "an extension of the [Interim Transit Rule] previously enjoined" (ECF No. 671); the parties jointly moved to convert the Court's temporary restraining order into a preliminary injunction on January 29, 2021 (ECF No. 674). Although Plaintiffs did not explicitly seek conversion of the Court's order at ECF No. 674, it would be illogical given the substantial similarity between the Interim Final Transit Rule and the Final Transit Rule, were the permanent injunction entered at ECF No. 816 incorporate the former but not the latter.

identifying affected Preliminary Injunction Class Members and either directing immigration judges or the Board of Immigration Appeals to reopen or reconsider their cases or directing DHS attorneys representing the government in such proceedings to affirmatively seek, and not oppose, such reopening or reconsideration.

c. Defendants must inform identified Preliminary Injunction Class Members in administrative proceedings before United States Citizenship and Immigration Services or EOIR, or in DHS custody, of their class membership, as well as the existence and import of the Preliminary Injunction (ECF No. 330), Clarification Order (ECF No. 605), and Order Converting Preliminary Injunction into a Permanent Injunction (ECF No. 816).

d. Defendants must make all reasonable efforts to identify Preliminary Injunction Class Members, including but not limited to reviewing their records for notations regarding class membership made pursuant to the guidance issued on November 25, 2019, and December 2, 2019, to U.S. Customs and Border Protection and sharing information regarding Class Members' identities with Plaintiffs.

The Clerk of Court is directed to close this case.

IT IS SO ORDERED.

DATED: August 23, 2022

/s/ CYNTHIA BASHANT
Hon. CYNTHIA BASHANT
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Case No. 17-cv-2366-BAS-KSC

AL OTRO LADO, INC.; ABIGAIL DOE, BEATRICE DOE, CAROLINA DOE, DINORA DOE, INGRID DOE, URSULA DOE, JOSE DOE, ROBERTO DOE, MARIA DOE, JUAN DOE, VICTORIA DOE, BIANCA DOE, EMILIANA DOE, AND CESAR DOE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

ALEJANDRO MAYORKAS, SECRETARY U.S. DEPARTMENT OF HOMELAND SECURITY, IN HIS OFFICIAL CAPACITY; CHRIS MAGNUS COMMISSIONER, U.S. CUSTOMS AND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY; PETE FLORES, EXECUTIVE ASSISTANT COMMISSIONER, OFFICE OF FIELD OPERATIONS, U.S. CUSTOMS AND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY, DEFENDANTS[1]

[Filed: Aug. 5, 2022]

REMEDIES OPINION

In its September 2, 2021 decision, this Court held the right to access the U.S. asylum process conferred vis a

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[1] Because all Defendants are sued in their official capacities, the successors for these public offices are automatically substituted as Defendants per Fed. R. Civ. P. 25(d).

vis § 1158(a)(1) applies extraterritorially to noncitizens who are arriving at Class A POEs along the U.S.-Mexico border, but who are not yet within the jurisdiction of the United States, and is of a constitutional dimension. (Op. Granting in Part and Denying in Part Parties' Cross-Mots. for Summ. J. ("MSJ Opinion"), ECF No. 742.) It further held that Defendants' systematic turnbacks of asylum seekers arriving at Class A POEs (the "Turnback Policy") amounted to an unlawful withholding by immigration officials of their mandatory ministerial "inspection and referral duties" detailed in 8 U.S.C. § 1225 ("§ 1225"), in violation of the Administrative Procedures Act, 5 U.S.C. § 706(1) *et seq.*, and the Fifth Amendment Due Process Clause. (MSJ Opinion at 33-34, 37-38); *see* 8 U.S.C. §§ 1225(a)(3) (mapping out immigration officials' duty to inspect asylum seekers), 1225(b)(1)(A)(ii) (mapping out immigration officials' duty to refer asylum seekers to the U.S-asylum process).

In casting appropriate equitable relief to rectify the irreparable injury Defendants' unauthorized and constitutionally violative Turnback Policy has inflicted upon members of the Plaintiff class,[2] this Court ordinarily

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[2] Plaintiffs consist of the named Plaintiffs listed in the case caption, along with a certified class consisting of "all noncitizens who seek or will seek to access the U.S. asylum process by presenting themselves at a Class A [POE] on the U.S.-Mexico border, and were or will be denied access to the U.S. asylum process by or at the instruction of [Customs and Border Protection] officials on or after January 1, 2016." (Class Certification Order at 18, ECF No. 513.) The Court also certified a subclass consisting of "all noncitizens who were or will be denied access to the U.S. asylum process at a Class A POE on the U.S.-Mexico border as a result of Defendants' metering policy on or after January 1, 2016." (*Id.*)

would be guided by the fundamental principle that an equitable remedy should be commensurate with the violations it is designed to vindicate. *See Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 465 (1979) ("[It is an] accepted rule that the remedy imposed by a court of equity should be commensurate with the violation ascertained."). Equitable relief should leave no stone unturned: it should correct entirely the violations it is aimed at vindicating. That cornerstone of Article III courts' equitable powers generally is unfaltering, whether the party against whom an injunction is sought is a private entity, a state actor, or, as here, a federal official. Thus, in the ordinary course of things, this Court would not hesitate to issue broad, programmatic relief enjoining Defendants from now, or in the future, turning back asylum seekers in the process of arriving at Class A POEs, absent a valid statutory basis for doing so.

Yet the circumstances with which this Court is presented are not ordinary because of the extraordinary, intervening decision of the United States Supreme Court in *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022). That decision takes a sledgehammer to the premise that immigration enforcement agencies are bound to implement their mandatory ministerial duties prescribed by Congress, including their obligation to inspect and refer arriving noncitizens for asylum, and that, when immigration enforcement agencies deviate from those duties, lower courts have authority to issue equitable relief to enjoin the resulting violations. It does so through unprecedented expansion of a provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1989 ("IIRIRA"), 8 U.S.C. § 1252(f)(1) *et seq.* ("§ 1252(f)(1)"), which for years the Ninth Circuit has interpreted as placing a relatively nar-

row limit on injunctive relief. In essence, *Aleman Gonzalez* holds that § 1252(f)(1) prohibits lower courts from issuing class-wide injunctions that "require officials to take actions that (in the Government's view) are not required" by certain removal statutes, including § 1225, or "to refrain from actions that (again in the Government's view) are allowed" by those same provisions. *Id.*, 142 S. Ct. at 2065. Federal courts (except for the Supreme Court) now may only issue injunctions enjoining federal officials' unauthorized implementation of the removal statutes in the individual cases of noncitizens against whom removal proceedings have been initiated. *See id.*

In no uncertain terms, the logical extension of *Aleman Gonzalez* appears to bestow immigration enforcement agencies *carte blanche* to implement immigration enforcement policies that clearly are unauthorized by the statutes under which they operate because the Government need only *claim* authority to implement to immunize itself from the federal judiciary's oversight.

With acknowledgment that its decision will further contribute to the human suffering of asylum seekers enduring squalid and dangerous conditions in Mexican border communities as they await entry to POEs, this Court finds the shadow of *Aleman Gonzalez* inescapable in this case. Even the most narrow, meaningful equitable relief would have the effect of interfering with the "operation" of § 1225, as that term is construed by the *Aleman Gonzalez* Court, and, thus, would clash with § 1252(f)(1)'s remedy bar. *Aleman Gonzalez* not only renders uneconomical vindication of Plaintiff class members' statutorily- and constitutionally-protected right to apply for asylum, those inefficiencies inevitably will lead

to innumerable instances in which Plaintiff class members will be unable to vindicate their rights at all. Thus, while the majority and dissent in *Aleman Gonzalez* hash out their textual disagreements concerning § 1252(f)(1)'s scope in terms of remedies, make no mistake, *Aleman Gonzalez* leaves largely unrestrained immigration enforcement agencies to rapaciously scale back rights. *See* Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 San Diego L. Rev. 1633, 1634 (2004) ("Disputes over remedies provide a convenient way for dissenters to resist conformance to legal guarantees. Courts can declare rights, but then default in the remedy to avoid a politically unpopular result." (footnote omitted)).

Although it is no substitute for a permanent injunction, class-wide declaratory relief is both available and warranted here. In lieu of even a circumscribed injunction enjoining Defendants from again implementing a policy under which they turn back asylum seekers presenting themselves at POEs along the U.S.-Mexico border, the Court enters a declaration in accordance with its MSJ Opinion that turning back asylum seekers constitutes both an unlawful withholding of Defendants' mandatory ministerial inspection and referral duties under § 1158 and § 1225 in violation of both the APA and the Fifth Amendment Due Process Clause. The Court also issues relief as necessary to named Plaintiff Beatrice Doe.

I. BACKGROUND[3]

On September 2, 2022, this Court granted Plaintiffs' motion for summary judgment on their APA and Fifth Amendment claims.[4] (*See generally* MSJ Op.) Specifically, this Court found that Defendants' implementation of the Turnback Policy withheld their mandatory ministerial duties to inspect and refer asylum seekers who present themselves at Class A POEs along the U.S.-Mexico border, but who are not yet within the jurisdiction of the United States, in violation of Section 706(1) of the APA.[5] (*See id.* at 34.) This Court further found that, because Defendants' withholding of inspection and referral duties infringed upon the Plaintiff class's right to access the U.S.-asylum process secured by § 1158(a)(1), and because the Plaintiff class's Fifth Amendment due process rights are coextensive with that statute, the Turnback Policy also violates the Fifth Amendment. (*Id.* at 37-38.)

The Court asked the parties to weigh in on what equitable relief these statutory and constitutional viola-

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[3] Familiarity with this Court's prior orders granting in part and denying in part Defendants' motion to dismiss ("MTD Opinion") (ECF No. 280) and MSJ Opinion is presumed. The factual and procedural history needed to understand this Remedies Opinion is found in the background section of those Opinions.

[4] This Court also found legally invalid on summary judgment Plaintiffs' claims Defendants committed *ultra vires* violations of the Plaintiff class's right to seek asylum under the Immigration and Nationality Act ("INA") and violated the Alien Tort Statute. (MSJ Opinion at 11-13, 38-43.)

[5] The term "inspection and referral duties" to which the Court alludes throughout retains the same meaning given to that term in the MSJ Opinion. (MSJ Opinion at 8 n.7.) Those duties refer to the asylum provision in § 1158(a)(1), which this Court found bestows

tions warrant. (*Id.* at 44.) The parties contemporaneously filed briefs in accordance with the MSJ Opinion on October 1, 2021. (*See* Pls.' Remedies Br., ECF No. 768; Defs.' Remedies Br., ECF No. 770.) Plaintiffs additionally filed a Proposed Order listing the injunctive, oversight, and declaratory relief they believe is appropriate to rectify Defendants' systemic violations. (*See* Proposed Order, ECF No. 773-4.) On October 22, 2021, Defendants sought leave to file essentially a sur-reply, which addresses the purported overbreadth of Plaintiffs' proposed class-wide injunctions.[6] (*See* Mot. for Leave to File Sur-Reply, ECF No. 773; Defs.' Sur-Reply, ECF No. 773-2.)

Several requests for relief Plaintiffs proffer are not in dispute. The parties agree Plaintiffs are entitled under the APA to vacatur of the Department of Homeland Security ("DHS")'s Metering Guidance and Prioritization-Based Que Management ("PBQM") Memorandum and the Office of Field Operations' Metering Guidance Memorandum, both of which served to formalize Defendants' Turnback Policy in approximately 2018. (*See* Proposed Order ¶ 5; Defs.' Remedies Br. at 6-8 (propos-

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upon noncitizens who are in the process of arriving at a Class A POE—but who are still physically outside the international boundary line at the POE—a right to apply for asylum, and § 1225, which sets forth specific asylum processing duties Defendants must undertake to give meaning to that right. *See* 8 U.S.C. §§ 1225(a)(3) (delineating immigration officers' duty to inspect), 1225(b)(1)(A)(ii) (delineating immigration officers' duty to refer).

[6] The Court **GRANTS** Defendants leave to file a sur-reply (ECF No. 773), but notes that Defendants' arguments therein were irrelevant to the issue on which this Court's decision not to enter a class-wide injunction ultimately turns: whether § 1252(f)(1)'s remedy bar applies to this case. *See infra* Sec. III.A.

ing vacatur of the Memoranda as an appropriate form of relief).)

Furthermore, Defendants do not appear to oppose entry of an order restoring the *status quo ante* for named Plaintiffs Roberto Doe and Beatrice Doe, including requiring Defendants to issue any necessary travel documents to allow them to travel to the United States and to ensure their processing for asylum upon arrival. (*See* Proposed Order ¶ 7.)

Finally, Defendants appear to welcome Plaintiffs' request for entry of a declaratory judgment giving legal effect to the MSJ Opinion's conclusion that § 1158 and § 1225 *require* Defendants to inspect and refer noncitizens who present themselves at Class A POEs but who are not yet within the jurisdiction of the United States (*see* MSJ Opinion 33-34). (*See* Proposed Order ¶ 1; Defs.' Remedies Br. at 6-8 (encouraging Court to enter class-wide declaratory relief, which can then be used "as a predicate to further relief, including an injunction" in individual suits by Plaintiff class members seeking an injunction against Defendants).)

Despite these areas of agreement, there is contentious disagreement concerning whether this Court has authority to enter class-wide injunctive relief and, if so, the proper scope of such relief. Plaintiffs primarily request the Court to issue a class-wide injunction stating:

> Defendants and others acting at their direction or in active concert or participation with them are PERMANENTLY ENJOINED from turning away, turning back, or otherwise denying access to inspection and/or asylum processing to noncitizens who have not been admitted or paroled and who are in the process

> of arriving in the United States at Class A Ports of Entry regardless of their purported justification for doing so, absent any independent, express, and lawful statutory authority to do so outside of Title 8 of the U.S. Code.

(Proposed Order ¶ 2.) Plaintiffs also seek an ancillary injunction directing Defendants and the Executive Office of Immigration Review "[t]o inspect and provide asylum" to each Plaintiff class member "under the rules and regulations that would have applied [to each member] at the time" he or she would have first entered the United States, but for Defendants' unlawful Turnback Policy. (*Id.* ¶ 3.)[7] Finally, Plaintiffs seek appointment of Magistrate Judge Karen S. Crawford as special master pursuant to Federal Rule of Civil Procedure ("Rule") 65 to monitor and oversee Defendants' implementation of all class-wide injunctive relief. (*Id.* ¶ 8.)

Defendants contend the IIRIRA at § 1252(f)(1) bars *any* class-wide injunctive relief in the instant case. (*See* Defs.' Remedies Br. at 3-4.) They aver § 1252(f)(1),

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[7] Additionally, Plaintiffs ask the Court to convert into a permanent injunction the Preliminary Injunction enjoining application of 8 C.F.R. § 208.13(c)(4), known more commonly as the "Asylum Ban," to the immigration proceedings of members of a provisionally certified class consisting of "non-Mexican asylum seekers who were unable to make a direct asylum claim at a [Class A POE] before July 16, 2019 because of [Defendants'] metering policy" (Prelim. Inj., ECF No. 330). (*See* Proposed Order ¶ 4; *see also* Clarification Order, ECF No. 605.) The Court addresses this request for class-wide injunctive relief separately in its contemporaneously filed Opinion at ECF No. 816, which principally resolves Plaintiffs' motions to essentially clarify for a second time the contours of the Preliminary Injunction and Clarification Orders (*see* ECF Nos. 644, 736).

which prohibits lower courts from "enjoin[ing] or restrain[ing] the operation of [8 U.S.C. §§ 1221 through 1332]," precludes entry of even a circumscribed injunction enjoining Defendants' unauthorized practice of turning back asylum seekers arriving at Class A POEs because such an injunction would interfere with the "operation" of § 1225. (Defs.' Remedies Br. at 3-4.) Defendants further argue that Plaintiffs have failed to show that a balancing of the parties' respective hardships and the public interest favor entry of their proposed permanent injunctions. Moreover, they contend the class-wide injunctions set forth in the Proposed Order are overbroad, impermissibly vague, and would threaten to hamper implementation of the Department of Health and Human Services' Center for Disease Control and Prevention ("CDC") orders, which, with limited exceptions, effectively suspend asylum processing at land POEs pursuant to 42 U.S.C. § 265 ("Title 42") to prevent the spread of COVID-19 virus at POE facilities. (*See* Defs.' Remedies Br. at 8-18; Defs.' Sur-Reply at 7-12.)

Several intervening factual developments since the MSJ Opinion have rendered moot certain of Plaintiffs' requests for relief in their Proposed Order. On November 2, 2022, Defendants voluntarily rescinded the PBQM and Metering Guidance Memoranda; those Memoranda have not been replaced with revised or amended policy documents. (*See* Rescission of June 5, 2018, Prioritization-Based Queue Management Memorandum, Ex. 2 to Notice of Administrative Action ("NOAA"), ECF No. 775-2; Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry, Ex. 1 to NOAA, ECF

No. 775-1.)[8] Then, on January 28, 2022, the parties indicated that Plaintiff Roberto Doe had arrived in the United States by commercial airline and was allowed to access the U.S.-asylum process. (*See* Joint Status Report, ECF No. 796.)

In addition to these factual developments, the legal landscape concerning § 1252(f)(1) has changed drastically since the MSJ Opinion. At the time of the MSJ Opinion, it was the law in the Ninth Circuit that § 1252(f)(1) "d[id] not . . . categorically insulate immigration enforcement from judicial classwide injunctions." *Gonzalez v. United States Immigration & Customs Enf't*, 975 F.3d 788, 812 (9th Cir. 2020). Rather, the Ninth Circuit left in place lower courts' authority to enjoin or restrain immigration enforcement agencies' *violations* of the covered statutory provisions. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010) (citing *Ali v. Ashcroft*, 346 F.3d 873, 896 (9th Cir. 2003)).

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[8] Despite rescission of the PBQM and Metering Guidance Memoranda in November of 2021, asylum processing at the U.S.-Mexico border is still restricted in light of the CDC's COVID-19 Title 42 orders, which generally "suspend[s] the introduction of persons into the United States" who are "traveling from Canada or Mexico (regardless of their country of origin) [and] who would otherwise be introduced into a congregate setting in a land [POE] or Border Patrol station at or near the United States borders with Canada and Mexico[.]" 85 Fed. Reg. 17,060 (Mar. 26, 2020). On April 1, 2022, CDC Director Rochelle Walensky issued an order terminating the then-operative Title 42 order, *see* 87 Fed. Reg. 15,243 (Mar. 17, 2022). 87 Fed. Reg. 19,941 (Apr. 6, 2022). However, the CDC's rescission was enjoined by a district court in the Lafayette Division of the Western District of Louisiana on May 20, 2022. *See Louisiana v. Ctrs. for Disease Control & Prevention*, --- F. Supp. 3d ---, 2022 WL 1604901, at *1 (W.D. La. May 20, 2022). The legality of the Title 42 orders is not at issue in this case.

The Ninth Circuit did so on the ground that when immigration enforcement agencies implement their duties under §§ 1221 through 1332 in a manner that is not authorized by those statutes, an injunction rectifying the resulting violation(s) does not enjoin the "operation" of those statutes. *See id.*

But on June 13, 2022, the Supreme Court effectively held in *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022) ("*Aleman Gonzalez*"), that § 1252(f)(1) prohibits lower court injunctions that enjoin even immigration enforcement agencies' "unlawful" or "improper operation" of the covered provisions, including § 1225. *Id.* at 2065 (holding injunctions that "require officials [either] to take actions that (in the Government's view) are not required by [§§ 1221-32]" or "to refrain from actions that (again in the Government's view) are allowed by [§§ 1221-32]" are barred by § 1252(f)(1)). *Aleman Gonzalez* has breathed new life into Defendants' contention that this Court is foreclosed by § 1252(f)(1) from simply enjoining Defendants' unauthorized turnbacks or directing Defendants to administer their inspection and referral duties with respect to Plaintiff class members. (*See* Defs.' Supp. Br., ECF No. 813.) Plaintiffs acknowledge *Aleman Gonzalez* has truncated the legal ground for the injunctive relief they seek; however, they aver there still exist paths forward to rectify in a single order the systemic statutory and constitutional violations found in the MSJ Opinion. (*See* Pls.' Supp. Br., ECF No. 814.)

II. LEGAL STANDARD

A. Permanent Injunctive Relief

In the Ninth Circuit, a plaintiff who seeks a permanent injunction must satisfy a four-factor test. *See Kurin, Inc. v. Magnolia Med. Techs., Inc.*, 473 F. Supp. 3d 1117, 1141 (S.D. Cal. July 20, 2020) (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). A plaintiff must establish:

> (1) [t]hat it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction [("*eBay* factors")].

eBay Inc., 547 U.S. at 391. Where the Government is the party opposing issuance of injunctive relief, the above-mentioned third and fourth factors—balancing of hardships and public interest—merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). This merger requires the Court to examine whether "any significant 'public consequences' would result from issuing the preliminary injunction" and, if so, whether they favor or disfavor its entry. *See Fraihat v. United States Immigration & Customs Enf't*, 445 F. Supp. 3d 709, 749 (C.D. Cal. 2020) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

It is well-established that deprivation of a constitutional right "unquestionably constitutes irreparable injury," and that no public interest is served by withholding equitable relief without which those rights will con-

tinue to be infringed. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("*Melendres I*") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959 (9th Cir. 2002) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.").

District courts have "broad discretion to fashion injunctive relief" to eliminate constitutional violations. *See Melendres v. Maricopa Cty.*, 897 F.3d 1217, 1221 (9th Cir. 2018) ("*Melendres IV*"); *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) ("Where . . . a constitutional violation has been found, the remedy does not exceed the violation if the remedy is tailored to cure the condition that offends the Constitution." (internal quotation marks and citation omitted). "Further, where the enjoined party has a 'history of noncompliance with prior orders,' and particularly where the trial judge has 'years of experience with the case at hand,' [district courts are given] a 'great deal of flexibility and discretion in choosing the remedy best suited to curing the violation.'" *Melendres IV*, 897 F.3d at 1221 (quoting *Melendres v. Arpaio*, 784 F.3d 1254, 1265 (9th Cir. 2015)).

B. Declaratory Judgment Act

The Declaratory Judgment Act provides, in pertinent part, that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a); *see* Fed. R. Civ. P. 57 ("The existence of another adequate remedy does not preclude a declaratory judgment that is other-

wise appropriate."); *see also In re Singh*, 457 B.R. 790, 798 (Bankr. E.D. Cal. 2011) ("Declaratory relief is an equitable remedy distinctive in that it allows adjudication of rights and obligations on disputes regardless of whether claims for damages or injunction have arisen.").

The question whether to issue declaratory relief is a matter of the district court's sound discretion. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) ("By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver[.]"). A court's decision to enter declaratory relief must be firmly implanted "in sound reason," *McGraw-Edison Co. v. Preformed Line Products. Co.*, 362 F.2d 339, 342 (9th Cir. 1966) (quoting *Yellow Cab Co. v. City of Chicago*, 186 F.2d 946, 950-51 (7th Cir. 1951)), and should be issued with "two principal criteria guiding the policy in favor of rendering declaratory judgments" in mind: (1) "clarifying and settling the legal relations in issue"; and (2) "terminat[ing] and afford[ing] relief from the uncertainty, insecurity, and controversy giving rise to the proceeding," *id.* (quoting Borchard, *Declaratory Judgments* 299 (2d ed. 1941)). *See also Crossley v. California*, 479 F. Supp. 3d 901, 920 (S.D. Cal. 2020).

III. ANALYSIS

A. Class-Wide Permanent Injunction

1. 8 U.S.C. § 1252(f)(1)

Among the "'judicial power[s]' committed to the federal courts by Article III" is the power to grant broad, equitable relief, including on a class-wide basis. *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010) ("*Rodriguez*") (citing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 460, 462 (1855)). These "traditional

equitable powers can be curtailed only by an unmistakable legislative command." *Id.*; *see Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("Unless 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.").

Here, the remedy-stripping statute at issue is § 1252(f)(1). That provision states:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, [which includes § 1225,] as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1252(f)(1). Section 1252(f)(1) is "nothing more or less than a limit on injunctive relief." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999).

At the heart of the parties' dispute concerning remedies is whether § 1252(f)(1) is so broad in scope as to preclude the entry of any permanent class-wide injunction that remediates Defendants' statutory and constitutional violations.

2. The Ninth Circuit's Interpretation of § 1252(f)(1)

It has been the law in the Ninth Circuit for nearly twenty years that § 1252(f)(1) "does not . . . categorically insulate immigration enforcement from judicial classwide injunctions." *Gonzalez v. U.S. Immigration & Customs Enf't*, 975 F.3d 788, 812 (9th Cir. 2020) (internal quotation marks omitted). The Ninth Circuit concluded in *Ali v. Ashcroft*, 346 F.3d 873, 886 (9th Cir. 2003) ("*Ali*"), *vacated on unrelated grounds sub nom. Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2005), and reaffirmed in *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010), that § 1252(f)(1) does not prohibit injunctions that "enjoin or restrain" *violations* of the covered provisions therein. The Ninth Circuit found there is a qualitative distinction between injunctions that "enjoin or restrain the *operation* of [§§ 1221-32]" and those that direct immigration enforcement agencies to conform their extralegal conduct that "is not even authorized" under the covered provisions. *Ali*, 346 F.3d at 886 (emphasis added and citations omitted).

Thus, in the Ninth Circuit, lower courts have had authority to enter injunctions against violations of the detention statutes. *See Rodriguez*, 591 F.3d at 1120 (holding § 1252(f)(1) "prohibits only injunction[s] of 'the operation of' the detention statutes, not injunction[s] of a violation of th[ose] statutes"); *see also Immigrant Defs. Law Ctr. v. U.S. Dep't of Homeland Sec.*, No. CV 21-0395 FMO (RAOx), 2021 WL 4295139, at *7 (C.D. Cal. July 27, 2021) ("To the extent plaintiffs establish that the remedy they seek addresses violations of the relevant statutes, § 1252(f) will not be an obstacle to relief."); *Osny Sort-Vasquez Kidd v. Mayorkas*, No. 2:20-

cv-3512-ODW (JPRx), 2021 WL 1612087, at *5 (C.D. Cal. Apr. 26, 2021) ("Whereas Plaintiffs seek . . . an injunction to prevent further violations, such requested relief does not target 'the operation of' the Immigration and Nationality Act ('INA'). Plaintiffs' attempt to enjoin 'violation of' the INA through unconstitutional practices falls outside the injunction bar of § 1252(f)(1)."); *accord Grace v. Barr*, 965 F.3d 883, 907 (D.C. Cir. 2020) ("[S]ection 1252(f)(1) . . . places no restriction on the district court's authority to enjoin agency action found to be unlawful." (emphasis omitted)).[9]

Prior to *Aleman Gonzalez*, this Court would have little difficulty finding that *Rodriguez* and *Ali* provide fertile ground upon which it could enter an injunction enjoining Defendants from turning back asylum seekers in the process of arriving at Class A POEs, or compelling Defendants to inspect and refer those individuals in accordance with § 1158(a)(1) and § 1225, despite § 1252(f)(1)'s remedial bar. Defendants' turning back of asylum seekers unlawfully withholds inspection and referral duties that § 1158(a)(1) and § 1225 require De-

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[9] The Supreme Court in *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018), accepted without repudiation the underlying logic of the Ninth Circuit's interpretation of § 1252(f)(1): that the injunction bar "d[oes] not affect [lower courts'] jurisdiction over . . . *statutory* claims because those claims d[o] not 'seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct . . . not authorized by the statutes.'" *Id.* (quoting *Rodriguez*, 591 F.3d at 1120). Here, however, there is little distinction between Plaintiffs' statutory and constitutional claims. Indeed, the MSJ Opinion found Plaintiffs' Fifth Amendment due process right to access the U.S.-asylum process is derived exclusively from statute, specifically by way of § 1158(a)(1) and the process of inspection and referral afforded in § 1225.

fendants to perform; by failing to perform those duties, Defendants act without statutory authority and commensurately violate the due process rights of Plaintiff class members. (*See* MSJ Opinion at 33-34, 37-38.) *Rodriguez* and *Ali* make explicitly clear that a class-wide injunction enjoining Defendants from withholding their inspection and referral duties would not interfere with the "operation" of § 1225 because such an injunction would be directed at unauthorized and unconstitutional practices. *See also Osny Sorto-Vasquez Kidd*, 2021 WL 1612087, at *5.

Nor would this Court have difficulty concluding each of the *eBay* factors tip decidedly in favor of such an injunction. *See* 547 U.S. at 391; *Nken*, 556 U.S. at 435. Plaintiffs have established irreparable harm. Defendants' Turnback Policy inflicted constitutional injuries upon members of the Plaintiff class. (MSJ Opinion at 37-38.) Deprivation of a Fifth Amendment due process right "unquestionably constitutes irreparable injury." *See Melendres I*, 695 F.3d at 1002. And while this harm is sufficient, it deserves special mention that Plaintiff class members have endured—and, absent injunctive relief, will continue to endure—another form of irreparable harm: preventable human suffering. *See Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017). As this Court has found repeatedly, and as the record reflects, Defendants' Turnback Policy "resulted in asylum seekers' deaths, assaults, and disappearances after they were returned to Mexico," (*see, e.g.*, Decl. of Erika Pinheiro ¶ 17 (attesting that in a survey of 12,500 refugees arriving at the U.S.-Mexico border prior to the Title 42 restrictions implemented in March of 2020, 30% of respondents reported having been kidnapped or having escaped attempted kidnapping and 40% reported having

been assaulted while waiting in Mexico), ECF No. 768-2), and has contributed to humanitarian crises in the Mexican border communities adjacent to Class A POEs (*see id.* ¶ 11 (attesting that, in Tijuana alone, "[t]housands of migrants live in a makeshift tent encampment . . . next to San Ysidro," where residents sleep under plastic tarps, have no bathrooms or access to running water, and are subjected to extreme weather conditions and organized crime)). (*See* SMJ Opinion at 32-33; MTD Opinion at 16-17.) Like constitutional injuries, the threat of physical danger and harm absent injunctive relief qualifies as irreparable. *Cf. Leiva-Perez v. Holder*, 640 F.3d 962, 969 (9th Cir. 2011) (holding irreparable harm inures where a noncitizen shows removal from the United States would place an individual in physical danger).

Furthermore, intolerable public consequences would arise from withholding classwide injunctive relief tailored to remediate the specific violations found in the MSJ Opinion. Without issuance of an injunction enjoining Defendants' systemic withholding of their referral and inspection duties, Defendants will continue to have free rein to trample upon Plaintiffs' statutory and constitutional rights. *See Melendres I*, 695 F.3d at 1002 ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights." (quoting *Sammartano*, 303 F.3d at 974)). Moreover, absent an injunction, noncitizens awaiting entry to the United States in Mexican border communities will continue to be exposed to great risk of illness, kidnapping, assault, and death. *See Hernandez*, 872 F.3d at 996 ("Faced with such a conflict between [defendant's] financial concerns and [plaintiff's] preventable human suffering, we have little difficulty concluding that the balance of hard-

ships tips decidedly in plaintiffs' favor." (quoting *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983))).

However, as Defendants assert, and Plaintiffs concede, *Aleman Gonzalez* completely changes this Court's calculus. (*See* Defs.' Suppl. Br. at 1-3.) The Court must answer the question whether *Ali* and *Rodriguez* are still viable post-*Aleman Gonzalez* and, if not, whether § 1252(f)(1) precludes issuance of a permanent class-wide injunction in this case.[10]

3. *Aleman Gonzalez* is Clearly Irreconcilable with *Ali* and *Rodriguez*

An intervening change in controlling law is found where the reasoning or theory of a case "is clearly irreconcilable with the reasoning or theory of intervening higher authority," *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003), or where "a subsequent decision 'creates a *significant shift* in [a court's] analysis,'" *Teamsters Local 617 Pension & Welfare Funds v. Apollo Grp., Inc.*, 282 F.R.D. 216, 222 (D. Ariz. 2012) (quoting *Beckstrand v. Elec. Arts Grp. Long Term Disability Ins. Plan*, No. CV F 05-0323 AWI LJO, 2007 WL 177907, at *2 (E.D. Cal. Jan. 19, 2007)). For example, "[i]ntervening Supreme Court authority only overrules past circuit precedent to the extent that the Supreme Court decision 'un-

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[10] Importantly, the Court notes that the Ninth Circuit requested briefing on precisely this issue on June 29, 2022 in *Leobardo Moreno Galvez v. Tracy Renaud*, No. 20-36052, Dkt. No. 62 ("The parties are directed to address . . . whether the Supreme Court's decision in *Aleman Gonzalez* overrules this Court's holding that Section 1252(f) prohibits only injunction of 'the operation of the detention statutes, not injunction of a violation of the statutes.'" (citing *Rodriguez*, 591 F.3d at 1120)). As of the date of this Opinion, the Ninth Circuit has yet to weigh in on the fate of *Rodriguez* and *Ali*.

dercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.'" *United States v. Cisneros*, 763 F.3d 1236, 1240 (9th Cir. 2014) (quoting *Miller*, 335 F.3d at 900)).

Before the Supreme Court in *Aleman Gonzalez* was the question whether the discretionary detention provision at 8 U.S.C. § 1231(a)(6), which enables the federal government to detain noncitizens pending removal, requires the Immigration and Naturalization Service ("INS") to provide bail hearings to individuals in DHS custody for a period of six months or more. 142 S. Ct. at 2057. The district courts in the two underlying cases certified classes consisting of individuals detained pursuant to § 1231(a)(6) for at least six months, concluded INS likely is required by statute to hold a bail hearing in the case of an individual detained for six months or more, and issued class-wide preliminary injunctive relief requiring INS to administer bail hearings to all class members. *See Gonzalez v. Sessions*, 325 F.R.D. 616, 629 (N.D. Cal. 2018), *aff'd sub nom.*, *Aleman Gonzalez v. Barr*, 955 F.3d 762, 766 (9th Cir. 2020); *Baños v. Asher*, No. C16-1454JLR, 2018 WL 1617706, at *1 (W.D. Wash. Apr. 4, 2018), *aff'd in relevant part sub nom.*, *Flores Tejada v. Godfrey*, 954 F.3d 1245, 1247 (9th Cir. 2020). The Ninth Circuit affirmed the lower courts' class certification and issuance of injunctive relief. *See Aleman Gonzalez*, 955 F.3d at 762; *Flores Tejada*, 954 F.3d at 1245. It did not address application of § 1252(f)(1) in either decision. *Aleman Gonzalez*, 955 F.3d at 762; *Flores Tejada*, 954 F.3d at 1245.

The Government appealed to the Supreme Court, which granted certiorari and *sua sponte* requested ad-

ditional briefing concerning whether § 1252(f)(1) precluded the lower courts from issuing preliminary injunctions in the first instance. *Aleman Gonzalez*, 142 S. Ct. at 2063.

On June 13, 2022, the Supreme Court held § 1252(f)(1) "generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out [§§ 1221-32]," with "one exception": lower courts "retain the authority to 'enjoin or restrain the operation of' the relevant statutory provisions 'with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.'" *Aleman Gonzalez*, 142 S. Ct. at 2065 (quoting 8 U.S.C. §1252(f)(1)). Applying this principle, the Supreme Court vacated the lower courts' preliminary injunctions, finding § 1252(f)(1) precluded those orders because they "require[d] officials to take actions that (in the Government's view) are not required by § 1231(a)(6) and to refrain from actions that (again in the Government's view) are allowed by § 1231(a)(6)" and, thus, "interfere[d] with the Government's efforts to operate § 1231(a)(6)." *Id.* at 2065.

Although it does not mention them by name, there can be little doubt *Aleman Gonzalez* repudiates the central holdings of *Ali* and *Rodriguez*. Indeed, the Supreme Court in *Aleman Gonzalez* poured cold water on the premise for which *Ali* and *Rodriguez* stand—that § 1252(f)(1) is inapplicable to injunctions that merely seek to force immigration enforcement agencies to implement the statute consistent with its terms—by concluding even injunctions that "enjoin or restrain" the "unlawful" or "improper operation," *i.e.*, violations, of

§ 1252(f)(1)'s covered provisions clash with that statute's remedy bar.[11] *Aleman Gonzalez*, 142 S. Ct. at 2066. Thus, following *Aleman Gonzalez*, this Court no longer can enter injunctive relief under *Ali* and *Rodriguez* that enjoins or restrains Defendants' unauthorized implementation of their mandatory ministerial inspection and referral duties on the ground that the practice of turning back arriving asylum seekers constitutes a violation, as opposed to the "operation," of § 1225.

4. 8 U.S.C. § 1252(f)(1) Bars Class-Wide Injunctive Relief

Having concluded *Aleman Gonzalez* appears to repudiate *Ali* and *Rodriguez*, this Court finds itself at odds between two competing obligations: its duty to avoid interpreting and applying § 1252(f)(1) in a manner that "produce[s] absurd results," *see Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982), and its overriding fidelity to apply controlling Supreme Court prece-

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[11] The *Aleman Gonzalez* Court's interpretation rests principally upon its observation that "it is very common to refer to the 'unlawful' or 'improper' operation of whatever it is that is being operated," pointing by way of example to, *inter alia*, cars, airplanes, railroads, radios, and video poker machines, all of which "can be unlawfully or improperly operated." *Aleman Gonzalez*, 142 S. Ct. at 2066. Of course, whether lawfully operated or not, a car is still a car, an airplane is still an airplane, a railroad is still a railroad, a radio is still a radio, and a video poker machine is still a video poker machine. The unlawful or improper operation of those objects does not fundamentally change what they are. The same cannot be said of a law. As the dissent in *Aleman Gonzalez* opines, when officials unlawfully operate a statute, they put the statute at odds with itself: a contradiction that neither withstands textual interpretation nor logic. *Id.* at 2074 (Sotomayor, J., dissenting).

dent, *see Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001).

On the one hand, *Aleman Gonzalez* flips on their heads two fundamental principles that guide Article III courts in exercising their inherent judicial powers: that "it is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), and that when government officials exceed the scope of their statutory authority as properly interpreted by the federal courts, federal courts have broad equitable power to enjoin those violations, *see, e.g.*, *Am. Sch. Of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902) ("That the conduct of the postoffice is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head, or one of the subordinate officials, of that Department, which is unauthorized by the statute under which he assumes to act.").

"Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." *Harmon v. Bruckler*, 355 U.S. 579, 581-82 (1958) (citing *McAnnulty*, 187 U.S. at 108). Indeed, since at least *Brown v. Board of Education*, 394 U.S. 294 (1955), the general rule has been that federal courts should exercise their broad equitable power to fashion injunctive relief to vindicate rights infringed by the systematic unlawfulness of government actors. *See* Richard H. Fallon, Jr. *et al.*, *The Federal Courts and the Federal System* 803 (5th ed. 2003); *cf. Brown*, 349 U.S. at 301 (affirming lower court's issuance of a permanent injunction "ordering the imme-

diate admission of the plaintiffs to schools previously attended only by white children"); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (affirming a district court's injunction requiring school board to implement plan to desegregate school district); *Milliken*, 433 U.S. at 269 (upholding the equitable powers of a district court, as part of a desegregation decree, to "order compensatory or remedial educational programs for schoolchildren who have been subjected to past acts of *de jure* segregation"); *Orantes-Hernandez v. Thornbugh*, 919 F.2d 549 (9th Cir. 1990) (affirming lower court's permanent injunction enjoining INS, *inter alia*, from forcing detainees to sign voluntary departure agreements and transferring detainees irrespective of their established attorney-client relationships on ground those practices violate the Fifth Amendment due process clause); *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017) (similar).[12]

It would be quite absurd if, in *Brown*, *Swann*, or *Milliken*, the lower courts were restrained to issue injunctive relief, schoolchild-by-schoolchild. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established[.]"). One can hardly think of a remedial methodology that is less economical, particularly where the members of a class raise indistinguishable claims and seek identical relief, and less effective. Yet that is precisely the approach the Supreme Court deems

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[12] While the Supreme Court decisions cited all involve unauthorized acts taken by state officials, it is well-settled that federal courts' equitable powers extend to entering class-wide injunctive relief to enjoin violations of federal law *by federal officers*. *See, e.g.*, *McAnnulty*, 187 U.S. at 110; *Harmon*, 355 U.S. at 582.

proper for remediating statutory and constitutional violations committed by immigration enforcement agencies.

By restraining the lower federal courts' authority to issue meaningful relief, *Aleman Gonzalez* simultaneously confers to immigration enforcement agencies power to unilaterally ignore or deviate from the Congressional mandates set forth in the removal provisions of the INA, *see* 8 U.S.C. §§ 1221-32. In this way, *Aleman Gonzalez* not only deflates the historical and traditional role of Article III courts, but it also undermines a fundamental principle of federalism: that when Congress explicitly speaks to a specific issue, federal agencies and courts are bound to "give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Although § 1158 and § 1225 in no uncertain terms impose upon Defendants a mandatory ministerial duty to inspect and refer asylum seekers in the process of arriving at Class A POEs, *Aleman Gonzalez* appears to suggest that Defendants have *carte blanche* to refuse to do so, as long as they present to a lower court a *claimed* ground for their refusal, even if a federal court ultimately finds that basis meritless. *But see Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (holding courts need only defer to an agency's "statutory interpretation . . . when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent").

Defendants suggest *Aleman Gonzalez*'s implications are not as damaging to the rights of the Plaintiff class as they appear at first glance. Defendants say that, if this Court issues class-wide declaratory relief, Plaintiff class

members can institute a separate, non-class action suit and rely upon this Court's declaratory judgment "as a predicate to further relief, including [an] injunction," which would fit within § 1252(f)(1)'s carve out. (Defs.' Remedies Br. at 7.) But by requiring injunctive relief to be issued Plaintiff class member-by-member, there inevitably will be individuals deprived of their due process right to access asylum. As the dissent in *Aleman Gonzalez* observed:

> Noncitizens subjected to removal proceedings are disproportionately unlikely to be familiar with the U.S. legal system or fluent in the English language. Even so, these individuals must navigate the Nation's labyrinthine immigration laws without entitlement to appointed counsel or legal support.

142 S. Ct. at 2076 (Sotomayor, J., dissenting). These practical difficulties are amplified where, as here, the noncitizens in need of a permanent injunction are not even located within the United States, but rather in Mexican border communities, where they have even less access to legal assistance and must endure horrid conditions and threats to life and safety as they prosecute their cases.

On the other hand, this Court has an unfaltering obligation to faithfully apply pertinent Supreme Court precedent. *Hart*, 266 F.3d at 1171. "[I]ndividual judges, cloaked with the authority granted by Article III of the Constitution, are not at liberty to impose their personal view of a just result in the face of a contrary rule of law." *In re United States*, 945 F.3d 616, 627 (2d Cir. 2019). The instant case squarely is controlled by *Aleman Gonzalez*.

The inspection and referral duties this Court found Defendants had withheld by implementing their Turnback Policy are explicitly imposed by the INA at § 1225(a)(3) (delineating immigration officers' duty to inspect) and § 1225(b)(1)(A)(ii) (delineating immigration officers' duty to refer asylum seekers). *See Al Otro Lado v. Wolf*, 952 F.3d 999, 1010 (9th Cir. 2020) (holding § 1158(a)(1) "creates a right to apply for asylum" while § 1225 "imposes two key mandatory duties on immigration officers with respect to potential asylum seekers"). Section 1225 is among § 1252(f)(1)'s covered provisions. Clearly, after *Aleman Gonzalez*, such an injunction must be construed as "enjoin[ing] or restrain[ing] the operation" of § 1225 because it would have the effect of "interfer[ing] with the Government's efforts to operate § [1225]." 142 S. Ct. at 2066.

Nevertheless, Plaintiffs fashion several creative arguments for why an injunction is appropriate despite *Aleman Gonzalez*'s repudiation of *Rodriguez* and *Ali*. None are availing.

i. Vacatur under the Administrative Procedures Act

First, Plaintiffs argue that the Court can issue vacatur relief. (Pls.' Supplemental Br. at 2.) As an initial matter, Plaintiffs are wrong to suggest this Court simply can issue an injunction disguised as vacatur relief; though the two remedies may overlap, they are not the same. Unlike an injunction, a vacatur does not restrain the enjoined defendants from pursuing other courses of action to reach the same or a similar result as the vacated agency action. *See* Daniel Mach, *Rules Without Reasons: The Diminishing Role of Statutory Policy and Equitable Discretion in the Law of NEPA*

Remedies, 35 Harv. Envtl. L. Rev. 205, 237 (2011). For example, here, either vacatur or an injunction would suffice to strike down the Turnback Policy, but only an injunction, not vacatur, would restrain Defendants from, in the future, experimenting with and instituting a modified or amended version of the Turnback Policy. *See. id.*

Moreover, although this Court believes (and Defendants appear to as well) that neither § 1252(f)(1) nor *Aleman Gonzalez* restrict lower courts from "set[ting] aside" or "vacating" a policy based upon an APA violation,[13] Defendants accurately observe that because the PBQM and Metering Guidance Memoranda were rescinded in November of 2021, there exists no "agency action" for this Court to vacate (Defs.' Supp. Br. at 3). *See* 5 U.S.C. § 706(2).

ii. Anchoring an Injunction in § 1158

Second, Plaintiffs argue that a separate line of Ninth Circuit precedent, besides *Ali* and *Rodriguez*, provides this Court with authority to issue a class-wide permanent injunction despite § 1252(f)(1)'s remedial bar. Specifically, citing *Gonzales v. Department of Homeland Security*, 508 F.3d 1227, 1233 (9th Cir. 2007), in which the Ninth Circuit held § 1252(f)(1) does not prohibit class-wide injunctions that directly implicate provisions

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[13] *See Texas v. United States*, --- F. Supp. 3d ---, 2022 WL 2466786, at *5-6 (S.D. Tex. July 6, 2022) ("There are meaningful differences between an injunction, which is a 'drastic and extraordinary remedy,' and a vacatur, which is 'a less drastic remedy.'" (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010))); *Capital Area Immigrants' Rights Coal. v. Trump*, 471 F. Supp. 3d 25, 60 (D.D.C. 2020) ("[B]y vacating the Rule, the Court is not enjoining or restraining the INA's operation.").

not covered by § 1252(f)(1), "even if that injunction has some *collateral* effect on the operation of [one of § 1252(f)(1)'s] covered provision[s]," Plaintiffs argue this Court simply should anchor its injunction in § 1158 as opposed to § 1225. *Aleman Gonzalez*, 142 S. Ct. at 2067 n.4 (interpreting *Gonzales*, 508 F.3d at 1233, and describing its central holding as "nonresponsive" to the issues in the case at bar) (emphasis added); *see also Catholic Soc. Servs., Inc. v. Immigration & Naturalization Servs.*, 232 F.3d 1139, 1149-50 (9th Cir. 2000) (upholding preliminary injunction because it was issued under "Part V" of the subchapter and thus "by its terms, the limitation on injunctive relief [in § 1252(f)(1)] does not apply"); *Gonzalez v. U.S. Immigration & Customs Enf't*, 975 F.3d 788, 814 (9th Cir. 2020) ("[§ 1252(f)(1)'s] plain text makes clear that its limitations on injunctive relief *do not* apply to *other* provisions of the INA [beyond 8 U.S.C. §§ 1221 through 1332]." (emphasis added)).

Despite Plaintiffs' assertion otherwise, *Gonzales* is not applicable here. Unlike in *Gonzales*, there is practically no attenuation between § 1158, the statute in which Plaintiffs ask this Court to anchor an injunction, and § 1225, the statute that Plaintiffs acknowledge § 1252(f)(1) prohibits this Court from influencing through injunctive relief. Those statutes are inextricably intertwined. (*See* MTD Opinion at 5 ("This case turns on [§] 1225(b) asylum procedure that [§] 1158 incorporates") and 42 ("As the Court has discussed, [§] 1158(a)(1) incorporates [§] 1225, which in turn places a focus on immigration officers who process arriving aliens.").) Section 1158(a)(1) provides noncitizens arriving at Class A POEs along the U.S.-Mexico border a right to apply for asylum; that statute does not explicitly

impose any duties upon Defendants to carry out tasks to put that right into practice. *Al Otro Lado*, 952 F.3d at 1010; *see also Al Otro Lado v. Nielsen*, 327 F. Supp. 3d 1284, 1310 n.12 (S.D. Cal. 2018) (observing § 1158(a)(1) "does not identify any specific obligations placed on an immigration officer"). Rather, § 1158(a)(1) only does so through its express incorporation of § 1225(b)(1). *See* 8 U.S.C. § 1158(a)(1) ("Any alien who . . . arrives in the United States . . . may apply for asylum in accordance with this section or, where applicable, *section 1225(b) of this title*." (emphasis added)). Indeed, it is § 1225 that sets forth the specific asylum procedure that § 1158 incorporates. As this Court put it in its MTD Opinion, § 1225 imposes "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." (MTD Opinion at 5.) Thus, the Court sees no way, and Plaintiffs do not explain how, an injunction anchored in § 1158 would have only collateral consequences on Defendants' operation of § 1225. Accordingly, this argument, too, is unavailing.

iii. Anchoring an Injunction in 8 U.S.C. § 1103(a)(1) and 6 U.S.C. § 202

Relying again on *Gonzales*, Plaintiffs aver that this Court can issue an injunction anchored in the statutory provisions Defendants claimed authorized their Turnback Policy: 8 U.S.C. § 1103(a)(1) and 6 U.S.C. § 202. As this Court has explained previously, Defendants predicated the Turnback Policy based upon their interpretation of those statutes as authorizing the DHS Secretary with incredibly broad discretion to prioritize DHS's responsibilities in the manner he or she deems

necessary. (MTD Opinion at 55 ("Defendants point to [§] 1103(a)(1) in particular, which provides that the Secretary 'shall establish such regulations; prescribe such forms of bonds, reports, entries, and other papers; issue instructions; and *perform other acts as he deems necessary for carrying out his authority under the provisions of this chapter.*" (emphasis added)).)

While the Court is intrigued by this theory, Plaintiffs miss the mark. *Aleman Gonzalez* requires this Court to inquire whether an injunction would "interfere with [Defendants'] efforts to operate" § 1225, which this Court answered in the affirmative above, *see supra* Sec. III.A.4. *Aleman Gonzalez*, 142 S. Ct. at 2065. This is analytically distinct from the narrower question that Plaintiffs appear to propose as the relevant inquiry: under which statute did Defendants principally invoke as a legal basis to implement the unlawful regulation? Because any class-wide injunction in this case would "interfere" with Defendants' "operation" of § 1225, as that word is construed in *Aleman Gonzalez*, this Court cannot simply anchor injunctive relief in 6 U.S.C. § 202 and 8 U.S.C. § 1103(a)(1) to evade § 1252(f)(1)'s remedial bar.

Accordingly, this Court concludes that § 1252(f)(1) prohibits it from entering a permanent class-wide injunction enjoining Defendants from turning back noncitizen asylum seekers in the process of arriving at Class A POEs or compelling Defendants to inspect and refer such asylum seekers.

* * * *

Having concluded § 1252(f)(1) strips this Court of authority to enter a permanent injunction, Plaintiffs' re-

quest for oversight of all permanent injunctive relief is therefore moot.[14]

B. Individual Relief

Plaintiffs seek an order restoring the *status quo ante* for named Plaintiff Beatrice Doe prior to Defendants' unlawful Turnback Policy. Defendants neither argue § 1252(f)(1) prohibits this Court from issuing such an injunction nor assert that such relief is unwarranted. Indeed, it is apparent to the Court that Plaintiff Beatrice Doe is entitled to the relief sought in the Proposed Order. (*See* Proposed Order ¶ 7.) Accordingly, the Court orders Defendants to restore the *status quo ante* for named Plaintiff Beatrice Doe prior to Defendants' unlawful conduct. This includes taking the necessary steps to facilitate Plaintiff Beatrice Doe's entry into the United States, including issuing any necessary travel documents to allow her to travel to the United States (by air if necessary) and to ensure her asylum processing upon arrival.

Although Plaintiff Beatrice Doe does not seek an injunction directing Defendants to "inspect and refer" her to the U.S. asylum process at a Class A land POE along the U.S.-Mexico border, Defendants suggest that the appropriate recourse for the innumerable Plaintiff class members waiting in Mexican border communities is to seek individualized relief in accordance with § 1252(f)(1) and *Aleman Gonzalez*. The Court, therefore, takes

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[14] This decision does not cover Plaintiffs' request to convert the Preliminary Injunction into a permanent one or Plaintiffs' request for oversight over Defendants' compliance with the Preliminary Injunction and Clarification Order. As mentioned above, *supra* note 7, those issues are addressed at ECF No. 816.

this occasion to point out yet another absurd consequence *Aleman Gonzalez* produces when taken to its logical endpoint.

The Supreme Court held in *Aleman Gonzalez* that § 1252(f)(1) has "one exception" to its general prohibition against lower court injunctions: lower courts "retain authority to restrain or enjoin the operation of the [covered] statutory provisions 'with respect to the application of such provisions to an individual *alien against whom* [*removal*] *proceedings . . . have been initiated.*'" *Aleman Gonzalez*, 142 S. Ct. at 2065 (quoting 8 U.S.C. § 1252(f)(1)) (emphasis added). But the text of § 1252(f)(1) places the individual members of the Plaintiff class in a devastatingly cruel catch-22. Unlike the class members in *Aleman Gonzalez*, removal proceedings have yet to be instituted against all members of the Plaintiff class here precisely because of Defendants' unlawful Turnback Policy. Definitionally, inspection and referral is a prerequisite to removal. Thus, without *Ali* and *Rodriguez* to rest upon, *Aleman Gonzalez* appears to effectively render illusory Plaintiff class members' Fifth Amendment due process right to apply for asylum. This is despite Congress's clear legislative intent in enacting § 1252(f)(1) that the statute "not hamper a district court's ability to address imminent rights violations." *Padilla v. Immigration & Customs Enf't*, 953 F.3d 1134, 1150-51 (9th Cir. 2020) (citing H.R. Rep. No. 104-469(I), at 161 (1996)).[15]

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[15] It is true that even if this dire interpretation of § 1252(f)(1) and *Aleman Gonzalez* is the correct one, § 1252(f)(1) still leaves open the possibility that the Supreme Court can fashion class-wide injunctive relief to vindicate the Plaintiff class's right to access the U.S.-asylum process. *See Biden v. Texas*, 142 S. Ct. 2528, 2539

"The government of the United States has been emphatically termed a government of laws, and not men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. *Marbury*, 5 U.S. (1 Cranch) 137, 163; *see also Ashby v. White*, 92 Eng. Rep. 126 (K.B. 1703) ("If the plaintiff has a right, he must of necessity have means to vindicate and maintain it, and a remedy if he is injured in the exercise of enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy and want of a remedy are reciprocal."). Because of *Aleman Gonzalez*, innumerable Plaintiff class members may well end up living in this gray area where they possess a due process right but no remedy when that right is violated by rapacious executive overreach.

C. Class-wide Declaratory Relief is Warranted

Although the issuance of a class-wide injunction is prohibited, § 1252(f)(1) does not strip this Court of jurisdiction to issue a class-wide declaration. *See Rodriguez*, 591 F.3d at 119 (construing § 1252(f)(1) narrowly as not banning class-wide declaratory relief), *cited affirmatively by Padilla*, 953 F.3d at 1150; *see also Aleman Gonzalez*, 142 S. Ct. at 2065 n.2 ("Because only in-

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(2022) ("A second feature of the text of section 1252(f)(1) leaves no doubt that this Court has jurisdiction: the parenthetical explicitly preserving this Court's power to enter injunctive relief."). But the Supreme Court "grants only a very small percentage of certiorari petitions." *United States v. Burch*, 202 F.3d 1274, 1277 (10th Cir. 2000). The mere prospect that that Court might, after months or years, grant certiorari in this case must be cold comfort to asylum seekers awaiting Defendants to fulfill their mandatory ministerial asylum inspection and referral duties and, in so doing, give meaning to Plaintiff class members' Fifth Amendment due process right to apply for asylum.

junctive relief was entered here, we have no occasion to address [the Government's suggestion that § 1252(f)(1) bars class-wide declaratory relief].").

The parties agree that this Court has both constitutional and statutory jurisdiction to issue a declaratory judgment in this case. *See Gov't Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1224 (9th Cir. 1998) ("[W]hen a district court has constitutional and statutory authority to hear a case brought pursuant to the Declaratory Judgment Act, the district court may entertain the action without *sua sponte* addressing whether jurisdiction should be declined" as a matter of discretion).

Both parties aver that declaratory relief will serve a useful purpose in clarifying where the balance lies between Defendants' authority to regulate the flow and methodology of inspecting and processing asylum seekers in the process of arriving at Class A POEs and the Plaintiff class's right to access the U.S. Asylum Process. (Pls.' Remedy Br. at 7-8 ("[T]he Court should issue a judgment declaring, pursuant to its earlier opinion on the parties' cross-motion for summary judgment, that turnbacks of noncitizens in the process of arriving at POEs on the U.S.-Mexico border violate the INA, section 706(1) of the APA, and the Due Process Clause of the Fifth Amendment."); *see* Defs.' Remedy Br. at 6-7.) They also concur that a declaratory judgment memorializing the Court's central holdings in its MSJ Opinion would extinguish the disputes giving rise to this action and avoid future litigation concerning the scope of Defendants' inspection and referral duties. (*See* Pls.' Remedy Br. at 7-8 (arguing a declaratory judgment would terminate in advance disputes that might arise "should this Administration or another one wish to ex-

periment with new ways of denying arriving noncitizens access to the asylum process at POEs."); Defs.' Remedy Br.at 7 ("[A declaratory judgment] could be used by individual [*AOL*] Class Members 'as a predicate to further relief, including an injunction.'" (quoting *Powell v. McCormack*, 395 U.S. 486, 499 (1969))).)

The Court is persuaded that declaratory relief that captures the central holdings of its MSJ Opinion would serve the dual purposes of the Declaratory Judgment Act. Accordingly, the Court enters the following declaratory relief:

> This Court enters a DECLARATORY JUDGMENT that, absent any independent, express, and lawful statutory authority, Defendants' refusal to deny inspection or asylum processing to noncitizens who have not been admitted or paroled and who are in the process of arriving in the United States at Class A Ports of Entry is unlawful regardless of the purported justification for doing so.

IV. CONCLUSION

For the foregoing reasons stated above:

1) The Court **ORDERS** Defendants to restore the status quo ante for the named Plaintiffs prior to Defendants' unlawful conduct. This includes taking the necessary steps to facilitate Plaintiff Beatrice Doe's entry into the United States, including issuing any necessary travel documents to allow her to travel to the United States (by air if necessary) and to ensure her inspection and asylum processing upon arrival.

2) The Court **DECLARES** that, absent any independent, express, and lawful statutory authority, Defendants' refusal to deny inspection or asylum processing to

noncitizens who have not been admitted or paroled and who are in the process of arriving in the United States at Class A Ports of Entry is unlawful regardless of the purported justification for doing so.

The parties are further **ORDERED** to meet and confer and lodge a Proposed Final Judgment that incorporates this Court's rulings in its MSJ Opinion (ECF No. 742) and set forth herein **by no later than August 22, 2022**.

IT IS SO ORDERED.

DATED: August 5, 2022

/s/ CYNTHIA BASHANT
Hon. CYNTHIA BASHANT
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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

AL OTRO LADO, INC.; ABIGAIL DOE, BEATRICE DOE, CAROLINA DOE, DINORA DOE, INGRID DOE, URSULA DOE, JOSE DOE, ROBERTO DOE, MARIA DOE, JUAN DOE, VICTORIA DOE, BIANCA DOE, EMILIANA DOE, AND CESAR DOE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

ALEJANDRO MAYORKAS, SECRETARY U.S. DEPARTMENT OF HOMELAND SECURITY, IN HIS OFFICIAL CAPACITY; CHRIS MAGNUS COMMISSIONER, U.S. CUSTOMS AND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY; PTEER FLORES, EXECUTIVE ASSISTANT COMMISSIONER, OFFICE OF FIELD OPERATIONS, U.S. CUSTOMS AND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY, DEFENDANTS[1]

Filed: Aug. 5, 2022

ORDER:

(1) GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTIONS SEEKING CLARIFICATION OR MODIFICATION OF THE PRE-

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[1] Because all Defendants are sued in their official capacities, the successors for these public offices are automatically substituted as Defendants per Fed. R. Civ. P. 25(d).

LIMINARY INJUNCTION AND CLARIFICATION ORDER (ECF Nos. 644, 736);

(2) CONVERTING PRELIMINARY INJUNCTION INTO A PERMANENT INJUNCTION; AND

(3) DENYING PLAINTIFFS' REQUEST FOR OVERSIGHT (ECF No. 736)

In an Opinion dated November 19, 2019, this Court enjoined Defendants from applying 8 C.F.R. § 208.13(c)(4), known more commonly as the "Asylum Ban," to the immigration proceedings of members of a provisionally certified class comprised of "all non-Mexican asylum seekers who were unable to make a direct asylum claim at a [United States] [port of entry] before July 16, 2019 because of the [United States] Government's metering policy" ("P.I. Class"). (Prelim. Inj. at 36, ECF No. 330.) On October 30, 2020, this Court issued a Clarification Order elucidating what is required to remain in compliance with the Preliminary Injunction. (Clarification Order, ECF No. 605.) The Clarification Order established that the Preliminary Injunction applies both to Defendants *and* the Executive Office of Immigration Review ("EOIR," together with Defendants, the "Government"). (*Id.* at 24-25.) It also explained that the Preliminary Injunction requires the Government to: (1) "make all reasonable efforts to identify" members of the P.I. Class; (2) provide notice to P.I. Class members in Department of Homeland Security ("DHS") custody or "in administrative proceedings" of their potential "membership and the existence and import of the Preliminary Injunction"; and (3) "take immediate affirmative steps to reopen or reconsider" prior

asylum determinations of P.I. Class members that were predicated upon the Asylum Ban. (*Id.*)

Since October 30, 2020, the Government has developed procedures at various stages of the immigration process with the aim of effectuating the directives of the Clarification Order. The Government has begun to implement many of these procedures and represents that it soon plans to implement those that have yet to be administered. (*See generally* First Decl. of Katherine J. Shinners ("First Shinners Decl.") ¶ 8, ECF No. 758-1.)

Nevertheless, in two separate motions before this Court, Plaintiffs challenge various aspects of the Government's procedures as falling short of the Clarification Order's requirements for P.I. Class-member identification, notice, and immigration case re-opening and re-consideration. (*See* Pls.' Mot. to Enforce Prelim. Inj. & Clarification Order ("Enforcement Mot."), ECF No. 644; Mem. in Supp. of Enforcement Mot. ("Enforcement Mem."), ECF No. 646; Pls.' Mot. to Oversee Prelim. Inj. & Clarification Order ("Oversight Mot."), ECF No. 736; Mem. in Supp. of Oversight Mot. ("Oversight Mem."), ECF No. 736-1; *see also* Pls.' Statement ¶¶ 1-16, Joint Status Report at 1-2, ECF No. 803.) Plaintiffs seek "enforcement" of the Preliminary Injunction and Clarification Order in the form of an order (1) finding the challenged aspects of the Government's procedures noncompliant and (2) adopting Plaintiffs' interpretation of the Clarification Order's directives. (Enforcement Mot.; Oversight Mot.)

Additionally, Plaintiffs seek to convert into a permanent injunction the Preliminary Injunction, inclusive of the Clarification order and any other clarification and/or modification relief this Court issues here, as well as an

order appointing Magistrate Judge Karen S. Crawford special master pursuant to Federal Rule of Civil Procedure ("Rule") 53 to oversee and monitor the Government's compliance therewith.[2] (Proposed Order ¶¶ 4, 8, ECF No. 773-4.)

For the reasons explained below, the Court construes Plaintiffs' pending motions as ones to clarify and/or modify the Clarification Order and Preliminary Injunction, which this Court **GRANTS IN PART** and **DENIES IN PART**, as set forth in Section III.A. (*See* ECF Nos. 644; 736.) Furthermore, the Court **GRANTS** Plaintiffs' request for to convert the Preliminary Injunction into a permanent injunction but **DENIES** Plaintiffs' request for appointment of a special master.

I. BACKGROUND

The Court presumes the parties' familiarity with the factual and procedural history of this case. That history is incorporated by reference hereto and repeated only to the extent necessary to frame the issues placed before the Court by Plaintiffs' Enforcement and Oversight Motions. (*See* Prelim. Inj. at 1-7; Clarification Order at 1-7.)

A. Procedural History

Plaintiffs commenced this action in 2017, alleging, *inter alia*, that Defendants' "Turnback Policy" violates

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[2] Plaintiffs also request other permanent injunctions to vindicate the statutory and constitutional violations found in this Court's September 2, 2021 opinion granting in part and denying in part the parties' cross-motions for summary judgment ("MSJ Opinion") (ECF No. 742). (*See* Proposed Order ¶¶ 2-3.) Those requests are addressed in the Remedies Opinion, filed contemporaneously with this Opinion. (Remedies Opinion, ECF No. 817.)

Section 706 of the Administrative Procedures Act ("APA") and, thus, deprives the *AOL* Class of their Fifth Amendment due process right to access the U.S. asylum process.[3,4] (Second Am. Compl. ("SAC") ¶ 3; *see id.* ¶¶ 256-59, 283-92.) Plaintiffs allege that the "Turnback Policy" was a formal policy "to restrict access to the asylum process" at Class A Ports of Entry ("POEs"), pursuant to which low-level CBP officials were ordered to "directly or constructively turn back asylum seekers at the [U.S.-Mexico] border." (*Id.* ¶ 3.) The Turnback Policy included a "metering" or "waitlist" system, which involved instructing asylum seekers "to wait on the bridge, in the pre-inspection area, or a shelter," or simply telling asylum seekers that "they [could not] be processed because the [POE] [was] 'full' or 'at capacity[.]'" (*Id.*) Accordingly, asylum seekers who arrived at Class A POEs often were unable to pursue asylum at the time they presented themselves, and instead had to wait in-

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[3] The plaintiff class (defined above as, "*AOL* Class") consists of "all noncitizens who seek or will seek to access the U.S. asylum process by presenting themselves at a Class A Port of Entry on the U.S.-Mexico border, and were or will be denied access to the U.S. asylum process by or at the instruction of [Customs and Border Protection ("CBP")] officials on or after January 1, 2016." (Class Certification Order at 18, ECF No. 513). The Court also certified a subclass consisting of "all noncitizens who were or will be denied access to the U.S. asylum process at a Class A POE on the U.S.-Mexico border as a result of Defendants' metering policy on or after January 1, 2016." (*Id.*)

[4] This Court has since granted summary judgment in favor of Plaintiffs on these claims. (Summary Judgment Order, ECF No. 742.) As previously mentioned, *supra* note 2, this Court's Remedies Opinion, which issues relief tailored to address these violations, is filed concurrently herewith at ECF No. 816.

determinate lengths of time for Defendants to reopen POEs for asylum processing. (*See id.* ¶¶ 1-3.)

On July 16, 2019, while this action was pending, the DHS promulgated the Asylum Ban. *See* 84 Fed. Reg. 33,829 (July 16, 2019), *codified at* 8 C.F.R. § 208.13(c)(4). Among other things, the Asylum Ban rendered ineligible for asylum noncitizens who entered, attempted to enter, or arrived at the U.S.-Mexico border after transiting through at least one country other than their country of origin without applying for humanitarian protection in that country ("Transit Rule").[5] *Id.*

On September 26, 2019, Plaintiffs moved to preliminarily enjoin application of the Asylum Ban to P.I. Class members, arguing that the "[Transit Rule] would not have affected [P.I. Class members' eligibility for asylum] but for Defendants' illegal use of metering, which forced [P.I. Class members] to stay in Mexico longer than they otherwise would have," *i.e.*, until July 16, 2019 or later. (Pls.' Mot. for Prelim Inj. at 7-8, ECF No. 294-1.) This Court granted Plaintiffs' application on November 19, 2019 in its Preliminary Injunction, which states:

> Defendants are hereby **ENJOINED** from applying the Asylum Ban to members of the [P.I. Class] and **ORDERED** to return to the pre-Asylum Ban practices for processing the asylum applications of members of the [P.I. Class].

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[5] By its express terms, the Asylum Ban applied only to the immigration proceedings of individuals who entered, attempted to enter, or arrived at the U.S.-Mexico border on or after July 16, 2019. 8 C.F.R. § 208.13(c)(4). It did not apply retroactively. *Id.*

(Prelim. Inj. at 36.)[6]

In July of 2020, citing what they believed to be deficiencies in Defendants' compliance procedures, Plaintiffs sought clarification of the Preliminary Injunction. (Pls.' Mot. for Clarification, ECF No. 494.) On October 30, 2020, this Court granted Plaintiffs' application and clarified the Preliminary Injunction as follows:

> (1) EOIR is bound by the terms of the [P]reliminary [I]njunction [("Paragraph 1")];
>
> (2) DHS and EOIR must take immediate affirmative steps to reopen and reconsider past determinations that potential [P.I.] [C]lass members were ineligible for asylum based on the Asylum Ban, for all potential class members in expedited or regular removal proceedings. Such steps include identifying affected class members and either directing immigration judges or the [Board of Immigration Appeals ("BIA")] to reopen or reconsider their cases or directing DHS attorneys representing the government in such proceedings to affirmatively seek, and not oppose, such reopening or reconsideration [("Paragraph 2")];

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[6] Defendants appealed the Preliminary Injunction and sought an emergency stay. On December 20, 2019, the Ninth Circuit administratively stayed the Preliminary Injunction pending resolution on the merits of Defendants' stay application. (ECF No. 369.) Following oral argument, the Ninth Circuit lifted the stay on March 5, 2020. *Al Otro Lado v. Wolf*, 952 F.3d 999, 1013 (9th Cir. 2020). The Ninth Circuit held oral argument on the underlying appeal on July 20, 2020; that appeal still is pending. *See Al Otro Lado et al. v. Chad Wolf, et al.*, No. 19-56417 (9th Cir. Dec. 5, 2019), Dkt. Nos. 97, 105.

(3) Defendants must inform identified [P.I. Class] members in administrative proceedings before [United States Citizenship and Immigration Services ("USCIS")] or EOIR, or in DHS custody, of their potential [P.I.] [C]lass membership and the existence and import of the [P]reliminary [I]njunction [("Paragraph 3")]; and

(4) Defendants must make all reasonable efforts to identify [P.I. Class] members, including but not limited to reviewing their records for notations regarding class membership made pursuant to the guidance issued on November 25, 2019, and December 2, 2019, to [U.S. Customs and Border Protection] CBP and [CBP's Office of Field Operations ("OFO")], respectively, and sharing information regarding [P.I. Class] members' identities with Plaintiffs [("Paragraph 4")].

(Clarification Order at 24-25.)[7]

Crucially, in *Capital Area Immigrants' Rights Coalition v. Trump*, 471 F. Supp. 3d 25 (D.D.C. 2020) ("*C.A.I.R.*"), the Asylum Ban was deemed legally invalid and, thus, vacated, on June 30, 2020. *See id.*, 471 F. Supp. 3d at 25, *appeal dismissed as moot I.A. v. Garland*, No. 20-5271, 2022 WL 696459, at *1 (D.C. Cir. Feb. 24, 2022). The Government avers that after June 30,

[7] As with the Preliminary Injunction, the Government sought a stay of the Clarification Order, which the Ninth Circuit granted in part but lifted shortly thereafter. *See Al Otro Lado et al. v. Chad Wolf, et al.*, No. 20-56287 (9th Cir. Dec. 4, 2020), Dkt. Nos. 15, 30. The Government's underlying appeal of the Clarification Order remains pending alongside their appeal of the Preliminary Injunction. *Id.*, Dkt. 62. Those appeals were consolidated on May 26, 2022. *See Id.*, Dkt. 72.

2020, "the Asylum Ban should not have been applied to anyone." (First Shinners Decl. ¶ 8.)

B. The Government's Preliminary Injunction and Clarification Order Compliance Procedures

The Government has developed and implemented, or soon plans to implement, procedures at various stages of immigration proceedings to (1) identify potential P.I. Class members; (2) provide notice to those individuals; and (3) screen potential P.I. Class members to determine (a) whether they, in fact, meet the criteria for P.I. Class membership and, if so, (b) whether their cases are eligible for reopening and reconsideration.

1. Identifying Potential P.I. Class Members

On November 20, 2020, the Government queried CBP's electronic system of records to identify "all non-Mexican aliens encountered along the southwest border by both [U.S. Border Patrol ("USB")] and OFO, with an encounter date of July 16, 2019 through June 30, 2020, who were processed for expedited removal, expedited removal/credible fear, or a notice to appear[.]" (Decl. of Jay Visconti ("Second Visconti Decl.") ¶ 5 (attesting CBP STAT Division "queried available data from the relevant systems of record for all records based on the requested criteria"), ECF No. 695-2.) The Government then narrowed this list to individuals who: "(1) as of February 1, 2021, the electronic records of EOIR indicated that the individual filed for [a]sylum, [w]ithholding, or the [c]onvention against [t]orture before EOIR on or after July 16, 2019, and that a decision had been entered on that application; (2) were noted as being originally processed by CBP for [expedited removal/credible fear]; or (3) as of January 11, 2021, USCIS ha[d] an elec-

tronic record of the individual in the Asylum Division's case management system (other than records reflecting a Migrant Protection Protocols case or a Reasonable Fear case)." (*See* First Shinners Decl. ¶ 24; *see* Decl. of Katherine J. Shinners ("Second Shinners Decl.") ¶¶ 3-4, Ex. 1 to Unopposed Mot. to Correct, ECF No. 784-2.)[8]

The Government compiled names of individuals who met each of the abovementioned criteria into a "Master List." (First Shinners Decl. ¶ 24.) The individuals whose names appear on the Master List are deemed "potential" P.I. Class members by the Government; USCIS and/or EOIR assesses those individuals for P.I. Class-membership and entitlement to relief under the Preliminary Injunction pursuant to the procedures set forth below, *infra* Sec. I.B.2. (Decl. of Andrew J. Davidson ("Davidson Decl.") ¶¶ 4-5 (USCIS), ECF No. 758-2; First Decl. of Jill W. Anderson ("First Anderson Decl.") ¶ 4, ECF No. 695-6 (EOIR).) The Master List is also used to facilitate notice to potential P.I. Class members. (First Shinners Decl. ¶ 24; Davidson Decl. ¶¶ 4-5; First Anderson Decl. ¶ 4.)

2. P.I. Class Membership Determinations and Affirmative Steps to Reopen and Reconsider Eligible Cases

a. ICE

On November 6, 2020, Immigration and Customs Enforcement ("ICE") directed its Enforcement and Re-

[8] The Court **GRANTS** Defendants' Unopposed Motion to Correct, which identifies, and seeks to amend and correct, a misstatement in Defendants' Oversight Opposition respecting the parameters of its query for potential P.I. Class members. (ECF No. 784.)

moval Operations ("ERO") division to "suspend all removals . . . pending further screening by USCIS" of individuals appearing on a list consisting of non-Mexican noncitizens in DHS custody who had a final order of removal issued between July 16, 2019 and June 30, 2020. (Decl. of Robert Guadian ("Gaudian Decl.") ¶ 5, ECF No. 695-5; Guidance Regarding *Al Otro Lado v. McLeenan*, 423 F. Supp. 3d 848 (Nov. 19, 2019) ("ICE P.I. Notice"), Ex. 1 to Guadian Decl., ECF No. 695-5.)[9] On November 13, 2020, ICE distributed to ERO additional guidance, entitled "Review of Cases for Potential Membership in the Provisionally Certified Class" ("ICE Interim P.I. Guidance"). (*See* ICE Interim P.I. Guidance, Ex. 2 to Guadian Decl.) The ICE Interim P.I. Guidance essentially forbids ERO from removing noncitizens in DHS custody who possibly could qualify as P.I. Class members, while "enabl[ing] removal operations to proceed" with respect to noncitizens in DHS custody who, based on agreed-upon, objective criteria, could not possibly qualify for P.I. Class membership. (*Id.* at 2-3 (listing 10 agreed-upon P.I. Class exclusionary criteria, which, if just one is found present in a given case, authorizes ERO to proceed with removal); Guadian Decl. ¶¶ 5-6; Decl. of Elizabeth Mura ("Mura Decl.") ¶¶ 3, 5, ECF No. 695-3.)

On January 15, 2021, ICE issued updated guidance instructing ERO to "[c]ontinue to screen cases at imminent risk of removal using the [ICE Interim P.I. Guidance]" and to refer immediately to USCIS for "further class membership screening" those individuals who "d[o] not meet any of the exclusion[ary] criteria." (Fur-

[9] All exhibits to the Guadian Declaration are annexed at ECF No. 695-5.

ther Guidance on *Al Otro Lado Compliance* ("ICE Referral Guidance"), Ex. 3 to Guadian Decl.) The ICE Referral Guidance, which remains in effect, requires ERO to, *inter alia*, serve upon individuals whom it refers to USCIS for P.I. Class membership screening "a copy of the Notice of Potential Class Membership in Cases Subject to Removal," notify USCIS of the referral, and provide USCIS with documentation in ICE's possession that could bear upon P.I. Class membership. (ICE Referral Guidance at 2.) Additionally, as of April of 2022, DHS has posted notice concerning the Preliminary Injunction and its import in all ICE detention facilities. (Joint Status Report at 5.)

b. USCIS

i. Procedures for Potential P.I. Class Members with Final but Unexecuted Orders of Removal

The USCIS has delineated a framework (1) to make P.I. Class-membership determinations for individuals with final but unexecuted orders of removal and (2) to assess what form of reopening and/or reconsideration relief is warranted for those individuals who qualify for P.I. Class status ("USCIS Guidance"). (Mura Decl. ¶¶ 3, 4, 7; *see* ECF No. 695-3; Email of Andrew Davidson re: "*Al Otro Lado* Preliminary Injunction Guidance" ("Davidson Email"), Ex. 1 to Mura Decl.; USCIS *AOL* Preliminary-Injunction Class Membership Screening Guidance ("Non-detained P.I. Class Screening Procedures"), Ex. 2 to Mura Decl., ECF No. 758-2).)[10]

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[10] All exhibits to the Mura Declaration are annexed to ECF No. 758-2. Although the Government proffers only the document for Non-detained P.I. Class Screening Procedures, it attests that

P.I. Class-Membership Determinations: USCIS asylum officers undertake P.I. Class-membership determination interviews for two sets of potential P.I. Class members: (1) those in ICE custody who were referred to USCIS by ICE pursuant to the ICE Referral Guidance; and (2) those named in the Master List who (a) are not in ICE custody; (b) were issued final orders of removal, (c) have not yet been removed; and (d) were last located inside the United States according to ICE data. (Mura Decl. ¶¶ 3, 5-6.)

Prior to a P.I. Class-membership interview, asylum officers must review DHS records for any evidence that might bear upon an interviewee's P.I. Class membership, *i.e.*, evidence that the interviewee was metered prior to the relevant pre-Asylum Ban period. (*See* Non-detained P.I. Class Screening Procedures at 2.) Specifically, asylum officers must "[n]ote whether the [interviewee's] name seems to appear on one of the . . . waitlists [in the Government's possession] . . . that may indicate [the interviewee's] presence in a Mexican border town[.]"[11] (*Id.* at 2-3.) Asylum officers

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USCIS implements substantially identical procedures for potential P.I. Class members in DHS custody. (Mura Decl. ¶ 7.)

[11] As explained in this Court's March 8, 2022 Order, "[i]n response to the growing backlog of asylum seekers [in Mexican border cities], Mexican federal and municipal officials and shelter workers . . . Mexican border cities began collecting the names, nationalities, and contact information of migrants awaiting processing, and compiled that information into 'waitlists.'" (Class Facilitation Order at 4, ECF No. 800.) Although the Government did not create or administer these waitlists, it is undisputed that the Government relied upon them to call asylum seekers waiting in Mexican border towns to Class A POEs for asylum inspection and referral. *See Al Otro Lado*, 952 F.3d at 1008. According to Plaintiffs, waitlists operated in at least the Mexican border cities and

also review, *inter alia*, any Form I-213s, I-867A/Bs, and I-877s in an interviewee's case file. (*Id.* at 4.) Finally, asylum officers examine an interviewee's case file to assess whether he or she "was previously asked class membership screening questions" in connection with the Government's prior P.I. Class-membership screening process, which was instituted immediately after the Preliminary Injunction. If so, asylum officers must note "whether the responses contained evidence of [P.I.] [C]lass membership or evidence that would tend to negate [P.I.] [C]lass membership." (*Id.* at 4; *see also* First Shinners Decl. ¶ 13 (describing briefly USCIS's pre-Clarification Order screening procedures).)

At the P.I. Class-membership interview, asylum officers ask interviewees a set of scripted questions "to determine whether the individual sought to enter the United States at a [Class A POE] to seek asylum before July 16, 2019" but was prevented from doing so because of the Government's Turnback Policy. (USCIS *AOL* Preliminary-Injunction Class Member Screening Interview Questions ("Amended Screening Questions"), Ex. 4 to Mura Decl.; Non-detained P.I. Class Screening Procedures at 4.) The USCIS Guidance explicitly instructs asylum officers to ask these Amended Screening Questions even if the interviewee was previously interviewed in connection with USCIS's prior screening pro-

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towns of Agua Prieta, Ciudad Acuña, Ciduad Juárez, Matamoros, Mexicali, Nogales, Nuevo Laredo, Piedras Negras, Reynoso, San Luis Rio Colorado, Tijuana. (Class Facilitation Order at 4 n.4.) However, the Government possesses only a fraction of the waitlists that were in operation during the Asylum Ban period. These were provided to the Government either by Plaintiffs' counsel or Mexico's federal immigration agency ("INAMI"). (Non-detained P.I. Class Screening Procedures at 1 n.2 and 3 n.6.)

cedures. Furthermore, it forbids asylum officers from using the scripted interview questions ("Initial Screening Questions") that were deployed in USCIS's prior screening procedures. (*See* Initial Screening Questions, Ex. 1 to Enforcement Mot., ECF No. 644-3 (setting forth P.I. Class screening questions developed by USCIS immediately following Preliminary Injunction); *see also* Non-detained P.I. Class Screening Procedures at 4; *see also* Davidson Email at 2 ("As of today, asylum officers must *no longer use* the USCIS *AOL* metering questions distributed by Deputy Chief Ashley Caudill-Mirillo on November 24, 2019 [Initial Screening Questions]."") (emphasis in original).) At the conclusion of the interview, asylum officers must solicit from interviewees any additional evidence of P.I. Class membership they wish to submit. (Amended Screening Questions ¶ 10.)

After the P.I. Class-membership interview, "the asylum officer must determine if the [interviewee] has established he or she is more likely than not [a P.I. Class] member." (Non-detained P.I. Class Screening Procedures at 5; Mura Decl. ¶ 16.) "Documentary evidence of [P.I.] [C]lass membership is not required to meet this standard." (Non-detained P.I. Class Screening Procedures at 5.) However, documentary evidence of P.I. Class membership—"including but not limited to, documentation of a stay in a shelter or hotel in a Mexican border town/city during the relevant pre-[Asylum Ban] time period[,] documentation regarding the placement of a name on a waitlist during the relevant pre-[Asylum Ban] time period[,] and declarations, affidavits, or the individual's own statements regarding whether they may have been subject to metering during the relevant pre-[Asylum Ban] time period"—"will *generally be suf-*

ficient to establish" P.I. Class membership. (*Id.* (emphasis added).)

The USCIS Guidance permits asylum officers to consider "contradictory evidence" in an interviewee's DHS records or testimony, including testimony elicited in response to the Initial Screening Questions. (*Id.*) Indeed, while the USCIS Guidance instructs asylum officers "not [to] rel[y] on the results of prior [P.I] class membership screenings to exclude individuals from consideration for [P.I.] [C]ass membership," it also states asylum officers may consider "an individual's prior statements in prior screening interviews" in deciding whether an interviewee establishes P.I. Class membership. (First Shinners Decl. ¶ 13; *see* Non-detained P.I. Class Screening Procedures at 6.)

The USCIS Guidance deems "generally sufficient" for establishing P.I. Class membership the presence of a potential P.I. Class member's name on a metering waitlist pre-dating the Asylum Ban. (Non-detained P.I. Class Screening Procedures at 4-5.) However, the USCIS Guidance explicitly confers asylum officers discretion to "giv[e] greater weight" to an individual's own statements—including those elicited at a prior P.I. Class-membership screening—that are "clearly and unequivocally contradict[ory]" of P.I. Class membership status. (*Id.* at 5; *see also id.* at 3 n.6 ("These [metering waitlists] may not be reliable, accurate, or comprehensive lists of those who were waiting to enter the United States through a [POE] at any given time.").)

The USCIS Guidance further prescribes that "[t]he absence of an individual's name on a waitlist should not be used to conclude that the individual is not a [P.I.] [C]lass member where there is other credible evidence

of [P.I.] class membership, including but not limited to the individual's own testimony." (*Id.* at 6.) The USCIS Guidance explains that such flexibility is necessary in part because the Government only has incomplete waitlists from four Mexican border cities and towns and none of the waitlists from the other seven Mexican border cities and towns in which such a system was known to operate. (*Id.* at 5-6.)

If, after an interview, an asylum officer concludes an interviewee fails to satisfy the standard for P.I. Class membership, a negative P.I. Class-membership determination will issue. (Non-detained P.I. Class Screening Procedures at 6-7.) However, if the asylum officer finds the interviewee establishes that he or she is more likely than not a P.I. Class member, the asylum officer must proceed to the second strand of the USCIS Guidance's framework: identifying the appropriate form of relief to administer. (*Id.* at 7.)

Reopening and Reconsideration Relief: The USCIS Guidance instructs asylum officers to ascertain whether the Asylum Ban was applied to deny asylum in the cases of identified P.I. Class members and, if so, at which stage in immigration proceedings. (Mura Decl. ¶¶ 16-17.) In the case of a P.I. Class member to whom USCIS previously applied the Asylum Ban during his or her credible fear interview, the USCIS Guidance mandates that the case be reopened, the prior negative fear determination be vacated, and the responsible asylum officer reconduct the new credible fear interview and make a new credible fear determination without applying the Transit Rule. (*See id.* ¶ 17.) In the case of a P.I. Class member to whom an EOIR immigration judge ("IJ") previously applied the Asylum Ban during review

of the USCIS's negative fear determination, the USCIS Guidance confers jurisdiction to EOIR for the purpose of fashioning reopening or reconsideration relief. The asylum officers merely must re-issue the negative fear determination paperwork, re-refer for review the negative fear determination to the IJ, and notify the EOIR of USCIS's determination and referral. (*Id.* ¶ 17; Non-detained P.I. Class Screening Procedures at 8-9.) The propriety of reopening and/or reconsideration relief in this second category of cases is governed by the EOIR's procedures delineated below, *see infra* Sec. 1.B.2.c.

ii. Procedures for Potential P.I. Class Members Removed from the United States

As of September 2021, USCIS had developed, but not yet implemented, procedures to identify and screen potential P.I. Class members who have been removed pursuant to an expedited removal order and, thus, presumably are no longer located in the United States. (*See* Davidson Decl. ¶ 18.)[12] This process begins with USCIS querying the Master List to isolate individuals "who received a negative [credible fear] determination where the Asylum Ban was applied and [who] were removed pursuant to an expedited removal order." (*Id.* ¶ 18; *see id.* ¶ 24 ("To identify [removed potential P.I. Class members], USCIS will rely on the same data available in the [M]aster [L]ist[.]").) Class counsel—not the Government—has agreed to provide notice to these potential P.I. Class members, who then must self-

[12] The Government did not state in its section of the Joint Status Report whether USCIS had begun to institute its contemplated procedures for this subset of potential P.I. Class members. (*See* ECF No. 803.)

identify by sending directly to USCIS applications for P.I. Class membership in accordance with such notice. Upon receipt of a potential P.I. Class member's submission is received, a USCIS asylum officer will review the individual's DHS case file and solicit the individual to submit additional evidence. (*Id.* ¶¶ 20-21, 25-26.) USCIS will deploy substantially the same process for evaluating evidence to determine P.I. Class membership as set forth above, *see supra* Sec. I.2.b.i, except that potential P.I. Class members who have been removed will not receive an in-person screening interview. (*Id.* ¶ 26.)

Individuals deemed P.I. Class members will "be provided instructions on further processing, including how to request to return to the [United States] to participate in their immigration case." (Davidson Decl. ¶ 27.) Specifically, P.I. Class members must submit to DHS a Form I-131, Application for Travel Document; if the application is approved, DHS will send the P.I. Class member a travel letter allowing him or her to board an aircraft and travel to a POE. (First Shinners Decl. ¶ 35 (citing 8 C.F.R. § 212.5(f)).) Upon a removed P.I. Class member's arrival at a POE, CBP will inspect and determine how to process the individual depending upon the specific circumstances of his or her case. (*Id.*)

c. EOIR

On October 30, 2020, EOIR's Office of General Counsel ("EOIR-OGC") issued legal guidance to its adjudicators—IJs and the BIA—regarding how to effectuate the directives of the Clarification Order ("EOIR

Guidance"). (First Anderson Decl. ¶ 7.)[13] The EOIR Guidance instructs its adjudicators to undertake a *sua sponte* review of the records of proceeding ("ROP") in the cases of individuals identified from the Master List and referred to EOIR by USCIS pursuant to the above-referenced procedures ("ROP Review"). (*Id.* ¶ 4.) EOIR has also established a collateral process through which potential P.I. Class members themselves can affirmatively move to reopen their cases, notwithstanding the results of the ROP Review. (Decl. of Jill W. Anderson ("Second Anderson Decl.") ¶ 7, Ex. B to First Shinners Decl., ECF No. 758-3.)

i. ROP Review

The ROP Review entails (1) identifying eligible potential P.I. Class members and (2) reviewing the contents of the ROPs in those cases to (a) determine whether those potential P.I. Class members are, in fact, P.I. Class members, and (b) fashion the appropriate reopening and reconsideration relief to P.I. Class members.[14] (*See* Second Anderson Decl. ¶ 5.) The poten-

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[13] The EOIR Guidance does not refer to a specific document proffered by the Government but rather to a policy about which the Government has attested the details and accuracy. The EOIR-OGS contends the policy documents are protected by attorney-client privilege and, thus, the Government has chosen not to proffer those papers to this Court. (First Anderson Decl. ¶ 7.)

[14] The task of conducting an ROP Review is the responsibility of the last entity to issue a decision in a given case, *i.e.*, the IJ or BIA. (*See* First Anderson Decl. ¶ 15.) "For example, when an [IJ] issues a decision in an individual's removal proceeding and neither the individual nor DHS appeals the decision to the BIA, the IJ is the last entity to issue a decision and jurisdiction over a motion to reopen would lie with the IJ." (*Id.*) "If an IJ's decision is appealed to the BIA, and the BIA is the last entity to issue a decision

tial P.I. Class members subject to the ROP Review includes those individuals identified from the Master List who are in Section 240 removal proceedings, whose application for asylum was denied, and who were encountered by CBP between July 16, 2019 and June 30, 2020. (*Id.* ¶ 4.) The ROP Review also encompasses P.I. Class members referred to EOIR by USCIS under the process delineated above, *supra* Sec. I.B.2.b.i. (First Anderson Decl. ¶¶ 9-19; Mura Decl. ¶ 7.) However, in this second set of cases, adjudicators leave undisturbed USCIS's P.I. Class-membership determination and address only the question of whether reconsideration relief is warranted. (Mura Decl. ¶ 7.)

To identify P.I. Class members, adjudicators examine the ROP of a potential P.I. Class member's case to determine whether he or she: (1) is a non-citizen or national of Mexico; (2) most recently entered the United States on or after July 16, 2019; (3) was subject to metering at the southwest border before July 16, 2019; and (4) continues to seek access to the U.S. asylum process. (First Anderson Decl. ¶ 11.) During this process, EOIR adjudicators examine only the ROP. They do not search DHS records to locate additional evidence of metering that was not made part of the ROP. (First Shinners Decl. ¶ 38; Second Anderson Decl. ¶ 8.)

The EOIR Guidance requires its adjudicators to examine the final order of removal in the cases of individuals deemed P.I. Class members pursuant to the above-referenced procedure to ascertain whether that determination "was based on the Asylum Ban." (Second Anderson Decl. ¶ 5.) Where the Asylum Ban is listed as a

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in the case, the BIA would have jurisdiction to reopen proceedings," with some limited exceptions. (*Id.*)

ground for denial, adjudicators must reopen the case and issue a "new decision on the merits." (First Anderson Decl. ¶ 14.) The Government attests that it is standard practice for adjudicators to deny applications for asylum "on a number of grounds in the alternative should one of the grounds fail to survive further review." (*Id.* ¶ 13.) Thus, it is not uncommon for P.I. Class members' final orders of removal to identify the Asylum Ban, along with other legal bases, as grounds for denying asylum. (*Id.*) The EOIR Guidance requires case reopening even where there are alternative grounds for denying asylum listed in the final order of removal. However, it also confers to adjudicators discretion to issue in reopened cases a new merits decision denying a P.I. Class member's asylum application predicated upon alternative, non-Asylum Ban grounds for denying asylum, if any, identified in the prior order of removal. (*Id.* ¶¶ 13-14 (explaining "[w]here asylum was denied based on the Asylum Ban, but the adjudicator alternatively determined that the respondent had not satisfied his or her burden of proving eligibility for asylum on the merits," on reconsideration "the adjudicator [has discretion to] issue an order reopening the proceedings and setting forth the [negative] merits determination in the same order").)

The EOIR-OGC reviews each new decision resulting from ROP Review. (Second Anderson Decl. ¶ 6 ("EOIR-OGC reviews the results of the adjudicator-level review for each filing, including review of the adjudicator's notes and findings, and the individual file if necessary.").) If a deficiency is identified, the case is returned to the pertinent IJ or the BIA for remediation. (*Id.*)

As of September of 2021, the EOIR has completed ROP Review for 1,631 of the 2,117 identified cases. (Second Anderson Decl. ¶ 4.) EOIR adjudicators deemed 1,169 of those cases ineligible for reopening and 462 eligible.[15] Of the 462 cases reopened, in 271 adjudicators found that the Asylum Ban had been applied to deny asylum. (*Id.* ¶ 8.) An additional 46 cases subject to the ROP Review were determined to have "insufficient evidence" to make a P.I. Class-membership determination. (Second Anderson Decl. ¶¶ 4, 8.) The Government is "determining how to best accomplish any further review" respecting these 46 cases. (Shinners Decl. ¶ 38; *see also* Second Anderson Decl. ¶ 8 ("EOIR continues to explore whether and what further review procedures may be necessary for these 46 cases.").)

ii. Motions to Reopen

In addition to the ROP Review, EOIR established a process for individuals in Section 240 removal proceedings whose applications for asylum were denied to "file an affirmative motion to reopen." (Second Anderson Decl. ¶ 7.) An individual deemed ineligible for relief pursuant to the EOIR's ROP Review is *not* precluded from filing such a motion. (*Id.* ¶ 9.) The EOIR will reopen a case pursuant to the above-described motion practice when a movant establishes P.I. Class membership and the movant's ROP indicates the Asylum Ban was applied in his or her immigration case. (*Id.* ¶ 7.) If the movant fails to provide sufficient evidence of P.I.

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[15] The Government cautions the EOIR did not issue positive P.I. Class-membership determinations in all 462 re-opened cases. (Second Anderson Decl. ¶ 8 n.1.) Rather, some of those cases purportedly were reopened based upon adjudicators' "*sua sponte* authority" to do so "for other reasons." (*Id.*)

Class membership, the EOIR Guidance instructs adjudicators "to solicit additional information pursuant to an order or by conducting a hearing on the motion." (*Id.*)

The EOIR has in recent months developed a template motion, which it has posted to its website "with instructions and a link to [Plaintiffs' counsel's] website to obtain additional information." (Joint Status Report at 3 (stating EOIR developed the template motion together with Plaintiffs' counsel).) "The template motion and instructions . . . provide potential [P.I. Class] members with additional information about their existing right to file motions to reopen[,] to submit additional evidence of class membership[,] and [to] seek reopening or reconsideration." (*Id.* at 4.)

C. Plaintiffs' Pending Motions

In both their Enforcement and Oversight Motions, Plaintiffs identify numerous aspects of the Government's Preliminary Injunction-compliance procedures that purportedly fall short of the Clarification Order's directives for screening P.I. Class members, providing notice to P.I. Class members, and providing P.I. Class members with the reopening and reconsideration relief. (Enforcement Mem. 13-25; Oversight Mem. At 13-25; Pls.' Statement ¶¶ 1-16.) Plaintiffs seek to "enforce" the Clarification Order's directives against the Government by requesting that the Court resolve the disputes Plaintiffs have identified and once again clarify or modify the Preliminary Injunction and, moreover, the Clarification Order.

The Government opposes. It contends its procedures are compliant with both the Preliminary Injunction and Clarification Order. (Opp'n to Enforcement

Mot. ("Enforcement Opp'n"), ECF No. 657; Opp'n to Oversight Mot. ("Oversight Opp'n"), ECF No. 758.) Plaintiffs reply. (Reply in supp. of Enforcement Mot. ("Enforcement Reply"), ECF No. 665; Reply in supp. of Oversight Mot. ("Oversight Reply"), ECF No. 759.)

Additionally, Plaintiffs seek: (1) to convert to a permanent injunction the Preliminary Injunction, inclusive of the Clarification Order and any further relief issued here; and (2) to appoint Magistrate Judge Karen S. Crawford special master for the purpose of overseeing the Government's compliance with a permanent injunction. (*See generally* Oversight Mem; Proposed Order ¶¶ 4, 8.) The Government opposes both requests. (*See* Defs.' § 1252(f)(1) Br., ECF No. 813; Oversight Reply.) Relying upon a newly issued United States Supreme Court decision, the Government contends this Court lacked jurisdiction to issue either the Preliminary Injunction or Clarification Order under 8 U.S.C. § 1252(f)(1) and, thus, lacks jurisdiction to now enter a permanent injunction. (*See* Defs.' § 1252(f)(1) Br. at 1 (citing *Garland v. Aleman Gonzalez*, 142 U.S. 2057 (2022)).) The Government further argues that even if injunctive relief is not barred, the Court need not institute procedures for monitoring the Government's compliance, considering it "ha[s] continued to adhere to and progressively implement the terms of the [Preliminary Injunction] and the [Clarification Order]." (Oversight Opp'n at 17.)

II. LEGAL STANDARDS

A. Rule 65

"It is undoubtedly proper for a district court to issue an order clarifying the scope of an injunction in order to

facilitate compliance with the order and to prevent 'unwitting contempt.'" *Paramount Pictures Corp. v. Carol Publ'g Grp.*, 25 F. Supp. 2d 372, 374 (S.D.N.Y. 1998) (citing *Regal Knitwear Co. v. Nat'l Labor Relations Bd.*, 324 U.S. 9, 15 (1945)); *Sunburst Prod., Inc. v. Derrick Law Co.*, 922 F.2d 845 (9th Cir. 1991) (Memorandum Disposition) ("The modification or clarification of an injunction lies within the 'sound discretion of the district court[.]'") (citing same). Rule 65 requires that injunctions be specific "so that those who must obey them will know what the court intends to require and what it intends to forbid." *Int'l Longshoremen Ass'n, Local 1291 v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 76 (1968). "By clarifying the scope of a previously issued preliminary injunction, a court 'add[s] certainty to an implicated party's effort to comply with the order and provide[s] fair warning as to what future conduct may be found contemptuous.'" *Robinson v. Delicious Vinyl Records Inc.*, No. CV 13-411-CAS (PLAx), 2013 WL 12119735, at *1 (C.D. Cal. Sept. 24, 2013) (alterations in original) (quoting *N.A. Sales Co. v. Chapman Indus. Corp.*, 736 F.2d 854, 858 (2d Cir. 1984)).

B. Permanent Injunctive Relief

In the Ninth Circuit, a plaintiff who seeks a permanent injunction must satisfy a four-factor test. *See Kurin, Inc. v. Magnolia med. Techs., Inc.*, No. 3:18-CV-1060-L-LL, 2020 WL 4049977, at *9 (S.D. Cal. July 20, 2020) (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). A plaintiff must establish:

> (1) That it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships be-

> tween the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction [(collectively, "*eBay* factors")].

eBay Inc., 547 U.S. at 391. Where the Government is the party opposing issuance of injunctive relief, the above-mentioned third and fourth factors—balancing of hardships and public interest—merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). This merger requires the Court to examine whether the "public consequences" that would result from the permanent injunction sought favor or disfavor its issuance. *See Fraihat v. U.S. Immigration & Customs Enf't*, 445 F. Supp. 3d 709, 749 (C.D. Cal. 2020).

Typically, courts hold an evidentiary hearing before converting a previously-ordered preliminary injunction into a permanent one. *See Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1989). However, no evidentiary hearing is necessary "when the facts are not in dispute." *Id.*; *see United Food & Commercial Workers Local 99 v. Bennett*, 934 F. Supp. 2d 1167 (D. Ariz. Mar. 29, 2013) (holding that where plaintiffs had satisfied the *eBay* factors in their prior order "and nothing in the record indicates that the circumstances have changed," no evidentiary hearing is necessary).

C. Rule 53

"The appointment of a Special Master, with appropriately defined powers, is within both the inherent equitable powers of the court and the provisions of [Rule 53]." *Madrid v. Gomez*, 899 F. Supp. 1146, 1282 (N.D. Cal. 1995). Rule 53 provides, in pertinent part, "[u]nless a statute provides otherwise, a court may appoint a mas-

ter only to . . . hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by . . . some exceptional condition." Fed. R. Civ. P. 53(a)(1)(B)(i). Under this provision, a special master may "be appointed because of the complexity of litigation and problems associated with compliance with [a] district court order." *United States v. Suquamish Indian Tribe*, 901 F.2d 772, 775 (9th Cir. 1990) (citing *Hoptowit v. Ray*, 682 F.2d 1237, 1263 (9th Cir. 1982)). Circumstances that particularly warrant a special master's oversight of injunctive relief include those in which "a party has proved resistant or intransigent to complying with the remedial purpose of the injunction in question." *United States v. Apple*, 992 F. Sup. 2d 263, 280 (S.D.N.Y. 2014) (citing *United States v. Yonkers Bd. of Educ.*, 29 F.3d 40, 44 (2d Cir. 1994) (per curiam)).

III. ANALYSIS

A. Motions to Clarify or Modify

Before the Court are eleven distinct disputes concerning the Government's Preliminary Injunction and Clarification Order implementation measures: four disputes relate to the Government's purported failure to identify P.I. Class members pursuant to Paragraphs 2 and 4 of the Clarification Order; two relate to the Government's purported failure to provide notice to individuals identified in Paragraph 3 of the Clarification Order; and five relate to the Government's purported failure to issue reopening and/or reconsideration relief in accordance with Paragraph 4 of the Clarification Order and the

Preliminary Injunction. (Pls.' Statement ¶¶ 2-11, 13-16.)[16]

While Plaintiffs style their request to have the Court weigh in on these disputes as a motion to "enforce," what Plaintiffs truly seek is further clarification, or modification, of the Preliminary Injunction and, moreover, the Clarification Order. In so construing Plaintiffs' request, the Court finds significant both that (1) Plaintiffs do not seek the imposition of measures to compel the Government to comply with the Clarification Order, *e.g.*, sanctions or civil contempt, and (2) Plaintiffs' Enforcement and Oversight Motions principally ask the Court to define the requirements of the directives of Paragraphs 2, 3, and 4 of the Clarification Order more precisely. *See*, *e.g.*, *Shilitani v. United States*, 384 U.S. 364, 370 (1966) (observing motions to enforce generally seek sanctions or civil contempt to compel the nonmovant's compliance with a prior order).

Thus, the Court construes Plaintiffs' requests in their Enforcement and Oversight Motions to "enforce" the Preliminary Injunction and Clarification Order as requests to clarify and/or modify and grants in part and

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[16] The Court notes that while Plaintiffs identified 16 disputes in their Joint Status Report, there truly exist only 11. The disputes identified at Paragraphs 3 and 4 and Paragraphs 6 and 7 essentially overlap. (Pls.' Statement ¶¶ 3-4, 6-7.) Paragraph 15 identifies a dispute that was never raised in either of Plaintiffs' Motions. (*Id.* ¶ 15.) The dispute listed in Paragraph 1—that the Government must "provide a timeline for fully complying with the [Preliminary Injunction] and Clarification Order—effectively seeks oversight and does not identify any actual dispute concerning the manner in which the Government has carried out its compliance procedures. (*Id.* ¶ 1.) And there is no enumerated Paragraph 13.

denies in part those requests for the reasons set forth below.

1. Paragraph 4: Defendants' P.I. Class-Membership Identification Procedures

As set forth above, Paragraph 4 of the Clarification Order provides:

> Defendants must make all reasonable efforts to identify [P.I. Class] members, including but not limited to reviewing their records for notations regarding class membership made pursuant to the guidance issued on November 25, 2019, and December 2, 2019, to CBP and OFO, respectively, and sharing information regarding [P.I. Class] members' identities with Plaintiffs.

(Clarification Order at 25.)

Plaintiffs allege the Government has failed to "make all reasonable efforts to identify P.I. Class members." First, Plaintiffs contend that the Master List is underinclusive because the Government did not review USB Form I-213 annotations as an independent source to identify potential P.I. Class members, despite the explicit instruction to do so in Paragraph 4. (*See* Oversight Mem. at 24-25; Pls.' Statement ¶ 16.) Second, Plaintiffs assert the USCIS Guidance is noncompliant because it (A) does not contemplate the Government obtaining outstanding metering waitlists from its Mexican counterparts; (B) does not attribute sufficient evidentiary weight to metering waitlist; and (C) permits asylum officers to consider potential P.I. Class members' answers to the Initial Screening Questions in making

P.I. Class-membership determinations. (Enforcement Mem. at 13-17; Pls.' Statement ¶¶ 3-6.)[17]

a. USB Form I-213 Review

"The Form I-213 is essentially a recorded recollection of [an agent's] conversation with [an] alien[.]" *Bustos-Torres v. Immigration & Naturalization Servs.*, 898 F.2d 1053, 1056 (5th Cir. 1990). Both OFO *and* USB agents routinely complete Form I-213 after a first encounter with an undocumented noncitizen. *See Espinoza v. Immigration & Naturalization Servs.*, 45 F.3d 308, 309 (9th Cir. 1995). Following the Preliminary Injunction, USB and OFO agents were instructed on November 25, 2019 and December 2, 2019, respectively, to annotate Form I-213s with "Potential AOL Class Member" if they encountered an individual who affirmatively stated they were metered, provided information from which an agent could infer the individual had been subjected to metering, or affirmatively claimed to be an *AOL* Class member. (First Decl. of Jay Visconti ("First Visconti Decl.") ¶¶ 1, 4, 6.) These policies have remained in effect ever since. (Clarification Order at 24.)

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[17] Plaintiffs further aver that the ROP Review procedure is noncompliant with Paragraph 4 because it excludes from review P.I. Class members who received a final order of removal after June 30, 2020 and does not involve a separate examination of DHS records. (Enforcement Mem. at 18; Oversight Mem. At 17; Pls.' Statement ¶¶ 11, 14.) However, the text of Paragraph 4 clearly applies to *Defendants* only, not the EOIR. The Clarification Order sets forth the requirements applicable to EOIR's P.I. Class-identification procedures under Paragraph 2. *See infra* Sec. III.A.3.

The Clarification Order directed Defendants to "make all reasonable efforts to identify" P.I. Class members, "including but not limited to reviewing their records for notations regarding class membership" in the Form I-213s. (Clarification Order at 23-25.) Defendants digitized and made text searchable OFO Form I-213s, rendering these forms queryable data. Therefore, OFO Form I-213 annotations were among the information the Government reviewed in identifying potential P.I. Class members to place on the Master List. The Government attests it identified 10 potential P.I. Class members from its review of OFO Form I-213 annotations. In contrast, the USB Form I-213s are in paper form only and, therefore, must be manually reviewed. The Government acknowledges that it did not systematically search for and review notations made on USB Form I-213s as an independent source of data for identifying potential P.I. Class members in the first instance, but contend that its implementation measures nonetheless comply with Paragraph 4 because the USCIS Guidance requires asylum officers to review both OFO and USB Form I-213s, if any, found in a potential P.I. Class member's case file when making a P.I. Class-membership determination. (Shinners Decl. ¶¶ 26, 37.)

It is self-evident that Form I-213s are particularly useful in identifying *potential* P.I. Class members. The objective, defining trait of all P.I. Class members is that they were metered at a Class A POE along the U.S.-Mexico border, during the relevant pre-Asylum Ban period, and the Form I-213 annotations explicitly indicate whether a noncitizen claims to have been, or has evidence that he or she was, metered upon arriving at a Class A POE. (*See* Clarification Order.) Therefore,

it is inexplicable why the Government would screen only OFO Form I-213s for the purpose of identifying potential P.I. Class members, and not USB Form I-213s. The Government does not offer any qualitative distinction between the two Form I-213s that might justify the Government's decision to use OFO Form I-213s, but not USB Form I-213s, in compiling its Master List. Nor is one apparent to this Court.

Rather, the Government's argument that a fulsome review of USB Form I-213s is unnecessary rests exclusively on burdensomeness grounds. (Oversight Opp'n 22-23.) But as this Court has repeatedly opined, the Government's burdensomeness arguments respecting class-identification garner little sympathy. (Clarification Order at 23 n.6 ("[T]he [P.I. Class] is based on a metering system established by Defendants. . . . It therefore does not follow that determining who was subject to metering for the purposes of complying with the Preliminary Injunction now presents an insurmountable task.").) That is particularly the case where, as here, it appears that a review of USB Form I-213s is likely to unearth additional potential P.I. Class Members. (*See* First Shinners Decl. ¶ 37 (attesting that review of OFO Form I-213s identified 10 potential P.I. Class members).) Furthermore, the Government's assertion of undue burden rings hollow because there exists a simple alternative to conducting a purportedly burdensome manual review of paper documents: digitizing and rendering text-searchable the USB Form I-213s just as it did the OFO Form I-213s.

Accordingly, the Court **CLARIFIES** that Paragraph 4 of the Clarification Order directs the Government to review *all* Form I-213s—including those completed by

USB agents—for annotations of *AOL* Class membership in identifying potential P.I. Class members for inclusion to the Master List.

b. USCIS Guidance

i. Metering Waitlists

Plaintiffs allege that Paragraph 4's directive that the Government make "all reasonable efforts to identify" includes attempting to obtain metering waitlists from the Mexican federal or municipal government officials or charity staff members responsible for managing those waitlists.[18] They also allege that "reasonable efforts to identify" P.I. Class members requires that asylum officers treat as "presumptive" evidence of P.I. Class membership the presence of a potential P.I. Class member's name on a metering waitlist. Plaintiffs claim that because the Government refuses to attempt to obtain outstanding metering waitlists and because the USCIS Guidance treats waitlist evidence as merely "probative," the Government's Clarification Order implementation measures violate Paragraph 4. (Pls.' Statement ¶¶ 2-4.)

Attempting to Obtain Metering Waitlists: As this Court has stated repeatedly, it is well-established Defendants relied upon waitlists managed by Mexican government and charity officials in border towns and cities to facilitate metering. (*See*, *e.g.*, Clarification Order at 23 n.6.) The Government has obtained from class coun-

[18] The Government has partial copies of the waitlists from Tijuana, Ciudad Juarez, Mexicali, and Ojinaga. (Non-detained P.I. Class Screening Procedures at 3.) It does not have any metering waitlists from the other Mexican border cities and towns in which those lists were maintained. (*Id.*)

sel and INAMI incomplete versions of waitlists from four Mexican border towns/cities in which such lists were maintained. However, the Government refuses to attempt to obtain outstanding metering waitlists used at numerous other Mexican border cities and towns, despite Plaintiffs' repeated pleas that it do so.[19] Plaintiffs attest that they have been unsuccessful in their endeavors to obtain outstanding waitlists, and that the Government is in a much better position to access these documents. (*See*, *e.g.*, Decl. of Ori Lev ("Lev Decl.") ¶ 24(c), ECF No. 644.) The Government contends that this premise ignores complex and nuanced diplomatic considerations and the fallout that could result from requesting INAMI to produce copies of the metering waitlists. (*See*, *e.g.*, Decl. of Joseph Draganac ("Draganac Decl.") ¶ 12 ("[W]ere CBP to make a request to the Mexican government for the waitlists for use in this litigation, it could cause harm to CBP's relationship with

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[19] Furthermore, Plaintiffs have repeatedly sought court orders directing the Government to obtain outstanding metering waitlists. For example, Plaintiffs sought discovery from Defendants of some metering waitlists not in the Government's control, essentially implying the Government has an obligation to retrieve those waitlists from its Mexican counterparts pursuant to Rule 34 discovery procedures. (ECF No. 760.) Magistrate Judge Crawford found that request overbroad; she instructed Plaintiffs to serve Defendants "with a more narrowly tailored document request . . . that only requires [Defendants] to produce copies of any waitlists in their physical possession that they have used or intend to use to determine whether any individual is a class member." (ECF No. 795 at 7.) Moreover, Plaintiffs Motion for Class Facilitation asked this Court to order Defendants to take all reasonable steps to obtain all outstanding metering waitlists from Mexican federal, state, and municipal officials. (ECF No. 720.) However, the Court denied this request on the ground that it lacked authority to issue such an order pursuant to Rule 23. (ECF No. 800.)

Mexico, especially on the local level. . . . I am concerned that a request for the waitlists could be perceived by individuals in the Mexican government as CBP attempting to monitor or regulate Mexico's internal processes for addressing immigration."), ECF No. 657-2.)

Plaintiffs argue that "tak[ing] all reasonable steps to identify [P.I. Class] members" includes attempting to procure from Mexican officials copies of all the relevant metering waitlists that the Government does not possess. (Enforcement Mem. at 13-14; Pls.' Statement ¶ 2.) The Government contends that Plaintiffs' argument is without textual basis in the Clarification Order, which requires only that the Government "must review [its] *own* records to aid in the identification of class members." (Clarification Order at 23 (emphasis added); *see* Enforcement Opp'n at 14-15.) The Court agrees with the Government. The Clarification Order directed the Government in unambiguous terms to review its *own* records. (*See* Clarification Order at 25.) It did not require the Government to obtain and review waitlists in the sole possession, custody, or control of Mexican authorities.

To the extent Plaintiffs request that the Court modify its Preliminary Injunction and Clarification Order to direct the Government to attempt to obtain from Mexican government and charity officials all outstanding waitlists, the Court declines to do so. Courts have jurisdiction to modify the terms of an injunction consistent with its original purposes in order to "preserve the status quo." *Nat'l Res. Def. Council, Inc. v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001) (holding district court may take action pursuant to Rule 62 so long as that action does not "materially alter the status of the case

on appeal"); *see also Tribe v. U.S. Bureau of Reclamation*, 319 F. Supp. 3d 1168, 1171 (N.D. Cal. Apr. 30, 2018).

Here, Plaintiffs have not shown modification of the Clarification Order is warranted. Individuals whose names are listed on metering waitlists the Government does not possess are not comparably disadvantaged when it comes to qualifying for "potential" P.I. Class membership. The Master List is purposefully overinclusive and, thus, additional waitlists are unlikely to serve a unique or necessary purpose for identifying potential P.I. Class members. Indeed, the Government currently identifies individuals for its Master List without examining the metering lists in its possession, a practice to which Plaintiffs do not object. Thus, this Court is not persuaded that USCIS's procedures for identifying potential P.I. Class members are impermissibly narrow absent the outstanding metering waitlists.

Nor does the USCIS Guidance put at a comparable disadvantage individuals whose names are listed on metering waitlists the Government does not possess. The USCIS Guidance explicitly provides "the absence of an individual's name on a waitlist should not be used to conclude that the individual is not a [P.I.] [C]lass member." (Non-detained P.I. Class Screening Procedures at 5-6.) Under the USCIS Guidance, there are many other forms of evidence in DHS records or that the potential P.I. Class member can proffer him- or herself that are "generally sufficient" to establish P.I. Class membership. (*Id.* at 4-5.) For example, although asylum officers will be unable to examine metering waitlists from the Mexican border town of San Luis Rio Colorado—waitlists which the Government does not possess—such

potential P.I. Class members may rely upon other, easily-attainable alternative forms of evidence to establish P.I. Class membership. This evidence includes: (1) Form I-213s, I-867A/Bs, and I-877s in their DHS case files; (2) documentary evidence indicating presence along the U.S.-Mexico border during the pre-Asylum Ban period, including but not limited to documentation of a stay at a shelter or hotel; and (3) testimony of metering during the pre-Asylum Ban period, all of which are "generally . . . sufficient to establish" P.I. Class membership. (*Id.* at 5.) Thus, Plaintiffs have failed to show that unless the Government obtains the outstanding metering waitlists, implementation of the USCIS Guidance will lead to exclusionary P.I. Class membership determinations. Without such a showing, it cannot be said Plaintiffs' proposed modification is necessary to preserve the status quo of the Preliminary Injunction or Clarification Order. *See*, *e.g.*, *Sierra Club v. U.S. Army Corps of Eng'rs*, 732 F.2d 253, 257 (2d Cir. 1984) ("[W]hen reviewing an order modifying a preliminary injunction we look to see whether or not the status quo is maintained by the modification[.]") (emphasis omitted)).

Waitlists as "Presumptive" Evidence: Plaintiffs complain that the USCIS Guidance violates Paragraph 4 because it treats evidence of an interviewee's name on a waitlist as merely "probative" of P.I. Class membership, rather than "presumptive." (Enforcement Mem. at 13-14; Pls.' Statement ¶¶ 3-4.) The Government contends that the Clarification Order does not prescribe evidentiary rules or presumptions; rather, it requires the Government to undertake "reasonable efforts" to identify P.I. Class members, which, the Government avers,

the USCIS Guidance does. (Enforcement Opp'n at 16-17.)

Under the USCIS Guidance, the presence of a potential P.I. Class member's name on a metering waitlist is generally sufficient to establish P.I. Class membership. (Non-detained P.I. Class Screening Procedures at 4-5.) "However, if an individual's name is on one of these waitlists, but the individual's own statements . . . clearly and unequivocally contradict that information . . . the individual's own statements may be given greater weight than the existence of a name on the waitlist." (*Id.*)

As an initial matter, it is unclear to the Court how, in Plaintiffs' view, the USCIS Guidance treats metering waitlists as "probative" as opposed to "presumptive." Indeed, Plaintiffs repeatedly use the term "presumptive" to describe the evidentiary weight they believe should attach to the waitlists, but never in their papers do Plaintiffs explain what the USCIS Guidance must do to treat waitlists as "presumptive" rather than "probative." Is the presumption they imagine should attach to metering waitlists rebuttable, or is it irrefutable? Plaintiffs do not say. Nor do Plaintiffs explain how the USCIS Guidance, particularly its requirement that evidence a potential P.I. Class member was not metered must be "clear and unequivocal" to outweigh other documentary evidence demonstrating metering, is incompatible with treating metering waitlists "presumptive" of P.I. Class membership. The answers to these questions ultimately matter not because this Court is solely concerned with the question whether USCIS's P.I. Class-identification procedures are "reasonable" ones.

(*See* Clarification Order at 25.) The Court is satisfied that, indeed, they are.

On the one hand, the USCIS Guidance acknowledges that the presence of an individual's name on a metering waitlist during the pre-Asylum Ban period strongly indicates that person was metered at a Mexican border city or town and, thus, is likely a P.I. Class member. Indeed, the USCIS Guidance instructs asylum officers to treat that evidence as sufficient for establishing P.I. Class membership in ordinary cases. (Non-detained P.I. Class Screening Procedures at 5 ("[D]ocumentation regarding the placement of a name on a waitlist during the relevant pre-July 16, 2019 time period . . . will generally be sufficient to establish that an individual is more likely than not a class member.").) In fact, where waitlist evidence exists in a case, it may only be rebutted by "clear and unequivocal" evidence to the contrary. (*Id.*) However, the USCIS Guidance also provides the Government with the necessary flexibility to account for unusual instances in which a potential P.I. Class member stated in no uncertain terms that he or she was not actually subjected to metering during relevant the pre-Asylum Ban period. (*Id.*) This scenario is far from inconceivable, as Plaintiffs themselves have attested that there have been "numerous reports" of list managers adding individuals' names to waitlists remotely, before they reached a Class A POE. (*See* Decl. of Nicole Ramos ("Ramos Decl.") ¶ 10, ECF No. 390-48.)

Accordingly, the Court **DENIES** the Motions to the extent they seek an order clarifying or modifying Paragraph 4 to (1) require the Government to attempt to obtain from its Mexican official counterparts the outstanding metering waitlists and (2) impose evidentiary rules

overriding the USCIS Guidance's procedures for weighing evidence of a potential P.I. Class member's name on a metering waitlist.

c. Prior P.I. Class Membership Screening

Following the Preliminary Injunction, but before the Clarification Order, USCIS screened for P.I. Class membership a group of individuals whose names appear on the Master List. (First Shinners Decl. ¶ 13; *see* Non-detained P.I. Class Screening Procedures at 6.) That process involved a prior set of interviews, at which asylum officers asked the Initial Screening Questions and after which asylum officers made P.I. Class-membership determinations. (*See* First Shinners Decl. ¶ 13.) USCIS amended its procedures for P.I. Class-membership screening following the Clarification Order, vacated all prior P.I. Class-membership determinations, and directed asylum officers to re-interview potential P.I. Class members subjected to the prior screening process using the Amended Screening Questions. (*See id.*; *see also* Non-detained P.I. Class Screening Procedures at 4, 6.) But while the USCIS Guidance invalidates the *results* of the prior P.I. Class-membership screening process, it does not restrict asylum officers from considering testimony elicited from that prior screening process in making new P.I. Class-membership determinations. (Non-detained P.I. Class Screening Procedures at 6.) Plaintiffs claim that Paragraph 4 forbids consideration of interviewees' answers to the Initial Screening Questions. (*See* Enforcement Mem. at 16; Pls.' Statement ¶ 5.)

The Initial Screening Questions, Plaintiffs aver, are plagued by a "myriad" of problems. (Enforcement Mem. at 15-16 & n.6; *compare* Initial Screening Ques-

tions *with* Amended Screening Questions.) Plaintiffs list the following flaws:

- Question 2 asks interviewees whether they "[sought] to enter the United States" before the date of their entry? (Initial Screening Question ¶ 2.) Plaintiffs aver that "sought to enter" could easily have been misconstrued to mean "attempts to enter without inspection between [POEs] or the physical act of approaching the limit line (as opposed to putting one's name on [a] waitlist)." (Enforcement Mem. at 16);
- Question 3 asks interviewees "[d]id you ever put your name on any sort of list in Mexico that you believed would get you a place in line to get into the United States?" (Initial Screening Question ¶ 3.) Plaintiffs aver that this question easily could have been construed both narrowly and literally as asking whether the interviewee ever personally "physically wr[o]te" his or her name on a waitlist, as opposed to whether the list manager wrote his or her name on the list, as is usual practice. (Enforcement Mem. At 15 n.6); and
- Finally, Question 3(a) asks interviewees whether they "put [their] name on [a waitlist] after [July 16, 2016]? (Initial Screening Question ¶ 3(a).) Plaintiffs correctly point out that there is a typographical error in Question 3(a): "2016" should have been "2019." (Enforcement Mem. at 15 n.6.)

(Enforcement Mem. at 15-16 & n.6.) Plaintiffs aver that reliance upon answers to those questions would "threaten improper exclusion" of P.I. Class members. (Enforcement Reply at 7.)

Plaintiffs' argument, however, overlooks that USCIS has rephrased and revised the P.I. Class-membership screening questions to address fully Plaintiffs' list of concerns. (*See* Amended Screening Questions ¶ 4 (asking "did you ever try to approach a [POE] to enter the United States" instead of "did you seek entry"), ¶ 5 (asking "did you ever add your name to any sort of list in Mexico that you believed would get you a place in line to cross through a [POE]" and if so "did you add your name to the waitlist by writing it yourself" or "did someone else write your name on the list" instead of "did you ever put your name on any sort of list in Mexico"), ¶ 5(d) (asking whether metering occurred prior to "July 16, 2019" as opposed to "July 16, 2016").) Also, every potential P.I. Class member who was asked the Initial Screening Questions in connection with USCIS's prior screening process must be granted a new interview where he or she will be asked the Amended Screening Questions. (Davidson Email at 2; Non-detained P.I. Class Screening Procedures at 4.) Thus, it appears the USCIS Guidance is designed to rectify instances in which the Initial Screening Questions may have led to imprecise, inaccurate, or unreliable testimony.

Plaintiffs further argue that this Court should disallow consideration of prior statements because it has previously found the Initial Screening Questions ambiguous. (Enforcement Mem. at 16 (citing Order Granting Emergency Prelim. Inj. ("Emergency Order") at 5, ECF No. 607).) This is not true. Plaintiffs cite to an Emergency Order of this Court, which found that an asylum officer had erred when he asked an interviewee an unauthorized and ambiguous question. (*Id.* ("Although the asylum officer asked whether she was told to put her name on a list to get to a POE, Applicant did not answer

the question and asked if it could be repeated. Critically, the asylum officer did not repeat this exact question, but instead asked if Applicant had put her name on a list to enter a POE *besides San Ysidro*, to which Applicant said she had not.") (emphasis in original).) Contrary to Plaintiffs' assertion, this Court has never found any one of the Initial Screening Questions to be ambiguous or otherwise improper.

Accordingly, the Court **DENIES** the Motions to the extent they seek clarification or modification of Paragraph 4 to forbid asylum officers from consulting for the purpose of making P.I. Class-membership determinations an interviewee's testimony elicited in response to the Initial Screening Questions.

2. Paragraph 3: P.I. Class Notice

As set forth above, Paragraph 3 of the Clarification Order provides:

> Defendants must inform identified [P.I] [C]lass members in administrative proceedings before USCIS or EOIR, or in DHS custody, of their potential [P.I.] [C]lass membership and the existence and import of the preliminary injunction.

(Clarification Order at 25.) Plaintiffs allege the Government refuses to provide notice to certain groups of P.I. Class members identified in Paragraph 3. (Pls.' Statement ¶ 11.)

First, Plaintiffs aver it is the Government's position that it need not provide notice to persons in DHS custody at ICE detention centers. (Oversight Mem. at 22; Pls.' Statement ¶ 11.) However, the Government represented in the Joint Status Report that DHS posted notice in all ICE detention facilities in October of 2021 con-

taining language that was the result of a collaborative process between DHS and class counsel. (Joint Status Report at 5.) Plaintiffs do not contest the accuracy of this attestation or assert that this method of notice is flawed. Accordingly, this dispute appears to be moot, and the Court is unpersuaded that the Government has failed to provide notice to P.I. Class members in DHS custody.

Second, Plaintiffs claim the Government believes it need not provide notice to individuals who, on or after the date of the Clarification Order, "had pending motions to reopen before EOIR or pending petitions for review of final removal orders in the federal courts of appeal." (Oversight Mem. at 22.) Plaintiffs allege that, unless the EOIR finds in its ROP Review that such an individual is, in fact, a P.I. Class member, a noncitizen with a pending motion to reopen will not receive notice to which they are purportedly entitled pursuant to Paragraph 3. (*Id.* (noting the EOIR only notifies individuals with cases subject to ROP Review if there is a positive P.I. Class-membership identification).) The Government contends it has mooted this dispute by posting to the EOIR website a "template motion" and, more importantly, "instructions and a link to [class counsel's] website to obtain additional information" concerning potential P.I. Class members' "existing right to file motions to reopen[,] to resubmit additional evidence of class membership[,] and [to] seek reopening or reconsideration." (Joint Status Report at 4.) The Government effectively asserts that, together with the *sua sponte* review for potential P.I. Class members undertaken by USCIS and EOIR, these notice procedures provide adequate and reasonable procedural safeguards to individuals who had pending motions to reopen or ap-

peals when the Court issued its Clarification Order and may qualify for P.I. Class-membership status.

The parties' arguments are slightly off target in that they miss a different, but related, issue with Paragraph 3's language. That directive instructs the Government to notify individuals it already has "identified" as P.I. Class members that they *may potentially be* P.I. Class members. On its face, this directive is backwards: as a matter of procedure, it places the cart before the horse. What this Court meant by Paragraph 3 is to direct the Government to notify individuals in administrative proceedings before USCIS or EOIR, or in DHS custody of the existence of the Preliminary Injunction and their potential *rights to reopening and/or reconsideration relief thereunder* (not potential P.I. Class membership). Because this strand of Plaintiffs' Paragraph 3 challenge seeks to require the Government to provide notice to a potentially broad swath of individuals whom the Government has not even identified as potential P.I. Class members pursuant to its Master List query and ROP Review processes, Plaintiffs' interpretation goes beyond both the letter and spirit of the Court's intended directives concerning P.I. Class notice.

Accordingly, the Court **MODIFIES** Paragraph 3 of the Clarification Order as follows:

> Defendants must inform identified Preliminary Injunction class members in administrative proceedings before USCIS or EOIR, or in DHS Custody, of their class membership, as well as the existence and import of the Preliminary Injunction (ECF No. 330), Clarification Order (ECF No. 605), and this Order (ECF No. 808).

Furthermore, the Court **DENIES** the Motions to the extent they seek clarification or modification of Paragraph 3 to require the Government to provide notice to all individuals with pending motions to reopen before EOIR or pending petitions for review of final removal orders in the federal courts of appeal. The Clarification Order requires that notice be given to "identified" P.I. Class members. It does not direct that notice be given to individuals who have not even been identified as *potential* P.I. Class members.

3. Paragraph 2: EOIR's P.I. Class Membership Identification Procedures and the Implementation of Reopening and Reconsideration Relief

As set forth above, Paragraph 2 of the Clarification Order provides:

> DHS and EOIR must take immediate affirmative steps to reopen and reconsider past determinations that potential [P.I.] [C]lass members were ineligible for asylum based on the Asylum Ban, for all potential class members in expedited or regular removal proceedings. Such steps include identifying affected class members and either directing immigration judges or the BIA to reopen or reconsider their cases or directing DHS attorneys representing the government in such proceedings to affirmatively seek, and not oppose, such reopening or reconsideration.

(Clarification Order at 25.) Plaintiffs allege the Government has failed to comply with Paragraph 2 in several respects.

First, Plaintiffs claim that the EOIR Guidance violates the P.I. Class membership-identification proce-

dures applicable to the EOIR under Paragraph 2 because the ROP Review (A) excludes P.I. Class members who received a final order of removal after June 30, 2020 and (B) does not include an independent review of DHS records that might bear upon P.I. Class-membership, which have not been made part of the EOIR case file. (Pls.' Statement ¶¶ 8, 14.) Second, Plaintiffs claim the Government has failed to "take immediate affirmative steps to reopen and reconsider" the immigration cases of P.I. Class members. (Pls.' Statement ¶¶ 6-7, 9-10, 13.)

a. EOIR P.I. Class Identification Procedures

i. June 30, 2020 Cutoff

The EOIR Guidance instructs its adjudicators to undertake the ROP Review in cases where an IJ or the BIA issued a final order of removal identifying the Asylum Ban as a ground for denying asylum, between July 16, 2019, the date on which the Asylum Ban was effectuated, and June 30, 2020, the date on which the Asylum Ban was vacated by the *C.A.I.R.* Court. (First Anderson Decl. ¶ 4.) Plaintiffs contend that one would reasonably expect some delay between the *C.A.I.R.* decision and the IJs "recogniz[ing] the import of [the *C.A.I.R.* decision], especially in light of the government's appeal of that decision." (Enforcement Mem. at 25 (citing ECF No. 605-6).) Plaintiffs therefore argue that the temporal scope of the ROP Review is likely to exclude P.I. Class members who received final orders of removal *after* June 30, 2020, in violation of Paragraph 4's directive that the EOIR "identif[y] potential [P.I. Class] members." (Enforcement Mem. at 25.)

Plaintiffs aver that the Government could put to rest concerns about misapplication of the Asylum Ban after June 30, 2020 if it showed that EOIR provided notice to its adjudicators of the *C.A.I.R.* decision and its import immediately following issuance of the decision. (Enforcement Mem. at 25.) But the Government has not done so, despite the ease with which it could have.[20] Instead, it conclusively attests that on July 1, 2020, the Asylum Ban "*should* not have applied to anyone." (First Shinners Decl. ¶¶ 8, 27 (emphasis added).) This is cold comfort, particularly given that the record reflects instances of delays between pivotal judicial decisions of this Court, on the one hand, and notice to the pertinent agency of the policy changes that necessarily flowed therefrom, on the other. For example, it took ICE approximately one week following the Clarification Order to notify ERO of that Order's import and to instruct ERO personnel not to remove potential P.I. Class members in ICE custody pending USCIS screening. (*See* ICE P.I. Notice (issued November 6, 2020).) While anecdotal, this data point supports the premise that complex agency guidance takes time to issue and, thus, there may have been a delay between the *C.A.I.R.* decision and uniform non-application of the Asylum Ban by EOIR adjudicators.

The Government contends that the benefit of expanding the ROP Review does not justify the burden considering instances of Asylum Ban misapplication are likely "rare." (Enforcement Opp'n at 24 n. 9.) But Plain-

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[20] The Government attests that EOIR-OGC has deemed the EOIR Guidance attorney-client privileged, and, thus, has chosen not to proffer any documentation concerning that Guidance. (*See* First Anderson Decl. ¶ 7.)

tiffs do not seek an open-ended expansion of the ROP Review; their position contemplates that a cutoff is consistent with Paragraph 2, although they do not explicitly identify a cutoff for the ROP Review they view as reasonable. (Enforcement Mem. at 25.) Plaintiffs certainly have not made a showing that a lengthy expansion of the ROP Review's temporal scope is necessary. Indeed, Plaintiffs do not appear to have identified a single instance in a post-June 30, 2020 EOIR proceeding where the Asylum Ban was relied upon by an IJ or the BIA to issue a declination. Indeed, each of the exemplar cases cited by Plaintiffs either pre-date the *C.A.I.R.* decision or do not involve application of the Transit Rule at all. (*Id.* (citing Immigration Case #1, Lev Decl., Ex. 3 (issued on June 30, 2020); Immigration Case #2, Lev Decl., Ex. 4 (Asylum Ban not applied)).)

The Court finds that an expansion of the ROP Review period by one month adequately accounts for the potential lack of uniformity among EOIR adjudicators in applying the Transit Rule immediately following the *C.A.I.R.* decision, while limiting the burden of an expanded ROP Review of cases, the majority of which it appears will rarely be eligible for relief under the Preliminary Injunction. *See Syst. Fed'n No. 91, Ry. Emp. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 648 (1961) (describing district court's discretion to modify its injunctive relief as "wide").

Accordingly, the Court **CLARIFIES** that Paragraph 2's language requiring EOIR to take affirmative steps "to reopen and reconsider past determinations that potential [P.I.] [C]lass members were ineligible for asylum based on the Asylum Ban" requires EOIR to extend the

temporal scope of its ROP Review to include final orders of removal issued up until July 31, 2020.

ii. Review of DHS Records

The EOIR's ROP Review requires adjudicators to examine only the ROPs in potential P.I. Class members' immigration proceedings. (First Shinners Decl. ¶ 38; First Anderson Decl. ¶ 8.) EOIR adjudicators do not separately examine DHS records for evidence bearing upon P.I. Class membership. (First Shinners Decl. ¶ 38.) Plaintiffs allege that this approach is noncompliant with the EOIR's P.I. Class-identification requirements under Paragraph 2 because it will inevitably lead to the exclusion of P.I. Class members whose DHS records reflect evidence of metering but whose ROPs do not. (Oversight Mem. at 17.)

To quell Plaintiffs' concerns, the Government insinuates it is amenable to reviewing the DHS records in the 46 cases where EOIR adjudicators declared there was "insufficient evidence" to make a P.I. Class-member determination. (Shinners Decl. ¶ 38; Anderson Decl. ¶ 8.) The Government's modest concession does not suffice to bring the EOIR Guidance into compliance with the directive under Paragraph 2 that EOIR "identify affected" P.I. Class members. Under the EOIR Guidance for the ROP Review, an adjudicator would review DHS data indicative of metering—*e.g.*, waitlists, Form I-213s, Form I-867A/Bs, Form I-87s, or any other processing document of DHS's that might contain affirmative indications of class membership—only if the asylum seeker filed that information in his or her immigration case. (*See* Non-detained P.I. Class Screening Procedures at 3-4 (describing the DHS data USCIS asylum officers review in making P.I. Class-membership deter-

minations).) But as Plaintiffs point out, "[t]here would have been little reason for metering information to be filed with EOIR when the Asylum Ban was in full effect because at that time," evidence that an asylum seeker was metered at the U.S.-Mexico border "was not relevant to access to the asylum process or eligibility for relief." (Oversight Mem. at 18.) Thus, it appears that under the EOIR Guidance, adjudicators conducting ROP Reviews are making P.I. Class determinations without regard to evidence in the Government's possession that is most probative of P.I. Class membership.

This strand of the EOIR Guidance cannot reasonably be said to accord with the letter or spirit of Paragraph 2. It is not sufficient for the EOIR merely to examine DHS records in the 46 cases where it could not determine P.I. Class membership. The Government has not—nor can it—assure this Court that, in each of those 410 cases where a negative P.I. Class-membership determination was issued, adjudicators did not overlook evidence in DHS's possession that might contradict that determination. Thus, the EOIR Guidance taints the validity of these at least 410 negative P.I. Class-membership determinations yielded by the ROP Review. (*See* Second Anderson Decl. ¶ 8.)

Accordingly, the Court **CLARIFIES** that the EOIR's obligation under Paragraph 2 to "identify affected [P.I.] [C]lass members" precludes the EOIR from issuing a negative P.I. Class-membership determination without first considering any evidence of metering during the relevant pre-Asylum Ban period in DHS's records.

3. Reopening and Reconsideration Relief

a. USCIS

i. Self-Identification of Removed Potential P.I. Class Members

The USCIS Guidance developed to apply to potential P.I. Class members removed from the United States operates in the following manner. First, USCIS queries the Master List and identifies individuals who (1) received a negative credible fear determination where the Asylum Ban was applied and (2) ICE data reflects the individual was removed pursuant to an expedited removal order and is no longer located in the United States. (Davidson Decl. ¶¶ 18, 24.) The Government will next provide this information to class counsel, who is responsible for providing notice. Removed potential P.I. Class members then must self-identify to the Government in accordance delineated in the class notice to begin the P.I. Class-membership identification process. (*Id.* ¶¶ 20-21, 23.)

Plaintiffs allege the Government abdicates its "affirmative duty" under Paragraph 2 to provide reopening and reconsideration relief to all P.I. Class members because the USCIS Guidance places the burden on removed potential P.I. Class members to invoke their prospective rights under the Preliminary Injunction. (Oversight Mem. at 16; Pls.' Statement ¶ 13.) But Paragraph 2 encumbers Defendants with an "*affirmative* duty" to provide reopening and reconsideration relief only to the eligible cases of P.I. Class members "in expedited or regular removal proceedings." (Clarification Order at 25.) Because they have been removed, the distinct subset of potential P.I. Class members at issue here cannot

be said to be "in expedited or regular removal proceedings" and, thus, the Government's affirmative duty does not extend to them. Thus, procedures such as the USCIS Guidance's reliance upon self-identification, which aid the Government in dealing with the complex cases of potential P.I. Class members who have been removed and whose locations are unknown, are entirely consistent with both the letter and spirit of Paragraph 2.

Accordingly, the Court **DENIES** the Motions to the extent they seek to clarify or modify Paragraph 2 to invalidate the self-identification process delineated in the USCIS Guidance applicable to potential P.I. Class members who have been removed.

ii. Solicitation and Receipt of Metering Evidence

Plaintiffs further complain that the USCIS Guidance respecting removed potential P.I. Class members violates Paragraph 2 because it does not provide to that specific subset of individuals an equivalent process under which the USCIS solicits or receives evidence of P.I. Class membership. This argument mischaracterizes the Government's planned procedures. The Government attests that the USCIS will solicit and provide a process for potential P.I. Class members who self-identify to submit evidence of metering during the relevant Asylum Ban period. (Davidson Decl. ¶¶ 10, 20-21, 25-26.) Therefore, this Court is unpersuaded by Plaintiffs' assertion the Government's putative procedures do not contemplate soliciting and considering evidence of metering for potential P.I. Class members removed from the United States.

iii. Return to the United States of Removed P.I. Class Members

Finally, Plaintiffs argue that USCIS's failure to delineate any process for returning to the United States removed individuals who, after self-identifying, establish they qualify for P.I. Class membership violates Paragraph 2. (Pls.' Statement ¶ 9 ("Defendants have not adopted procedures for [P.I.] [C]lass members located outside the United States to return to the United States.").) But this is inaccurate. As explained above, *supra* Sec. I.B.2.b.ii, the USCIS intends to instruct removed individuals who make the requisite showing of P.I. Class membership to submit to DHS a Form I-131, Application for Travel Document; if the application is approved, the individual will receive from DHS a travel letter allowing him or her to board an aircraft and travel to a POE. (First Shinners Decl. ¶ 35 (citing 8 C.F.R. § 212.5(f)).) Once at a POE, CBP will inspect the individual and will ultimately determine how to proceed, which may depend on the circumstances of the case. (*Id.*) Plaintiffs do not challenge these procedures. Again, Plaintiffs fail to establish that the Government's putative procedures do not contemplate a process for returning removed P.I. Class members to the United States for asylum processing.

* * * *

Having concluded that Plaintiffs challenges to the contemplated USCIS procedures concerning potential P.I. Class members who have been removed are either moot or do not warrant judicial intervention, the Court notes that the Government still has not informed this Court whether implementation of the procedures delineated in *supra* Sec. I.B.2.b has begun or, if not, when the

Government plans to begin the process of identifying and providing reopening and/or reconsideration relief to removed P.I. Class members. Thus, the Court **ORDERS** the Government to provide an update concerning the status of these procedures **by no later than August 22, 2022**.

b. EOIR

Where an ROP Review of a case results in a positive P.I. Class-membership determination, the adjudicator must reopen the case if the prior order of removal identified the Asylum Ban as a basis for denying asylum. (Second Anderson Decl. ¶ 9.) In each of those cases, adjudicators must issue a new asylum decision on the merits. (*Id.*) However, under the EOIR Guidance, an adjudicator may review the prior order of removal to see what, if any, alternative bases for denying asylum besides the Asylum Ban were also applied. (Anderson Decl. ¶ 12.) If the adjudicator identifies such an alternative basis, it may issue a new decision denying asylum predicated upon that alternative ground set forth in the prior order of removal. (*Id.*)

Plaintiffs claim that, in this respect, the EOIR Guidance is noncompliant with the directive in Paragraph 4 to "reconsider" eligible cases. (Pls.' Statement ¶¶ 6-7; Enforcement Mem. at 23-24.) In their view, EOIR's adjudicators should be strictly forbidden from relying upon prior final orders of removal in which the Asylum Ban was identified as one of several grounds for denial, because all such orders are inevitably "tainted." (Enforcement Mem. at 23-24.)

Plaintiffs do not cite to a textual basis in the Clarification Order for this premise. Rather, they argue that

the Preliminary Injunction's mandate that the Government "return to pre-Asylum Ban practices" requires the Government, in all eligible cases, to invalidate alternative, independent grounds for declination in a final order of removal and to require further factfinding. (Enforcement Mem. at 23-24 (citing Preliminary Injunction at 36).) But the Preliminary Injunction did not enjoin, disturb the application of, or even touch upon other rules or regulations constituting a basis for denying asylum. Indeed, Plaintiffs do not identify any other rule or regulation besides the Asylum Ban as having a nexus to the Turnback Policy Plaintiffs principally challenged by this action. (Mot. for Prelim. Inj. At 1 ("[T]he very reason the [P.I. Class] members face application of the categorical prohibition in the Asylum Ban is the unlawful metering policy which forced them to wait in Mexico. These class members would have had their asylum claims heard under pre-existing law but for the illegal metering policy that is challenged in this case.").) Thus, Plaintiffs' interpretation of Paragraph 2 is untenable, for it would lead to an untenably overbroad and, therefore, abusive Preliminary Injunction. *See*, *e.g.*, *Milliken v. Bradley*, 433 U.S. 267, 281-82 (1974) ("The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the [alleged wrongful conduct] itself."); *see also Church of Holy Light of Queen v. Holder*, 443 F. App'x 302 (9th Cir. 2011) (finding preliminary injunction "overly broad because it . . . enjoins government regulations that were explicitly never challenged or litigated" (citing, *inter alia*, *Stormans*, 586 F.3d at 1141)); *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994) (similar).

Accordingly, the Court **DENIES** the Motions to the extent they seek to clarify or modify Paragraph 2 to prohibit EOIR adjudicators from predicating a new merits decision in a reopened case upon an alternative, legally valid ground for denying asylum that was set forth in the P.I. Class member's prior final order of removal.

B. Permanent Injunction

Plaintiffs seek entry of an order converting the Preliminary Injunction—inclusive of the Clarification Order and the orders in the instant Opinion at *supra* Sec. III.A—into a permanent one. Ordinarily, a court must conduct an evidentiary hearing to convert preliminary injunctive relief into permanent relief. *See Bennett*, 934 F. Supp. 2d at 1188. But this Court already concluded in its Preliminary Injunction that the factors enumerated in *eBay Inc.* tip sharply in favor of enjoining application of the Asylum Ban to the P.I. Class. (Prelim. Inj. at 35 ("The Court concludes Plaintiffs have clearly shown . . . irreparable harm[] and that the balance of equities and the public interest fall in their favor.").) Since this Court issued its preliminary injunction, nothing in the record indicates that circumstances have changed such that this Court's analysis of the *eBay* factors today would yield a different result. Moreover, since this Court issued its preliminary injunction, it has since found on summary judgment that Defendants' Turnback Policy is both statutorily and constitutionally unlawful and, thus, no facts are in dispute as to whether the P.I. Class was subjected to the Asylum Ban by virtue of an infringement of their legal rights. *See Bennett*, 934 F. Supp. 2d at 1188. Because the Government admittedly has yet to finish complying

with that Order, it is clear conversion of the Preliminary Injunction into a permanent injunction is warranted.

The Government does not ask for an evidentiary hearing. Nor does it contest that the factors enumerated in *eBay Inc.* tip in Plaintiffs' favor. Rather, the Government asserts this Court never had jurisdiction to issue the Preliminary Injunction or Clarification Order in the first place and, therefore, it does not have jurisdiction to make those orders permanent. (Defs.' § 1252(f)(1) Br.) This is the same stale argument that the Government raised in opposition to Plaintiffs' initial request for the Preliminary Injunction and their subsequent request for clarification: that the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") at 8 U.S.C. § 1252(f)(1) strips this Court of jurisdiction to "enjoin or restrain the operation of" specifically enumerated immigration enforcement laws, which govern removal proceedings, and that the Preliminary Injunction falls within this jurisdictional bar because it applies to a class of individuals "who are or will be placed into expedited removal or Section 1229a removal proceedings."[21] This Court has twice rejected this same argument. (*See* Prelim. Inj. at 15; Clarifica-

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[21] § 1252(f)(1) provides:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, [which includes 8 U.S.C. § 1225,] as amended by the Illegal Immigration Reform and Immigration Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1252(f)(1).

tion order at 19-21.) It has held repeatedly that § 1252(f) is not implicated because the Preliminary Injunction enjoins the Government from taking actions "not authorized by the Asylum Ban or, in fact, by any implementing regulation or statute." (Prelim. In. at 15.)

Despite this Court's repeated rejection of its § 1252(f)(1) argument, the Government, citing the recent United States Supreme Court decision, *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022) ("*Aleman Gonzalez*"), asserts a different outcome is warranted in this instance.[22] The Government argues that *Aleman Gonzalez* repudiates the Ninth Circuit precedent upon which this Court purportedly relied in the Preliminary Injunction and Clarification Order, *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (2003) ("*Rodriguez*") and *Ali v. Ashcroft*, 346 F.3d 873, 896 (2003) ("*Ali*"). *Ali* and *Rodriguez* hold § 1252(f)(1) is inapplicable "[w]here . . . a petitioner seeks to enjoin conduct that allegedly is not even authorized by [§§ 1221-32]" because in such instances "the court is not enjoining the *operation* of [the covered Immigration and Nationality Act ("INA") provisions]." *Ali*, 346 F.3d at 896. *Aleman Gonzalez*, however, suggests that lower courts lack jurisdiction even to enjoin or restrain immigration enforcement agencies' unauthorized implementation of the covered INA provisions. *Aleman Gonzalez*, 142 S. Ct. at 2065 (holding an injunction that "requires officials to take actions that (in the Government's view) are not required

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[22] For an in-depth analysis on *Aleman Gonzalez* and the implication it appears to have on permanent injunctions in the context of immigration enforcement, *see* this Court's Remedies Opinion at ECF No. 817.

by [8 U.S.C. §§ 1221-32]" or "to refrain from actions that (again in the Government's view are allowed by [§§ 1221-32] . . . interfere[s] with the Government's efforts to *operate* [§§ 1221-32]" and, thus, is barred by § 1252(f)(1)).

While this Court agrees with the Government's assertion *Ali* and *Rodriguez* are irreconcilable with *Aleman Gonzalez*, it disagrees that the latter seals the fate of the Preliminary Injunction and Clarification Order In its Preliminary Injunction and Clarification Order. Rather the injunctive relief issued in this case fits squarely within a different line of Ninth Circuit precedent, which *Aleman Gonzalez* explicitly did not displace: *Catholic Social Services. v. Immigration & Naturalization Services.*, 232 F.3d 1139 (9th Cir. 2000) ("*Catholic Social Services*"), *Gonzales v. Department of Homeland Security*, 508 F.3d 1227 (9th Cir. 2007) ("*Gonzales*"), and *Gonzalez v. U.S. Immigration & Customs Enforcement*, 975 F.3d 788 (9th Cir. 2020) ("*Gonzalez*"), which this Court cited as a ground for finding § 1252(f)(1) inapplicable in its Clarification Order (Clarification Order at 20). Taken together, these cases stand for the premise that lower courts may "enjoin the unlawful operation of a provision *that is not specified in § 1252(f)(1)* even if that injunction has some collateral effect on the operation of a covered provision." *Aleman Gonzalez*, 142 S. Ct. at 2067 n.4 (citing *Gonzales*, 508 F.3d at 1227 and describing the principle holding in that case as "nonresponsive" to the questions at issue in *Aleman Gonzalez*) (emphasis in original).

The Preliminary Injunction enjoins application of the Asylum Ban to the P.I. Class members on the basis that the regulation, by its express terms, does not apply to

them because they are "non-Mexican foreign nationals . . . who attempted to enter or arrived at the southern border *before* July 16, 2019." (Prelim. Inj. at 31.) The Government does not explain how enjoining or restraining the Government from taking actions not even authorized by the Asylum Ban, let alone any implementing regulation or statute, interferes with the operation of 8 U.S.C. §§ 1221 through 1332.[23]

Here, the Preliminary Injunction "directly implicates" 8 U.S.C. § 1158(b)(2)(C), the statute under which it was issued, not one of § 1252(f)(1)'s covered provisions. *Gonzales*, 508 at 1233 (holding an injunction that "directly implicates" a provision that is not covered by § 1252(f)(1) is authorized, notwithstanding that injunction's "collateral consequence[s]" on the operation of a covered provision); *see C.A.I.R.*, 471 F. Supp. 3d at 59-60 (citing 84 Fed. Reg. at 33,835 (July 16, 2019)). And while the Preliminary Injunction no doubt effects the removal proceedings of potential and actual P.I. Class members, those consequences definitionally are collateral, and, thus, insufficient under *Catholic Social Services, Gonzales*, and *Gonzalez* to bring the injunctive relief issued here within the panoply of § 1252(f)(1). *See Gonzales*, 508 F.3d at 1233. It does not interfere with the "independent judgment and discretion" afforded to immigration judges in deciding the individual cases before them. 8 C.F.R. § 1003.10(b). Immigration judges are still tasked with addressing whether the individual asylum seekers have sufficiently demonstrated class membership and are thus subject to the

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[23] As the *C.A.I.R.* Court found, to the extent the Asylum Ban directly implicates a provision of the INA, it is 8 U.S.C. § 1158(b)(2)(C), to which § 1252(f)(1) is inapplicable. *C.A.I.R.*, 471 F.3d at 59-60.

Preliminary Injunction's mandate, and, moreover, these judges maintain the authority to make other findings on the merits that warrant removal. Any effect the Preliminary Injunction has on the decisions of adjudicators with whom authority is vested to preside over removal proceedings is "one step removed" from enjoining application of the Asylum Ban to P.I. Class members. *Gonzales*, 508 F.3d at 1233.

Because neither the Preliminary Injunction, Clarification Order, nor the orders in this Opinion enjoin or restrain the INA's operation, the Court **GRANTS** Plaintiffs' request to convert the Preliminary Injunction into a Permanent Injunction.

C. Oversight

Plaintiffs seek appointment of Magistrate Judge Karen S. Crawford as Special Master to oversee the Government's compliance with the Preliminary Injunction. Furthermore, they request that this Court issue "instructions that [Judge Crawford] hold regular status conferences with the parties regarding [Preliminary Injunction] compliance issues, seek to mediate areas of disagreement, and either decide, or make recommendations to this Court regarding, disputes that the parties cannot resolve through mediation." (Oversight Mem. at 1-2; Proposed Order ¶ 8; *see also id.* ¶ 6.) Plaintiffs principally argue that the Government's "continued intransigence" warrants the appointment they request. (*Id.*)

But the record does not support Plaintiffs' bold claim. Rather, as set forth in detail above, *supra* Sec. I.B, the Government has developed and implemented (or nearly implemented) procedures to comply with the Prelimi-

nary Injunction and Clarification Order at each stage of immigration proceedings. For example, ICE has procedures in place to ensure no potential P.I. Class member in its custody removed; USCIS has implemented procedures to screen for P.I. Class membership for potential P.I. Class members within the United States; and the EOIR is nearly three-quarters of the way complete with their ROP Review of nearly 2,000 immigration cases. While the instant case is no doubt a complicated one, Plaintiffs make no showing of the Government's resistance or obduracy in complying with the Preliminary Injunction. *See Apple*, 992 F. Sup. 2d at 280 ("[M]onitors have been found to be appropriate where consensual methods of implementation of remedial orders are 'unreliable' or where a party has proved resistant or intransigent to complying with the remedial purpose of the injunction in question."). Moreover, Plaintiffs have not identified a single instance in which a noncitizen, despite qualifying for P.I. Class-membership, was removed due to application of the Asylum Ban.

Accordingly, the Court **DENIES** Plaintiffs' request for oversight of the now-Permanent Injunction.

IV. CONCLUSION

Plaintiffs' Enforcement Motion and Oversight Motion are **GRANTED IN PART** and **DENIED IN PART**. For the reasons stated above:

(1) The Court **CLARIFIES** that Paragraph 4 of the Clarification Order directs the Government to review *all* Form I-213s—including those of USB agents—for annotations of *AOL* Class membership in identifying potential P.I. Class members to add to the Master List.

(2) The Court **MODIFIES** Paragraph 3 of the Clarification Order to read as follows:

> Defendants must inform identified Preliminary Injunction class members in administrative proceedings before USCIS or EOIR, or in DHS Custody, of their class membership, as well as the existence and import of the Preliminary Injunction (ECF No. 330), Clarification Order (ECF No. 605), and this Order (ECF No. 808).

(3) The Court **CLARIFIES** that Paragraph 2's language requiring EOIR to take affirmative steps "to reopen and reconsider past determinations that potential [P.I.] [C]lass members were ineligible for asylum based on the Asylum Ban" requires EOIR to extend the temporal scope of its ROP Review to include final orders of removal issued up until July 31, 2020.

(4) The Court **CLARIFIES** that the EOIR's obligation under Paragraph 2 to "identify affected [P.I.] [C]lass members" precludes the EOIR from issuing a negative P.I. Class-membership determination without first considering any evidence of metering during the relevant pre-Asylum Ban period in DHS's records.

(5) The Court **GRANTS** Plaintiffs' request to convert to a **PERMANENT INJUNCTION** the Preliminary Injunction (ECF No. 330), as clarified in the Clarification Order (ECF No. 605) and above, *supra* Sec. III.A.

(6) The Court **DENIES** Plaintiffs' request to appoint a special master pursuant to Federal Rule of Civil Procedure 53 to oversee Defendants' compliance with this Permeant Injunction

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The Court also **GRANTS** Defendants' Unopposed Motion to Correct. (ECF No. 784.) Further, the Court **ORDERS** the Government to provide an update concerning the implementation status of USCIS's procedures for P.I. Class-membership identification and the provision of reopening and reconsideration relief to potential P.I. Class members who were removed from the United States **by no later than August 22, 2022.** Finally, the Court **ORDERS** that, in the event any party hereafter seeks clarification, modification, or enforcement of the Permanent Injunction, the parties **ALL MUST CERTIFY** in a court filing that despite having undertaken all reasonable efforts to resolve their disputes they believe they have reached an impasse that necessitates court intervention.

IT IS SO ORDERED.

DATED: August 5, 2022

/s/ CYNTHIA BASHANT
CYNTHIA BASHANT
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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

AL OTRO LADO, INC.; ABIGAIL DOE, BEATRICE DOE, CAROLINA DOE, DINORA DOE, INGRID DOE, ROBERTO DOE, MARIA DOE, JUAN DOE, VICTORIA DOE, BIANCA DOE, EMILIANA DOE, AND CESAR DOE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

ALEJANDRO MAYORKAS, SECRETARY U.S. DEPARTMENT OF HOMELAND SECURITY, IN HIS OFFICIAL CAPACITY; TROY A. MILLER, ACTING COMMISSIONER, U.S. CUSTOMS AND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY; WILLIAM A. FERRERA, EXECUTIVE ASSISTANT COMMISSIONER, OFFICE OF FIELD OPERATIONS, U.S. CUSTOMS AND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY, DEFENDANTS[1]

Filed: Sept. 2, 2021

ORDER:

(1) GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (ECF No. 535);

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[1] Because all Defendants are sued in their official capacities, the successors for these public offices are automatically substituted as Defendants per Fed. R. Civ. P. 25(d).

(2) GRANTING IN PART AND DENYING IN PART DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT (ECF No. 563); AND

(3) REQUIRING SUPPLEMENTAL BRIEFING

This action challenges the lawfulness of the Government's practice of systematically denying asylum seekers access to the asylum process at ports of entry ("POEs") along the U.S.-Mexico border. Plaintiffs allege that in violation of existing statutory, constitutional, and international law, Customs and Border Protection ("CBP") officers do not inspect asylum seekers when they arrive at POEs and refer them for asylum interviews but instead turn them back to Mexico on the basis that the ports are "at capacity[.]"[2,3] (Second Am. Compl. ("SAC") ¶ 13, ECF No. 189.)

Now before the Court are the parties' respective summary judgment motions. (Pls.' Mot. for Summ. J. ("Pls.' MSJ"), ECF No. 535; Defs.' Cross-Mot. for Summ. J. and Opp'n to Pls.' Mot. for Summ. J. ("Defs.' MSJ"), ECF No. 563.) For the reasons stated below,

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[2] Plaintiffs in this case include Al Otro Lado and the above-captioned individuals on behalf of a class of "all noncitizens who seek or will seek to access the U.S. asylum process by presenting themselves at a Class A [POE] on the U.S.-Mexico border, and were or will be denied access to the U.S. asylum process by or at the instruction of [CBP] officials on or after January 1, 2016." (ECF No. 513.) The Court also certified a subclass consisting of "all noncitizens who were or will be denied access to the U.S. asylum process at a Class A POE on the U.S.-Mexico border as a result of Defendants' metering policy on or after January 1, 2016." (*Id.*)

[3] This practice of turning back asylum seekers at POEs is alternatively referred to as "metering" or "queue management."

the Court **GRANTS IN PART AND DENIES IN PART** Plaintiffs' Motion for Summary Judgment and **GRANTS IN PART AND DENIES IN PART** Defendants' Cross-Motion for Summary Judgment.

STATEMENT OF FACTS

I. Factual Background[4]

A. Overview of CBP

CBP, a component agency of the Department of Homeland Security ("DHS"), is tasked with monitoring the flow of people and goods across United States borders. (JSUF ¶ 1.) The Office of Field Operations ("OFO"), a division of CBP, is responsible for the management of operations at POEs in the United States. (JSUF ¶ 4.) OFO operates various different classes of POEs. (JSUF ¶ 5.) Relevant here is a "Class A" land POE, designated for all aliens. (*Id.*) Class A POEs on the U.S.-Mexico border include, among others: San Ysidro, Otay Mesa, Calexico, Nogales, El Paso, Laredo, Hidalgo, and Brownsville. (JSUF ¶ 8.) These POEs are overseen by four regional field offices: San Diego, Tucson, El Paso, and Laredo. (JSUF ¶ 7.)

B. First Use of Metering in 2016

Before metering was implemented in 2016, migrants seeking asylum who lacked documents for lawful entry

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[4] The parties filed a lengthy joint statement of undisputed facts ("JSUF") in support of their respective summary judgment motions. For the sake of brevity, the Court includes an abridged version to provide an overview of the events since 2016 precipitating this litigation and relevant to this Order. The complete joint statement is available on the docket. (*See* ECF No 619.)

would queue between the limit line[5] at a POE and the primary inspection booths to wait until there was sufficient space for their intake. (JSUF ¶ 49.)

Beginning in February 2016, CBP saw an increase in the number of inadmissible Haitian nationals seeking admission at San Diego POEs. (JSUF ¶ 31.) CBP had both border-wide and port-specific "contingency plans" in place for the purpose of responding to such "mass migration events." (JSUF ¶¶ 28-29, 191.) In response to the increase in Haitian migration in 2016, the San Ysidro POE converted spaces to create more temporary holding rooms, increased its staffing, and took other measures to increase capacity consistent with the contingency plans in place. (JSUF ¶¶ 35-39, 40-41, 44-47, 55-58.) No contingency plan includes metering or queue management as a tactic for managing port capacity constraints during a period of high-volume arrivals. (*Id.*) However, in 2016, San Ysidro port officials began to stop migrants at the limit line outside the POE to prevent them from entering the port building and coordinated with the Government of Mexico to "meter" asylum seekers at the San Diego POEs "due to facility and processing constraints." (JSUF ¶¶ 66-69, 70, 86-87.)

The high volume of migration continued into the fall of 2016, spread east, and included more family units

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[5] The Court understands the "limit line" to be an area at or near the U.S.-Mexico border where CBP officers stand "to control the flow of undocumented aliens entering CBP ports for processing." (*See* "CBP Has Taken Steps to Limit Processing of Undocumented Aliens at Ports of Entry," Office of Inspector General (Oct. 27, 2020) ("OIG Report") at 4, Ex. 1 to Decl. of Stephen Medlock in supp. of Pls.' Reply, ECF No. 610-2.)

("FAMUs") and unaccompanied alien children ("UAC") in addition to the Haitian nationals. (JSUF ¶ 76.) Ports reported challenges with managing the number of people in custody. (JSUF ¶¶ 94-95, 105-07.) CBP officials were informed that their counterparts in Mexico were under pressure for assisting with processing of asylum seekers because of the "local humanitarian crisis" developing in border towns. (JSUF ¶ 81.) After Hurricane Matthew struck in October 2016, the number of arrivals increased. (JSUF ¶¶ 96-97.) DHS, with the assistance of MCAT,[6] developed a multi-phased plan to "address the surge of migration along the Southwest border," including constructing "soft-sided holding facilities" to increase capacity. (JSUF ¶¶ 116, 121-22, 125-26, 128.)

The presidential election was held on November 8, 2016. (JSUF ¶ 133.) On November 9, 2016, some soft-sided facilities were put on hold. (JSUF ¶¶ 134, 151.) Shortly after, then-CBP Deputy Commissioner Kevin McAleenan attended a meeting at DHS where he discussed increasing "efforts to meter arrivals of non-UAC, non-Mexican CF [credible fear] cases mid-bridge." (JSUF ¶ 140.) Then-DHS Secretary Jeh Johnson approved the proposal to increase metering on November 10, 2016. (JSUF ¶ 141.) Soft-sided facilities were ultimately scrapped or put on stand-by. (JSUF ¶¶ 134, 151, 170-71.)

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[6] In October 2016, the CBP Commissioner established a Migrant Crisis Action Team ("MCAT"), which was composed of various CBP and DHS components and headed by Border Patrol's Deputy Chief. (JSUF ¶¶ 117-18.) The MCAT reported on DHS-coordinated plans "for addressing the surge of migration along the Southwest border." (JSUF ¶ 120.)

Metering was then adopted by POEs, although the way in which it was implemented varied. (JSUF ¶¶ 142-44.) At some ports, officers were stationed too far from the limit line and consequently turned back asylum seekers on U.S. soil. (JSUF ¶¶ 157, 159, 160, 162-63, 166-67.) There were also differences in approach, with some ports verbally providing "return" appointments to asylum seekers while others advised them only "to come back at a later time." (JSUF ¶¶ 164-65.) Officials at Laredo noticed that the so-called "turnbacks" were having a strong enough deterrent effect that constant metering was not necessary. (JSUF ¶ 165.)

The levels of migration ebbed and flowed in the following 16 months. In December 2016, the number of inadmissible arrivals presenting at POEs on the southwest border decreased. (JSUF ¶ 168.) In a 2017 report, the Office of the Inspector General ("OIG") stated that the "surge of migrants arriving on the Southwest border in 2016" "abruptly, drastically, and unexpectedly ended" in January 2017. (JSUF ¶ 169.) Nonetheless, some ports continued to meter in December 2017. (JSUF ¶¶ 193-98.) In 2018, the migration numbers again began to increase and peaked in the spring. (JSUF ¶ 199.) However, a "migrant caravan" reportedly making its way from Guatemala quickly dwindled and did not have an impact on port operations. (JSUF ¶¶ 206-12, 214-17, 223, 227.) One CBP officer in 2018 noted that metering "deterred [other than Mexican] traffic." (JSUF ¶ 235.)

C. The Memorialization of Metering/Queue Management

On April 27, 2018, the then-Executive Assistant Commissioner of the OFO, Todd Owen, issued a memorandum with the subject line "Metering Guidance to the Directors of Field Operations ['DFOs'] overseeing operations at POEs on the U.S.-Mexico border." (JSUF ¶ 228.) In the memorandum, Owen wrote, in part:

> 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, DFOs 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. . . . Once a traveler is in the United States, he or she must be fully processed.

(*Id.*; *see also* "Metering Guidance," Ex. 82 to Decl. of Stephen Medlock in supp. of Pls.' MSJ ("Medlock Decl."), ECF No. 535-84.) The guidance was disseminated to other executives as "processing guidance for surge events." (JSUF ¶ 230.)

In May 2018, DHS made its position on metering publicly known. The DHS Secretary at the time, Kirstjen Nielsen, publicly stated: "We are 'metering,' which means that if we don't have the resources to let them in on a particular day, they are going to have to come back." (JSUF ¶ 238.) Around this time, CBP officials responded to DHS's requests for information regarding the number of people likely to be turned away under a full implementation of the metering policy. (JSUF ¶¶ 239-43.)

Shortly thereafter, in June 2018, Nielsen issued a "Prioritization-Based Queue Management" ("PBQM") memorandum to the CBP Commissioner. (JSUF ¶ 244; *see also* "Prioritization-Based Queue Management," Ex. 3 to Decl. of Alexander Halaska in supp. of Defs.' MSJ, ECF No. 563-5.) In the memorandum, Nielsen explained that apprehensions between POEs and arrivals at POEs of inadmissible migrants "continue to rise," but "CBP's resources remain strained along the Southwest Border." (*Id.*) Specifically, she noted that inadmissible arrivals at POEs require additional processing because they lack documents, which "delays the flow of legitimate trade and travel" and "draws resources away from CBP's fundamental responsibilities." (*Id.*) Nielsen sought to refocus CBP "on its primary mission: to protect the American public from dangerous people and materials while enhancing our economic competi-

tiveness through facilitating legitimate trade and travel." (*Id.*)

To this end, she directed the CBP Commissioner to "initiate a 30-day pilot program to prioritize staffing and operations in accordance with the following order of priority at all Southwest border ports of entry:" (1) national security efforts, (2) counter-narcotics operations, (3) economic security, and (4) trade and travel facilitation. (*Id.*) The PBQM memorandum further explains how these priorities function practically: Nielsen further granted DFOs the discretion to "establish and operate physical access controls at the borderline, including as close to the U.S.-Mexico border as operationally feasible." (JSUF ¶ 245.) Thus, according to Nielsen, ports could process asylum seekers to the extent their capacity would allow "without negatively impacting their other responsibilities" under this priority-based regime. (JSUF ¶ 247.) Port officials subsequently began to use "operational capacity" instead of "detention capacity" to determine when to employ metering at their respective POEs. (JSUF ¶ 50.) CBP has not officially defined the term "operational capacity" in its written policy and procedure documents. (JSUF ¶ 251.)

Additional metering guidance was issued by CBP in 2019 and 2020, reiterating the objectives in the PBQM memorandum. (JSUF ¶¶ 263-65.) The 2020 guidance cautioned immigration officers not to "discourage any traveler from waiting to be processed, claiming fear of return, or seeking any other protection." (JSUF ¶ 265.) Port officials were also informed that if they "determine that, due to a particular port's operating conditions, it is not operationally feasible to safely process" inadmissible arrivals at the port, these individuals

could "be encouraged to initiate their processing and entry at another port that is better positioned to process" them. (*Id.*) However, the guidance made clear that "[o]nce a traveler is in the United States, he or she must be inspected and processed, and may not be directed to return to Mexico." (*Id.*)

II. Statutory and Regulatory Framework

Two statutory provisions in the Immigration and Nationality Act ("INA") are implicated in this case. The first, 8 U.S.C. § 1158(a)(1), provides:

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

Section 1225 concerns the process of "inspection." This section requires immigration officials to inspect all applicants for admission to the United States. 8 U.S.C. § 1225(a)(1)(3); *see also* 8 C.F.R. § 235.1(a) ("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. . . ."). Applicants for admission are noncitizens "present in the United States who have not been admitted" or those "who arrive[] in the United States." 8 U.S.C. § 1225(a)(1).

Section 1225(b) establishes the specific procedure by which immigration officials must conduct this inspection. 8 U.S.C. § 1225(b)(1)(A). Officers are required to order all noncitizens determined to be "inadmissible"

removed without further hearing or review—a process known as "expedited removal"—"unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution." 8 U.S.C. § 1225(b)(1)(A)(i). Once an applicant for admission indicates either of the above, "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).[7] Subparagraph (B) elaborates on the interview process and events following the credible fear determination. *See* 8 U.S.C. § 1225(b)(1)(B)(i)-(iii).

LEGAL STANDARD

I. Summary Judgment

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought." Fed. R. Civ. P. 56(a). Summary judgment is appropriate under Rule 56(c) where the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248.

When cross-motions for summary judgment are filed by the parties, as here, "[e]ach motion must be consid-

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[7] The Court refers to the asylum provision in § 1158(a)(1) and the specific actions listed in § 1225(a)(1)(3) and § 1225(b)(1)(A)(i)-(ii) as the "inspection and referral duties."

ered on its own merits." *Fair Hous. Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001). In other words, a court must review the evidence submitted in support of each cross-motion, *id.*, and "giv[e] the nonmoving party in each instance the benefit of all reasonable inferences," *A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784, 791 (9th Cir. 2006). Further, even where neither party disputes issues of material fact, the court is still required to analyze the record to determine whether disputed issues of material fact are present. *United States v. Fred A. Arnold, Inc.*, 573 F.2d 605, 606 (9th Cir. 1978); *see also Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1037 n.5 (9th Cir. 2000) ("[T]he district court is responsible for determining whether the requirements of [Rule 56] are met, whether or not the parties believe that they are.").

Summary judgment can turn on factual issues or legal questions. "Where a case turns on a mixed question of law and fact and . . . the only disputes relate to the legal significance of undisputed facts, the controversy collapses into a question of law suitable to disposition on summary judgment." *Blue Lake Rancheria v. United States*, 653 F.3d 1112, 1115 (9th Cir. 2011) (quotations omitted); *see also Johnson v. Allstate Ins. Co.*, 126 Wash. App. 510, 515 (2005) (questions of law include the interpretation of contracts, statutes, "and other writings"), *cited with approval in Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963, 973 (9th Cir. 2017).

II. Administrative Procedure Act

The Administrative Procedure Act ("APA") generally limits the scope of judicial review to the administrative record. 5 U.S.C. § 706 (directing the court to "re-

view the whole record or those parts of it cited by a party"); *see, e.g.*, *GB Int'l v. Crandall*, 403 F. Supp. 3d 927, 931 (W.D. Wash. 2019) ("[T]he Court reviews the evidence included in the administrative record to determine whether, as a matter of law, the evidence permitted the agency to make the decision it did." (citing *Nw. Motorcycle Ass'n v. U.S. Dep't Agric.*, 18 F.3d 1468, 1471-72 (9th Cir. 1994) and *Occidental Eng'g Co. v. I.N.S.*, 753 F.2d 766, 769-70 (9th Cir. 1985))), *aff'd sub nom. GB Int'l, Inc. v. Crandall*, 851 F. App'x 689 (9th Cir. 2021).

The parties did not designate an administrative record in this action. However, because this Court's evaluation of the APA claims is limited to Plaintiffs' contention that Defendants failed to act under § 706(1), an administrative record is not necessary here. *See San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 886 (9th Cir. 2002) ("[W]hen a court considers a claim that an agency has failed to act in violation of a legal obligation, review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record." (quoting *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000))); *Cherokee Nation v. United States Dep't of the Interior*, No. 19-CV-2154-TNM-ZMF, 2021 WL 1209205, at *6 (D.D.C. Mar. 31, 2021) ("Review under [§ 706(1)] is not limited to the administrative record."); *see also Consejo de Desarrollo Economico de Mexicali, AC v. United States*, 438 F. Supp. 2d 1207, 1221 (D. Nev. 2006) (refusing to limit its review to the administrative record when evaluating a § 706(1) claim, instead considering "materials submitted by Plaintiffs as they relate to the present matter"), *rev'd on other grounds*, 482 F.3d 1157 (9th Cir. 2007).

Accordingly, when evaluating the APA claims in this case, the Court considers all materials submitted by the parties.

ANALYSIS

Plaintiffs move for summary judgment on all claims in this case, arguing that Defendants' act of turning back asylum seekers at POEs violates the INA, the APA, the Fifth Amendment to the United States Constitution, and the Alien Tort Statute ("ATS"). Defendants move for summary judgment on the basis that turning back class members does not violate their statutory duties of inspection and referral and is therefore lawful under the Constitution. They further argue that metering does not violate the duty of nonrefoulement and that, even where the Court finds it does, various factors counsel again this Court's recognition of a cause of action under the ATS. (*Id.*)

The Court confronts two threshold questions on summary judgment: (1) whether, as a matter of law, Defendants' metering policy satisfies their inspection and referral duties under the INA; and (2) if it does, whether the record evinces any genuine issues of material fact as to whether Defendants' decision to turn back asylum seekers at POEs was pretextual such that it is unlawful under the APA. In addition, the Court determines whether turnbacks violate due process and the ATS. The Court states below its conclusions as to each claim.

I. Immigration and Nationality Act

Plaintiffs' first claim for relief alleges that Defendants have violated their inspection and referral duties under the INA by turning back asylum seekers at POEs and thereby denying them the statutorily prescribed ac-

cess to the asylum process. (SAC ¶¶ 244-52.) They request as relief a judicial determination of their rights under these provisions. (*Id.* ¶¶ 253-55.) Defendants move for summary judgment against this claim on the basis that the INA provides no private right of action allowing for standalone claims, leaving Plaintiffs to seek enforcement of its provisions only through the APA. (Mem. of P. & A. in supp. of Defs.' MSJ ("Defs.' Mem. of P. & A.") at 31-32, ECF No. 563-1.) Plaintiffs do not argue that the INA creates a private right of action but instead contend that this Court can, under its inherent authority, issue equitable relief even in the absence of a statutory cause of action. (Pls.' Opp'n to Defs.' MSJ ("Pls.' Opp'n") at 24-25, ECF No. 585.)

"[S]ection 706 of the APA functions as a default judicial review standard" for decisions made by administrative agencies. *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1194 (9th Cir. 2000) (construing *Dickinson v. Zurko*, 527 U.S. 150, 154-55 (1999)). Some courts have understood the APA to displace traditional equitable authority to set aside ultra vires actions taken by the executive branch while others have found that this inherent power persists. *Compare Eagle Tr. Fund v. U.S. Postal Serv.*, 365 F. Supp. 3d 57, 65-66 (D.D.C. 2019) (finding that no "pre-APA equitable review" of agency action was available because the APA was "a catch-all cause of action for plaintiffs who seek to challenge agency decisionmaking where none otherwise exists"), *aff'd*, 811 F. App'x 669 (D.C. Cir. 2020), *with Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988) (finding that notwithstanding the APA, courts still maintain judicial authority to review ultra vires actions taken by the executive).

Recently, in a set of related cases, the Ninth Circuit has expressed support for the view that ultra vires claims independent of the APA are viable. *See California v. Trump*, 963 F.3d 926, 941 n.12 (9th Cir. 2020) (finding that an equitable ultra vires cause of action and APA cause of action can proceed separately, but declining to address the ultra vires claims because the plaintiffs sought "the same scope of relief" under both and prevailed under the APA), *cert. granted sub nom. Trump v. Sierra Club*, 141 S. Ct. 618 (2020); *see also Sierra Club v. Trump*, 963 F.3d 874, 890-92 (9th Cir. 2020) (citing *Dart* to support holding that the Sierra Club could assert an equitable ultra vires cause of action to hold unconstitutional an agency's conduct), *majority op. vacated sub nom.*, *Biden v. Sierra Club*, __ U.S. __, __ S. Ct. __, 2021 WL 2742775 (July 2, 2021). However, both decisions were addressing requests to enjoin ultra vires activities alleged to be unconstitutional, which the Court does not understand to be the basis of Plaintiffs' INA claim here.

In the context of this case, the Court finds instructive *E. V. v. Robinson*, 906 F.3d 1082 (9th Cir. 2018), which established that ultra vires claims independent of the APA and of any statutory private right of action can be brought against federal officers on a nonconstitutional and constitutional basis. Specifically, the Ninth Circuit held that these ultra vires claims are available in "(1) suits alleging that a federal official acted ultra vires of statutorily delegated authority, and (2) suits alleging that a federal official violated the Constitution." *Id.* at 1090 (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-89 (1949) (noting that these suits are not considered "suits against the sovereign"

and therefore did not require a waiver of sovereign immunity)).

The defendant-appellees in *Robinson* argued that ultra vires claims under *Larson* were no longer available because they were abrogated by the APA's express waiver of sovereign immunity.[8] *Id.* at 1092. The Ninth Circuit found that while Congress intended the APA's sovereign immunity waiver to "'replace[] the [*Larson* exceptions] as the doctrinal basis for a claim for prospective relief'" against federal officers, it did not intend for the APA to eliminate the *Larson* exceptions altogether. *Id.* at 1092-93 (quoting *E.E.O.C. v. Peabody W. Coal Co.*, 610 F.3d 1070, 1085 (9th Cir. 2010)). Thus, the Ninth Circuit concluded that the APA's waiver "superseded the *Larson* exceptions only for suits in which the . . . waiver applies[.]" *Id.* at 1092. Finding the APA waiver did not apply, the court held that the ultra vires claim was not abrogated by the APA.

Here, on summary judgment, neither party argues that the APA's waiver of sovereign immunity does not apply to Plaintiffs' claims. The Court also independently finds no reason why the APA's waiver would not apply in this case. Thus, in keeping with the rule as articulated in *Robinson*, the Court finds that the APA waiver applies to Plaintiffs' claims and consequently abrogates Plaintiffs' ultra vires INA claim. *Cf. Jafarza-*

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[8] The APA's waiver of sovereign immunity states: "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party." 5 U.S.C. § 702.

deh v. Duke, 270 F. Supp. 3d 296, 311 (D.D.C. 2017) (dismissing plaintiffs' ultra vires claim for adjustment of status under the INA because plaintiffs could obtain review under the APA). Summary judgment in favor of Defendants on this claim is therefore warranted.

II. Unlawful Withholding Under the APA (5 U.S.C. § 706(1))

The purpose of the APA is, in part, to provide an avenue for judicial review of "agency action." *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). Reviewing courts "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." *Id.* § 706. In relevant part, courts must "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1).

Plaintiffs state that summary judgment is warranted on their § 706(1) claims because Defendants' undisputed act of turning asylum seekers arriving at POEs back to Mexico violates their statutorily mandatory duties to inspect and refer asylum seekers. Defendants argue that, as a matter of law, summary judgment should be granted on Plaintiffs' § 706(1) claim because: (1) Plaintiffs have not identified a final or discrete agency action; (2) their inspection and referral duties under § 1225 are not mandatory ministerial actions as to class members not on U.S. soil,[9] and; (3) in any event, their inspection

[9] Defendants conceded at oral argument that turning back asylum seekers on U.S. soil is unlawful.

and referral duties were not unlawfully withheld because asylum seekers were still ultimately provided access to the process, although it was delayed.

A. Final Agency Action

Defendants move for summary judgment on both APA claims on the basis that no final agency action exists (Defs.' Mem. of P. & A. at 32-34), while the context of Plaintiffs' arguments implies that finality only applies to Defendants' affirmative "Turnback Policy," which is a feature only of the § 706(2) claim. (Pls.' Mem. of P. & A. in supp. of Pls.' MSJ ("Pls.' Mem. of P. & A.") at 20-21, ECF No. 535-1.)

Section 704 of the APA limits judicial review to "final agency actions," a standard which "does not easily accommodate an agency's *failure to act*." *W. Org. of Res. Councils v. Zinke*, 892 F.3d 1234, 1247 (D.C. Cir. 2018) (Edwards, J., concurring). There remains confusion over whether the finality requirement applies to § 706(1) "failure to act" claims. *Id.* However, the Ninth Circuit has given several indications that finality is not a consideration when evaluating § 706(1) claims. *See, e.g.*, *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 930 (9th Cir. 2010) (stating that plaintiffs were required to identify a final agency action for § 706(2) claims but not stating the same for § 706(1) claims); *Nw. Env't Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 681 n.10 (9th Cir. 2007) (distinguishing between "seek[ing] redress for agency inaction under § 706(1)" and "challeng[ing] a final agency action under" § 706(2)); *Indep. Min. Co. v. Babbitt*, 105 F.3d 502, 511 (9th Cir. 1997) ("Judicial review of an agency's actions under § 706(1) for alleged delay has been deemed an exception to the 'final agency decision' require-

ment."); *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999) ("Courts have permitted jurisdiction under the limited exception to the finality doctrine only when there has been a genuine failure to act.").

Accordingly, the Court finds no "final agency action" is necessary for Plaintiffs' § 706(1) claim and rejects Defendants' arguments as to the same.

B. Discrete Agency Action

A § 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* ("*SUWA*"), 542 U.S. 55, 64 (2004); *Hells Canyon Pres. Council*, 593 F.3d at 932. "This condition precludes attacks that seek broad programmatic improvements of agency behavior and also precludes judicial review of 'even discrete agency action that is not demanded by law.'" *Ramirez v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 7, 20 (D.D.C. 2018) (quoting *SUWA*, 542 U.S. at 65); *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) ("[R]espondent cannot seek wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made.").

Defendants argue that no "discrete" action has been identified here because the record shows only that the alleged "Turnback Policy" is a "constellation of actions" with "different factual bases" that do not show "an across-the-board measure to purposefully restrict access to the asylum process." (Defs.' Mem. of P. & A. at 34-35; *see also* Defs.' Reply in supp. of MSJ ("Defs.' Re-

ply") at 4, ECF No. 611.) Plaintiffs maintain that the agency practices cited identify a discrete and particularized action by Defendants "to purposefully restrict access to the asylum process in violation of their statutory obligations." (Pls.' Opp'n at 5-6.)

Preliminarily, to the extent the parties make this argument as to the § 706(1) claim, the Court notes that the parties slightly misconstrue the issue. The discreteness element of a § 706(1) failure to act claim is intended to identify the contours of the agency duty or responsibility that has purportedly been withheld or delayed by the agency. Plaintiffs identify that duty as the inspection of asylum seekers for admissibility when they arrive at POEs and refer them for credible fear interviews under 8 U.S.C. § 1158(a)(1) and § 1225. (Pls.' Mem. of P. & A. at 21.) Defendants have agreed throughout this litigation that these are mandatory duties for which this Court can compel § 706(1) relief and do not raise any argument on summary judgment to the contrary. *See Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1196 (S.D. Cal. 2019) ("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. . . .").

This defeats any argument that the record reflects a "broad programmatic attack" on agency action that is not permitted under § 706(1). These types of attacks occur when a plaintiff fails to identify a discrete agency action to which the court should compel compliance and instead identifies several purported agency "failures" that constitute violations of the law. *See Lujan*, 497 U.S. at 891 n.2 (finding that "land withdrawal review program" was not an agency action because it did not

identify "some specific order or regulation" that applied to everyone but instead constituted "a generic challenge to all aspects" of the program). But Plaintiffs here have identified specific statutory duties to inspect and refer every applicant for admission who approaches a POE. This is the discrete agency action Plaintiffs claim Defendants failed to take when they turned class members back. *See Ramirez*, 310 F. Supp. 3d at 20-21 ("Plaintiffs in this case seek to compel an agency to take the discrete and concrete action of considering statutorily specified factors in determining where and how to place [unaccompanied minors] . . . now that they have aged out of HHS's care and custody."); *Meina Xie v. Kerry*, 780 F.3d 405, 408 (D.C. Cir. 2015) (finding discrete agency action where plaintiff "point[ed] to a precise section of the INA, establishing a specific principle of temporal priority that clearly reins in the agency's discretion, and argues that the disparate cut-off dates for various subcategories manifest a violation of the principle").

Further, the record does not contain a grab bag of miscellaneous CBP practices which have been merged under an amorphous and broad programmatic umbrella for purposes of demonstrating multiple and varied failures to act on the part of Defendants. Rather, the record contains undisputed evidence that in 2016, 2017, and 2018, CBP officers did not carry out their discrete statutory duties to inspect and refer asylum seekers to start the asylum process once they arrived at POEs; instead, Defendants stationed CBP personnel at the limit line to "turn away" or "push back" asylum seekers as they reached POEs.

These "turnbacks" involved a combination of CBP officers (1) coordinating with Mexican immigration officials to "control the flow" of migrants seeking asylum before they reached the border and (2) affirmatively turning asylum seekers away from the border when Mexican immigration officials did not control the flow. This second step, which the Court understands to be the "turnbacks" at issue, involved "placing CBP personnel at the international line to screen legitimate passengers with entry documents . . . while asking those that do not have documents and that may otherwise be seeking some sort of benefit to return to Mexico with a date and time issued by our personnel." (Nov. 18, 2016 "RE: Consolidated Weekly highlights" email, Ex. 71 Medlock Decl., ECF No. 535-73 (referring to port-initiated "push back" of migrants as "self-metering").)

This strategy has been used on-and-off since 2016. The DHS's own Office of Inspector General identified that "[s]ince 2016, CBP has used Queue Management at various times to control the flow of undocumented aliens into ports of entry." (*See* OIG Report at 4.) Additionally, in response to the Haitian migrant surge, CBP officials discussed coordination with Mexican immigration to meter based on POE capacity. (JSUF ¶¶ 68, 70; AOL-DEF-00023718, Ex. 49 to Medlock Decl., ECF No. 535-51.) During the same period, CBP officials also instructed officers "to not allow any asylees past the limit line" and "hold the line to prevent any [migrants] from entering." (JSUF ¶¶ 68-70, 86-87.) Similarly, when metering was authorized after the November 2016 election, officers were instructed to meet with their immigration counterparts in Mexico to discuss controlling the flow of migrants to POEs and, if Mexican officials did not assist with metering, Port Directors were au-

thorized "to return the individuals claiming fear without valid entry documents to Mexico with an alternate date and time to return" if a port exceeded capacity. (JSUF ¶¶ 141, 149, 155-56, 158 ("[O]ur ports will be pushing migrants without entry documents back to Mexico to await an appointment to be processed at the POEs."); Nov. 11, 2016 "Metering Flow" email, Ex. 70 to Medlock Decl., ECF No. 535-72; Nov. 12, 2016 "Meeting with INM" email, Ex. 13 to Medlock Decl., ECF No. 535-15 (noting that CBP officers are "to meet with [their] INM counterpart and request they control the flow of aliens to the [POE]" and "[i]f [Mexican immigration] 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 them to Mexico").) At least one CBP official expressly understood the metering of South and Central American migrants at POEs as an extension of the previous measure used by CBP concerning Haitian migrants. (*See* JSUF ¶ 145 (email from CBP official explaining that the metering practices that had been applied to "Haitians at most locations" was now being extended to South and Central Americans).) It is also undisputed that turnbacks, including of asylum seekers "on the U.S. side of the [POE] bridge," continued in 2017. (JSUF ¶¶ 157, 174-76, 181.)

Finally, the 2018 Metering Guidance and PBQM memorandum formally implemented the same "self-metering" measures by authorizing turnbacks at points nearest the border. Both documents authorized Directors of Field Operations to "meter the flow of travelers at the land border" based on capacity by "establish[ing] and operat[ing] physical access controls at the borderline, including as close to the U.S.-Mexico border as operationally feasible." (JSUF ¶¶ 244-45, 228.) Meter-

ing continued to be used into 2020 as a part of the PBQM model. (JSUF ¶¶ 263-65.)

While the aforementioned circumstances in which CBP turned away asylum seekers span several years and have "different factual bases," they all involve CBP "pushing back" asylum seekers without inspecting and referring them upon arrival. The fact that Defendants sought to turn back asylum seekers in different contexts does not transform Plaintiffs' claim into a programmatic attack. *See Ramirez*, 310 F. Supp. 3d at 21 ("Defendants confuse aggregation of similar, discrete purported injuries—claims that many people were injured in similar ways by the same type of agency action—for a broad programmatic attack."). Thus, it remains undisputed on summary judgment that Defendants did not inspect and refer class members as they arrived at POEs and instead turned them away. The Court addresses below whether these turnbacks violated the statutes at issue. (*See infra* Section II.C.4.) But here, finding no dispute of fact regarding the aforementioned evidence, the Court finds a discrete agency action exists for purposes of Plaintiffs' § 706(1) claim.

C. Mandatory and Ministerial Duties

"An agency 'ministerial act' for purposes of mandamus relief has been defined as a clear, non-discretionary agency obligation to take a specific affirmative action, which obligation is positively commanded and so plainly prescribed as to be free from doubt." *Indep. Min. Co.*, 105 F.3d at 508 (quotations omitted). The issue on summary judgment is whether Defendants' duties to inspect and refer class members for asylum upon their arrival to a POE are mandatory and ministerial. Specif-

ically, the Court must address to whom and when these duties attach.

1. Duties attach to class members arriving at POEs but outside the U.S.

Defendants reiterate their position that the relevant statutes do not apply to asylum seekers who are outside the United States. (Defs.' Mem. of P. & A. at 37-40.) In support, Defendants raise many of the same arguments in their MSJ that they made on dismissal regarding the scope of § 1158(a)(1) and the relevant subsections of § 1225 as applied to individuals not on U.S. soil. (*Id.* at 38.) As Plaintiffs note, the Court has already conducted an extensive analysis of the text of both § 1158(a)(1) and § 1225 to determine their scope as they apply to class members who were standing in Mexico, due to metering efforts, when they raised their asylum requests with CBP officers at POEs. *See Al Otro Lado*, 394 F. Supp. 3d at 1198-1205. The Court found that the plain language of both statutes applies to migrants who are "in the process of arriving," which includes "aliens who have not yet come into the United States, but who are 'attempting to' do so" and may still be physically outside the international boundary line at a POE. *Id.* at 1205 (quoting 8 C.F.R. § 1.2).[10] This analysis expressly rejected Defendants' arguments con-

[10] The Court also incorporated this conclusion in its preliminary injunction order regarding the Asylum Ban. *See Al Otro Lado, Inc. v. McAleenan*, 423 F. Supp. 3d 848, 859 (S.D. Cal. 2019). In denying a motion to stay the injunction, the Ninth Circuit noted that the Court's statutory analysis "has considerable force" and is "likely correct." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1011-13 (9th Cir. 2020).

cerning plain meaning and the presumption against extraterritoriality. *Id.* at 1199-1202.

Defendants do not cite to a different factual basis or intervening legal developments to alter the Court's previous holding that both statutes mandate inspection and referral for asylum seekers not standing on U.S. soil at the time they interacted with CBP officers who turned them back. Thus, the Court abides by its previous conclusion regarding the scope of the statutes in this case. *See Huynh v. Harasz*, No. 14-CV-02367-LHK, 2016 WL 2757219, at *21 (N.D. Cal. May 12, 2016) (applying the "law of the case" doctrine to preclude summary judgment on legal issues previously decided by a court on a motion to dismiss "[i]f no factual issues have changed between the initial decision and the instant [summary judgment] motion" (citing *Bollinger v. Oregon*, 172 F. App'x 770, 771 (9th Cir. 2006) (unpublished))).

2. Defendants' statutory scheme argument fails.

Defendants also rehash an argument regarding the statutory scheme. They argue that metering is a "reasonable exercise of CBP's 'broad discretion' to allocate its limited resources to accomplish it many statutory functions." (Defs.' Mem. of P. & A. at 43.) Defendants argue that metering helps DHS balance the allocation of its limited resources to its multiple congressionally mandated "mission sets"—including facilitating lawful trade and travel, carrying out immigration enforcement measures, and interdicting unlawful entrants and goods—of which processing asylum seekers is only a part. (Defs.' Mem. Of P. & A. at 41-43 (citing 6 U.S.C. §§ 202, 211(c), 211(g)(3)).) Defendants also repeatedly state that in 2002, Congress "elevat[ed] . . . DHS's

national-security function over all others" by making antiterrorism efforts the agency's "primary mission." (*Id.* (citing 6 U.S.C. § 111(b)(1)(A), (E).)

These statutes do not support Defendants' arguments. First, the Court again finds that Defendants' citations to broad delegations of statutory authority to the DHS Secretary, CBP Commissioner, and the OFO are insufficient, as a matter of law, to establish that their ability to meter asylum seekers is "committed to agency discretion by law." *See Al Otro Lado*, 394 F. Supp. 3d at 1210 ("Sections 1158 and 1225 cannot be nullified by general statutory provisions regarding the Secretary's authority unless Congress clearly intended so."). Defendants' reliance on additional statutes in their summary judgment motion is similarly futile, as these provisions still do not provide a basis for agency discretion that supplants Defendants' duty to inspect and refer asylum seekers in § 1158(a)(1) and § 1225.

As this Court previously found, § 1225 codifies Congress's specific and detailed instructions regarding "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." *Id.* at 1210; *see also P.J.E.S. by & through Escobar Francisco v. Wolf*, 502 F. Supp. 3d 492, 542 (D.D.C. 2020) ("[T]he immigration laws cited are clearly part of a 'comprehensive scheme [that] has deliberately targeted specific problems with specific solutions.'" (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012))). None of the enumerated lists of various responsibilities and missions in 6 U.S.C. § 111, 211(c), 211(g)(3) include any indication that Congress intended to supersede the duties established

by § 1225. *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 (1987))). Section 211(c)(8)(A) states that the CBP Commissioner shall "enforce and administer all immigration laws" including "the inspection, processing, and admissions of persons who seek to enter or depart the United States." Similarly, § 211(g)(3)(B) indicates that OFO is responsible for "conduct[ing] inspections" at POEs to prevent illegal entry and "carry out other duties and power prescribed by the Commissioner." Nothing indicates that these lists are exhaustive or in order of priority such that one duty takes precedence over another, let alone that they preempt other specific statutory mandates.

Indeed, one of the cited provisions includes as a "primary mission" that DHS "ensure that the functions of the agencies and subdivisions within the Department that are not related directly to securing the homeland *are not diminished or neglected except by a specific explicit Act of Congress*." 6 U.S.C. § 111(1)(b)(E) (emphasis added). This language belies Defendants' entire argument. Rather than signaling that general national security directives displace more specific processing obligations, § 111(1)(b)(E) preserves DHS's other responsibilities absent a specific act of Congress. Defendants cite to no such act.

3. Defendants' citations to case law are inapposite.

Defendants also cite to several cases to support their position that, as a matter of law, inspection and referral duties are not conferred on asylum seekers physically outside the United States. (Defs.' Reply at 9-11.) The Court addresses these cases below and finds they do not support Defendants' proposition that inspection and referral under § 1225 is a discretionary duty.

(a) *Sale v. Haitian Centers Council, Inc.*

First, Defendants cite to *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), for the proposition that certain INA provisions, including § 1158, contemplate that immigration proceedings can only occur in the United States. In *Sale*, the Supreme Court addressed the lawfulness of the Coast Guard's interdiction of vessels on the high seas illegally transporting passengers from Haiti to the United States, after which the Coast Guard immediately repatriated passengers to Haiti. *Id.* at 159. Plaintiffs brought suit challenging the interdiction program as violating § 243(h)(1) of the INA. *Id.* at 166. This statute prohibited the deportation or return of "any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* at 170. The Court concluded that the Coast Guard's actions did not violate this provision because the statute's protection did not extend outside the United States where deportation and exclusion hearings were not authorized. *Id.* at 177.

The Court finds *Sale* inapposite. First, § 243(h)(1) no longer exists. This provision was ultimately repealed by the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA" or "1996 amendments"), which also overhauled entirely the deportation and exclusion systems that are referenced in *Sale*. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, §§ 307, 309, 110 Stat. 3009, 3009-612 to 3009-614 (1996) (revising § 243 to exclude subparagraph (h)). Thus, the statutory interpretation in *Sale* is not applicable here.

Second, Defendants cite to a footnote in *Sale* that uses § 1158 as an example of "other provisions of the INA" that "obviously contemplate that such proceedings would be held in the country[.]" 509 U.S. at 173 n.29. First, the Supreme Court's citation to § 1158(a) in *Sale* is purely dicta. The asylum statute serves as an example and is not the subject of the Court's holding. Second, the text of § 1158(a) referenced in *Sale* is significantly different than the current version. The Supreme Court quotes § 1158(a) as instructing the Attorney General to "establish a procedure for an alien *physically present in the United States or at a land border or port of entry*." *Id.* at 161 n.11. The present-day statute—which, again, is the subject of this Court's prior, extensive statutory interpretation—states that asylum is available to "any alien who is physically present in the United States *or who arrives in the United States*. . . ." 8 U.S.C. § 1158(a)(1) (2009) (emphasis added); *see* Pub. L. No. 104-208, 110 Stat. at 3009-690 (revising § 208 of the INA, codified as 8 U.S.C. § 1158). This is not a trivial distinction. The former requires physical presence in one of three places: (1) the United States; (2) a land border; or (3) a POE. The new stat-

ute requires either physical presence in the United States or arrival in the United States, which is not, as Defendants suggest, "just as or more territorially-focused" than the statute at issue in *Sale*. The Court has already found this language to cover class members in the process of arriving at a POE but physically outside the United States. *See Al Otro Lado*, 394 F. Supp. 3d at 1199.

Third, as to the presumption of extraterritoriality, *Sale* is distinguishable because, unlike here, the alleged unlawful conduct of U.S. government actors took place outside of the territorial United States. In this Court's previous extraterritoriality analysis, it found § 1158(a)(1) imposed inspection and referral duties on immigration officers via § 1225(b), and that the conduct relevant to § 1225(b)'s focus—"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"—occurs within the United States and therefore involves a permissible domestic application of the statute. *See id.* at 1202 (citing *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016)).

The Court therefore finds *Sale* inapposite and rejects Defendants' arguments based on this case.

(b) *DHS v. Thuraissigiam*

The second case Defendants cite to support their position is *DHS v. Thuraissigiam*, __ U.S. __, 140 S. Ct. 1959 (2020), a recent Supreme Court decision that postdates this Court's dismissal order. In *Thuraissigiam*, the respondent asylum seeker filed a habeas action to challenge his expedited removal order after he entered

the United States without inspection or entry documents. *Id.* at 1967. In relevant part, the respondent asserted that his due process rights were violated by a jurisdiction-stripping provision of the INA that precluded judicial review of his allegedly deficient credible fear proceeding. *Id.* at 1981. In rejecting his claim, the Supreme Court held that because respondent had not "effected an entry" when he illegally crossed into the United States, he "ha[d] only those rights regarding admission that Congress has provided by statute." *Id.* at 1983. In so finding, the Court cited, as an equivalent example, noncitizens who seek admission at a POE, stating that "[w]hen an alien arrives at a port of entry . . . the alien is on U. S. soil" but still not considered to have entered the country. *Id.* at 1982 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, 215 (1953)) (other quotations and citations omitted).

Defendants argue that this language subverts the Court's determination that the scope of "arriving in the United States" at a POE includes those not on U.S. soil. The Court disagrees. First, as with *Sale*, the language in *Thuraissigiam* is mere dicta. The respondent in the case was not, in fact, arriving at a POE. This cursory example assumes a usual state of affairs—which, notably, would have been true for some class members had metering not been in effect—and does not involve any close readings of the relevant statutes or their applicability under the factual circumstances present here. Second, shortly after making this statement, the Supreme Court uses more expansive language when referring to the respondent by stating that "an alien who *tries to enter the country illegally* is treated as an 'applicant for admission'" who has also not "effected an entry." *Id.* at 1983 (citing § 1225(a)(1)) (emphasis added). The

Court could have, but did not, state that the noncitizen who "enters the country illegally" and is therefore on U.S. soil is an applicant for admission, but instead extends it to those who "try to enter." This is incongruent with the notion that the Court's earlier language limited "arrival" at a POE to include only those on U.S. soil and would therefore exclude those "trying to enter" a POE but being obstructed by U.S. officials at the international boundary line. It makes little sense to use more expansive language to encompass those seeking to enter unlawfully and not those attempting to enter lawfully. This would be contrary to DHS implementing regulations, which the Court previously noted define "arriving aliens" as those "attempting to come into the United States at a port-of-entry." 8. C.F.R. § 1.2. It would also defeat the purpose of the 1996 amendments to the INA. *See Torres v. Barr*, 976 F.3d 918, 928 (9th Cir. 2020) (explaining that § 1225(a)(1) "ensures that all immigrants who have not been lawfully admitted, *regardless of their physical presence in the country*, are placed on equal footing in removal proceedings under the INA—in the position of an 'applicant for admission'" (emphasis added)).[11] Thus, the Court does not read the language used by the Supreme Court in *Thuraissigiam* as a definitive statement about the specific territorial scope of § 1158.

Once again, the Court abides by its prior finding that the statutes at issue apply to those who may be physically outside the United States but who are in the process of arriving at a POE. Thus, the Court finds that the duties to inspect and refer contained in § 1158(a)(1)

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[11] The Court discusses this in more depth below. (*See infra* Section II.C.4(b)).

and § 1225 are mandatory ministerial duties under § 706(1).

4. Turnbacks unlawfully withhold inspection and referral duties.

Plaintiffs' position is that, as a matter of law, Defendants' undisputed act of turning asylum seekers arriving at POEs back to Mexico unlawfully withholds their statutorily mandatory duties to inspect and refer asylum seekers. Defendants argue that they did not, in fact, withhold statutorily mandated duties under § 1158(a)(1) and § 1225 because class members were instructed to return to POEs and later inspected and referred, as reflected in Defendants' continued processing of asylum seekers throughout the relevant period. (Defs.' Mem. of P. & A. at 39.) Plaintiffs contend that this still constitutes an unlawful withholding of inspection of referral because "[g]iven the risks of living in Mexican border towns . . . and the extraordinary delays," turning back asylum seekers deprives them of a guaranteed opportunity to access the asylum process.[12] (Pls.' Opp'n at 7-8.)

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[12] The parties also appear to dispute whether Plaintiffs raise that immediate inspection and referral of asylum seekers on their first arrival to the port should be compelled as an agency action "unreasonably delayed." *See In re Ctr. for Auto Safety*, 793 F.2d 1346, 1353 (D.C. Cir. 1986) (noting that a party can also obtain judicial review "of a prolonged agency inaction" under § 706(1)'s "unreasonable delay" prong (quoting *Costle v. Pacific Legal Found.*, 445 U.S. 198, 220 n.14 (1980))). Defendants argue that Plaintiffs have not properly raised the issue in their opening brief; however, Defendants do not move for summary judgment on this claim themselves. (*See* Defs.' Mem. of P. & A. at 40; Defs.' Reply in supp. of MSJ at 12, ECF No. 611.) Plaintiffs do not expressly raise this argument but address this issue for the first time in reply to De-

The Ninth Circuit has said that judicial authority to "compel agency action" pursuant to § 706(1) "is carefully circumscribed to situations where an agency has ignored a specific legislative command." *Hells Canyon Pres. Council*, 593 F.3d at 932; *see also Vietnam Veterans of Am. v. Central Intelligence Agency*, 811 F.3d 1068, 1075-76 (9th Cir. 2016) ("[S]ection 706(1) applies to the situation where a federal agency refuses to act in disregard of its legal duty to act."). In a § 706(1) context, the Court must apply the two-step analysis in *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to determine the meaning of the statutory language and whether it establishes whether Defendants can defer processing asylum seekers after they have arrived at a POE. *See San Francisco Baykeeper*, 297 F.3d at 885-86 (following *Chevron* framework when considering the EPA's interpretation of the law it was charged with administering); *see also O.A. v. Trump*, 404 F. Supp. 3d 109, 147 (D.D.C. 2019) (applying *Chevron* even where not explicitly invoked by the parties because "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions . . . which are contrary to clear congressional intent" (quotations omitted)).

The *Chevron* analysis "mandates that absent a clear expression of congressional intent to the contrary, courts should defer to reasonable agency interpreta-

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fendants' characterization of metering as a delayed agency action. (Pls.' Reply in supp. Of MSJ at 11, ECF No. 610.) For these reasons, the Court does not understand either party to move for summary judgment on this claim and does not address it in this Order. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider arguments raised for the first time in a reply brief.").

tions of ambiguous statutory language." *Friends of Cowlitz v. FERC*, 253 F.3d 1161 (9th Cir. 2001); *T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1065-67 (9th Cir. 1997) ("A court should accept the 'reasonable' interpretation of a statute chosen by an administrative agency except when it is clearly contrary to the intent of Congress."). This requires courts to first consider "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." *Campos-Hernandez v. Sessions*, 889 F.3d 564, 568 (9th Cir. 2018) (quoting *Chevron*, 467 U.S. at 842). However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The Court understands the specific legal question here to be whether § 1158(a)(1) and § 1225 permit metering where asylum seekers who were turned back were ultimately processed for asylum.

(a) *Chevron* Step One

"To determine whether the statute unambiguously bars an agency interpretation we apply the normal tools of statutory construction." *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 815 (9th Cir. 2016) (quotations omitted). This includes "ask[ing] whether Congress intended to permit the agency interpretation." *Id.* at 815-16. If a court "ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9.

"To implement its immigration policy, the Government must be able to decide (1) who may enter the coun-

try and (2) who may stay here after entering." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). "That process of decision," captured in part by 8 U.S.C. § 1225, "generally begins at the Nation's borders and ports of entry, where the Government must determine whether an alien seeking to enter the country is admissible." *Id.* As the Court previously summarized, § 1225(a) establishes a general inspection duty and § 1225(b)(1) sets forth additional specific duties that arise for aliens arriving in the United States.

With regard to the inspection duty, the statute states that "[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 . . .) shall be deemed for purposes of this chapter an applicant for admission." *Id.* § 1225(a)(1); *see also* 8 C.F.R. § 1001.1(q) ("The term arriving alien means an applicant for admission coming or attempting to come into the United States at a port-of-entry."). All applicants for admission, moreover, "shall be inspected by immigration officers." 8 U.S.C. § 1225(a)(3). With regard to referral, the statute requires the following:

> [i]f 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 under subparagraph (B).

Id. § 1225(b)(1)(A)(ii). Under a straightforward reading of the statutes, a noncitizen must do two things for inspection and referral to be triggered: first, arrive at a POE, which prompts inspection (§ 1225(a)(1), (3)) and

second, indicate an intention to apply for asylum, which prompts referral (§ 1225(b)(1)(A)(ii)). At each stage, once arriving asylum seekers satisfy their end of the bargain, immigration officers must satisfy theirs.[13]

The plain text requires that an asylum seeker "arrives" or "is arriving" in the United States to prompt inspection, the first step in this process of decision. "Arrive" is not modified or conditioned to contemplate, let alone require, more than one arrival at a POE before Defendants' duties attach. *See, e.g.*, *Matter of F-P-R*, 24 I & N Dec. 681, 683, Int. Dec. 3630, 2008 WL 4817462 (BIA 2008) (distinguishing, for purposes of one-year asylum application deadline, between "arrival"—"to come to a certain point in the course of travel; reach one's destination" and "to come to a place after traveling," —and "last arrival" which "refer[s] to an alien's most recent coming or crossing into the United States after having traveled from somewhere outside the country"). But the Court acknowledges, as it has previously, Congress's instruction that "[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; *see Al Otro Lado*, 394 F. Supp. at 1200 (noting that this provision of the Dictionary Act has been applied to the INA). The present and present progressive use of "arrive," then, can be understood to encompass both the asylum seek-

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[13] There is no temporal element to this statute, i.e., how much time can elapse between arrival and inspection or inspection and referral. However, because the Court is addressing only unlawful withholding and not unreasonable delay (*see supra* note 12), the Court does not find this omission relevant to its analysis.

ers' present arrival at a POE and any future arrival at a POE.

However, construing "arrives" or "is arriving" in this way deprives the word of any real meaning. *See Chowdhury v. I.N.S.*, 249 F.3d 970, 973 (9th Cir. 2001) (stating that courts must interpret a statute in a way that "giv[es] effect to each word"). If immigration officers can forgo inspection upon an asylum seeker's first arrival and defer this duty to some unspecified future arrival without flouting the statute, the first arrival loses legal significance. *See Al Otro Lado v. Wolf*, 952 F.3d 999, 1013-14 (9th Cir. 2020) ("It is the INA . . . that makes an alien's first arrival legally significant."). [14] Moreover, if the statute is construed in this way, this would permit Defendants to turn back asylum seekers any number of times—perhaps indefinitely—without running afoul of their statutory obligations.

The Court finds the plain meaning of the statutory text cuts in favor of a finding that inspection and referral attach when asylum seekers arrive at a POE the first time. Nonetheless, out of an abundance of caution, the Court proceeds to the second *Chevron* step.

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[14] As such, regulations promulgated after class members were turned back have not applied to them because their "first arrival triggered a statutory right to apply for asylum and have that application considered" and thus the regulations in question, which were "not in place at the time each class member's right to apply for asylum attached," could not apply. *See id.* (regarding "Asylum Eligibility and Procedural Modifications," 84 Fed. Reg. 33,829 (July 16, 2019)); *see also Al Otro Lado v. Gaynor*, 513 F. Supp. 3d 1253, 1260 (S.D. Cal. 2021) (regarding "Asylum Eligibility and Procedural Modification," 85 Fed. Reg. 82,260 (Dec. 17, 2020)).

(b) *Chevron* Step Two

Where statutes are silent or ambiguous, the Court "must give effect to an agency's reasonable interpretation of a statute, unless the interpretation is inconsistent with clearly expressed congressional intent." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 671 (9th Cir. 2021). "[D]eference is not owed to an agency decision if it construes a statute in a way that is contrary to congressional intent or frustrates congressional policy." *CHW W. Bay v. Thompson*, 246 F.3d 1218, 1223 (9th Cir. 2001). Accordingly, the Court next turns to Congress's intent in establishing the inspection and referral procedures in § 1225 and whether metering is consistent with that intent.

The INA's inspection and referral duties were enacted as part of the larger expedited removal process. *See United States v. Barajas-Alvarado*, 655 F.3d 1077, 1080 n.2 (9th Cir. 2011) ("Expedited removal proceedings provide a streamlined process by which U.S. officers can remove aliens who attempt to gain entry to the United States but are not admissible." (citing 8 U.S.C. § 1225(b))). This process accelerates secondary inspection by authorizing immigration officers who find a noncitizen inadmissible after inspection to order the noncitizen removed "without further hearing or review." *See Am. Immigr. Laws. Ass'n v. Reno*, 199 F.3d 1352, 1354-55 (D.C. Cir. 2000) (citing 8 U.S.C. § 1225(b)(1)(A)(i)); *see also* H.R. Conf. Rep. No. 104-828, at 209 (1996) (stating that reforms to secondary inspection were intended to "expedite the removal from the United States of aliens who indisputably have no authorization to be admitted. . . ."). In this way, IIRIRA sought to deter illegal immigration by "simplify[ing] removal proceedings *while*

protecting credible asylum applicants." *Arcinega-Contreras v. Gonzales*, 138 F. App'x 961, 963 (9th Cir. 2005) (citing H.R. Rep. No. 104-469, pt. 1, at 1 (1996)) (emphasis added); *see also* H.R. Rep. No. 104-469(I), at 111 (1996) (stating that the purpose behind IIRIRA was to "*enable the prompt admission of those who are entitled to be admitted*, the prompt exclusion or removal of those who are not so entitled, and *the clear distinction between these categories*" (emphasis added)). Specifically, the amendments were intended to eliminate the "anomaly" in which noncitizens who were unlawfully present in the country were subject to "deportation proceedings," which afforded them greater procedural and substantive rights, "while non-citizens who presented themselves at a port of entry for inspection were subjected to more summary exclusion proceedings" and were therefore "in a worse position than persons who had crossed the border unlawfully." *Torres*, 976 F.3d at 927-28; H.R. Rep. No. 104-469, pt. 1, at 225-29.

Under the current metering framework, the right to an asylum determination is more onerous to an inadmissible individual who seeks to lawfully make a claim at a POE than to an inadmissible individual who illegally enters the country. A migrant who is apprehended after unlawfully crossing the border is afforded "the right to a determination whether he had a significant possibility of establish[ing] eligibility for asylum. . . ." *Thuraissigiam*, 140 S. Ct. at 1982. Because of metering, migrants who approach POEs to lawfully request asylum face a far more complicated process. Defendants, by turning away immigrants at POEs who are lawfully seeking admission into the United States, sending them to shelters in Mexico, and requiring them to make their way back to the POE at least a second time to access

asylum, create additional, logistical barriers to entry that contravene the attempt of IIRIRA to put all those not lawfully admitted "on equal footing." *Id.* (*See* OIG Report at 7, 14 (noting that implementation of queue management in 2018 and creation of other "barriers to ports of entry" created incentive to cross illegally)

This reality is undisputed. In fact, the record is replete with uncontroverted evidence that Defendants' interpretation of their inspection and referral duties under the statute creates multiple logistical hurdles for migrants seeking asylum who have otherwise complied with the statute by "arriving" at a POE and stating that they seek asylum. For example, the evidence in this case shows that class members, at the instruction of CBP officers, are required to leave the ports, coordinate with Mexican immigration officials to put their name on a list (which, evidence shows, itself sometimes required a wait), and spend additional time in Mexico waiting for their "appointments." (*See* JSUF ¶¶ 81, 157-58, 161, 163, 164, 260; Decl. of Stephanie Leutert ("Leutert Decl.") ¶¶ 51-52, Ex. 20 to Medlock Decl., ECF No. 535-22.)[15] The evidence shows that Defendants did not monitor the list and were not aware how Mexican officials determined who came over from the list. (Leutert Decl. ¶¶ 52-53; OIG Report at 9 n.22; Dep. of Samuel Cleaves 216:12-217:10; 221:8-10, Ex. 102 to Medlock

[15] The Court grants Defendants' Motion to Exclude Stephanie Leutert's Expert Testimony only as it pertained to port operations or capacities. Ms. Leutert has directly observed turnbacks at POEs and personally conducted fieldwork in Mexican border cities with asylum seekers, shelter staff, civil society organizations, and Mexican government officials as part of her work. (Leutert Decl. ¶ 6.) She therefore has personal knowledge of the steps imposed by metering on asylum seekers.

Decl., ECF No. 535-102.) There is also evidence that the lists themselves have been subject to fraud and corruption. (Leutert Decl. ¶¶ 53-54.)

The failure to inspect and refer as asylum seekers first arrived also creates additional burdens by requiring that asylum seekers stay in Mexico and make return trips to POEs to access the process. The risks of waiting in Mexico, often for an extended period of time, are high. The evidence submitted shows that turnbacks resulted in asylum seekers' deaths, assaults, and disappearances after they were returned to Mexico. (Dep. of Erika DaCruz Pinheiro 161:25-162:9, Ex. 113 to Medlock Decl., ECF No. 535-115; *see also* Dep. of Frank Longoria 202:24-203:5 (migrants waiting in Mexico for more than a day waiting to be processed at the Hidalgo POE would be in danger), Ex. 100 to Medlock Decl., ECF No. 535-102).) This is further supported by evidence that turnbacks created humanitarian issues in border communities and local pressure to remove them. (*See* May 24, 2018 "RE: Today's Meeting - A few items" email (noting that queue management would increase the number of people waiting in Mexico "and begin to strain local [Mexican] border communities" as seen with Haitians in Tijuana in 2016), Ex. 96 to Medlock Decl., ECF No. 535-98); Sept. 13, 2016 "RE: Haitians arriving in Tijuana" email (Haitian migrants waiting in Tijuana for appointments were causing a local humanitarian crisis and political pressure was mounting in Mexico to manage the situation), Ex. 50 to Medlock Decl., ECF No. 535-52.)

As the Court has stated before, "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." *Al Otro Lado*, 394 F. Supp. 3d at 1212. There may in fact be times when capacity or resource constraints prevent Defendants from processing asylum seekers expeditiously. However, it is also true that because courts "are not at liberty to rewrite the words chosen by Congress," *United States v. Vargas-Amaya*, 389 F.3d 901, 906 (9th Cir. 2004), the Court cannot find that these statutory duties are subject to modification or displacement based on Defendants' assessments. *See O.A.*, 404 F. Supp. 3d at 151 (holding that an executive assessment of a large-scale arrival of unlawful entrants does not override a statutory mandate permitting all aliens present in the United States to apply for asylum). As stated by the Ninth Circuit, "[w]here Congress itself has significantly limited executive discretion by establishing a detailed scheme that the Executive must follow in [dealing with] aliens," the Executive cannot "abandon that scheme because [it] thinks it is not working well[.]" *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 774 (9th Cir. 2018).

As aforementioned, an asylum seeker must only arrive and indicate an intention to apply for asylum for inspection and referral to commence. Requiring asylum seekers to arrive again at POEs requires an additional step neither stated in nor contemplated by § 1225(b)(1)(A)(ii). Therefore, failing to inspect and refer class members upon arrival, and instead turning them back, conditions the ability to apply for asylum "on a migrant's manner of entry," and "flouts this court's and the BIA's discretionary, individualized treatment of refugees' methods of entry[.]" *E. Bay Sanctuary Covenant*, 993 F.3d at 675. Accordingly, the Court concludes that turning back asylum seekers at POEs with-

out inspecting and referring them upon their arrival unlawfully withholds Defendants' statutory duties under 8 U.S.C. § 1158(a)(1) and § 1225. Because the Court concludes that turnbacks are unlawful regardless of their purported justification, the Court finds it unnecessary to address the parties' arguments regarding the § 706(2) arbitrary and capricious claim based on pretext.[16]

III. Fifth Amendment

Plaintiffs' second claim alleges that Defendants' act of turning back asylum seekers from POEs violates the Fifth Amendment. The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "The touchstone of due process is protection of the individual against arbitrary action of government[.]" *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

Plaintiffs argue that Defendants' violation of the procedural protections embodied in the INA provisions

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[16] Other courts have found significant overlap between § 706(1) and the contrary to law provisions in § 706(2). *See Ramirez*, 471 F. Supp. 3d at 191 (finding, after bench trial, that ICE's failure to follow procedures was "otherwise not in accordance with law" and an unlawful withholding or unreasonable delay of agency action); *N.A.A.C.P. v. Sec'y of Hous. & Urb. Dev.*, 817 F.2d 149, 160 (1st Cir. 1987) (finding no difference between a "failure to exercise" discretion and "abuse" of discretion as revealed by a pattern of activity); *Ligon Specialized Hauler, Inc. v. I. C. C.*, 587 F.2d 304, 315 (6th Cir. 1978) (noting that "unlawful" in § 706(1) includes but is not limited to the meaning given in § 706(2)(A) and (D)); *see also* Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 Va. Environmental L.J., 461-503 (2008).

alone prove a violation of due process. (Pls.' Mem. of P. & A. at 32.) Alternatively, they argue that weighing the individual interest in seeking asylum outweighs any governmental interest or burden. (*Id.* at 31-32.) Defendants argue that summary judgment is appropriate on this issue because: (1) neither § 1225 nor due process protects foreign nationals outside U.S. territory; and (2) "class members cannot obtain more than what the statute already provides: to be inspected and processed for admission." (Defs.' Mem. of P. & A. at 54.) The Court addresses each argument below.

A. The Fifth Amendment Still Applies

Defendants first take issue with the Court's prior conclusion regarding the extraterritorial application of due process. The Court previously held that the extraterritorial application of constitutional rights under the Fifth Amendment was not subject to a bright-line test but instead required that the court 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." *Al Otro Lado, Inc.*, 394 F. Supp. 3d at 1218 (citing the "functional approach" in *Boumediene v. Bush*, 553 U.S. 723 (2008)). The Court specifically found that the "substantial connection" test articulated by the Supreme Court in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)—applied alongside *Boumediene*'s functional approach by the Ninth Circuit in *Ibrahim v. Department of Homeland Security*, 669 F.3d 983 (9th Cir. 2012)—"does not constitute a ceiling on the application of the Constitution to aliens." *Id.* Relying on *Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018), this Court

rejected Defendants' argument that class members outside the country were required to allege a "prior significant voluntary connection" with the United States to receive the protections of the Fifth Amendment, particularly where the defendant's conduct occurred on American soil. *Id.* at 1219-21.

Defendants argue that two intervening Supreme Court decisions invalidate these previous legal conclusions. First, the Supreme Court vacated the judgment in *Rodriguez* and remanded the decision to the Ninth Circuit "for further consideration in light of *Hernandez v. Mesa*, 589 U.S. __, 140 S. Ct. 735 (2020)." In *Hernandez*, the Court found it improper to extend *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), to provide a damages remedy for a cross-border shooting in which a Border Patrol agent standing on American soil shot and killed a 15-year-old Mexican national standing on Mexican soil. The Court's analysis focused on the "special factors counseling hesitation" unique to the *Bivens* context, specifically the separation of powers and Congress's role in providing for a damages remedy. *Hernandez*, 140 S. Ct. at 749-50 ("[T]his case features multiple factors that counsel hesitation about extending *Bivens*, but they can all be condensed to one concern—respect for the separation of powers.").

Although *Rodriguez* was remanded in light of *Hernandez*, the Court does not understand *Hernandez* to invalidate the propositions in *Rodriguez* on which this Court relied. While the Supreme Court in *Hernandez* found that the particular circumstances of that case implicated foreign policy and national security in a way that counseled against fashioning a *Bivens* remedy "for injuries incurred on foreign soil," it did not hold that due

process itself cannot extend extraterritorially in any circumstance or that exterritorial application would require a "previous voluntary significant connection." Indeed, the Fifth Circuit's earlier decision found Hernandez was not entitled to protection under the Fourth Amendment because of his lack of "significant voluntary connection." *Hernandez v. United States*, 785 F.3d 117, 120 (5th Cir. 2015). The Supreme Court ultimately vacated this decision and remanded to the Fifth Circuit for consideration of a completely different question: whether Hernandez had a cause of action under *Bivens* to bring a due process claim in the first place. *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017). Thus, this particular holding in *Rodriguez* that a substantial connection is not necessary for extraterritorial application was never addressed by the Supreme Court in its *Hernandez* decision.

Second, Defendants argue that *Thuraissigiam* contravenes the Court's reliance on *Boumediene*'s functional test for due process. As aforementioned, the Court in *Thuraissigiam* addressed a constitutional challenge to 8 U.S.C. § 1252(e)(2), which limits habeas review of expedited removal orders. The Court indeed distinguished *Boumediene* because it "is not about immigration at all." *Id.* at 1981. The decision, however, makes this distinction in the context of habeas relief, noting that the challengers in *Boumediene* "were apprehended on the battlefield in Afghanistan and elsewhere, not while crossing the border," and "sought only to be released from Guantanamo, not to enter this country." *Id.* (quotations omitted). However, this Court did not cite to *Boumediene* for its conclusions regarding the propriety of habeas relief; rather, the Court relied on its instruction to conduct fact-specific extraterritoriality

analyses and not rely on formalism. *See Al Otro Lado*, 394 F. Supp. 3d at 1218. Nothing in *Thuraissigiam* has any bearing on this principle.[17]

While future case law could alter this holding, the cases cited by Defendants do not, at this juncture, displace the Court's adoption of the extraterritorial application of the Fifth Amendment. Thus, the Court finds no basis in the case law cited by Defendants to depart from its original conclusion that, under the functional approach in *Boumediene*, the Fifth Amendment applies to conduct that occurs on American soil and therefore applies here, where CBP failed to inspect and refer class members for asylum under statute. *See id.* at 1218-21.

B. Denial of Due Process

The Supreme Court recently emphasized that "the only procedural rights of an alien seeking to enter the country are those conferred by statute," and as such "'the decisions of executive or administrative officers, *acting within powers expressly conferred by congress*, are due process of law.'" *Thuraissigiam*, 140 S. Ct. at 1977 (emphasis added) (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892)); *see also Wolff*, 418 U.S. at 557 ("A liberty interest created by statute is protected by due process."); *Meachum v. Fano*, 427 U.S. 215, 226 (1976) ("[A] person's liberty is equally protected, even when the liberty itself is a statutory creation of the State." (quotation omitted) (quoting *Wolff*,

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[17] While *Thuraissigiam* primarily concerned whether the statute violated the Suspension Clause, the respondent also raised a due process claim related to his "allegedly flawed credible-fear proceeding." *Id.* at 1982. The Court addresses the Supreme Court's holding into its analysis below.

418 U.S. at 557)). As Plaintiffs point out, Defendants have conceded this point. *See Al Otro Lado*, 394 F. Supp. 3d at 1221 (quoting Defendants' argument 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").

Plaintiffs allege that their due process rights derive from a congressionally enacted statute; namely, the process of inspection and referral afforded in § 1225 by way of § 1158(a)(1). Plaintiffs' due process rights therefore extend as far as their rights under these provisions. *Thuraissigiam*, 140 S. Ct. at 1977. The Court determined above that turning asylum seekers away from POEs constitutes an unlawful exercise of Defendants' authority under the INA to inspect and refer asylum seekers both on U.S. soil and outside the international boundary line who are arriving at POEs. (*See supra* Section II.C.4.) *Al Otro Lado*, 394 F. Supp. 3d 1168, 1198-1205. Because Defendants' turning back of asylum seekers unlawfully withholds their duties under statute, it violates the process due to class members.[18] Thus, the Court finds summary judgment appropriate in Plaintiffs' favor on their due process claim.

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[18] During oral argument, Defendants argued that Plaintiffs' due process argument fails because they cannot show a deprivation on a class-wide basis. However, the Court found above that Defendants unlawfully withhold the duties of inspection and referral for all asylum seekers by turning them back upon their arrival at a POE. Thus, the class was uniformly subject to the same deprivation of process. (*See supra* note 2.) Defendants' argument regarding this issue therefore fails.

IV. Alien Tort Statute

The ATS confers on district courts "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. "The ATS 'is a jurisdictional statute creating no new causes of action,' although the First Congress adopted it on the assumption that 'district courts would recognize private causes of action for certain torts in violation of the law of nations. . . .'" *Mujica v. AirScan Inc.*, 771 F.3d 580, 591 (9th Cir. 2014) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004)). 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. Courts must "determine whether a norm of customary international law has attained the status of jus cogens" by consulting scholarship, judicial decisions, and "the general usage and practice of nations" but "must also determine whether the international community recognizes the norm as one from which no derogation is permitted." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (quotations omitted).

Even where a jus cogens norm exists, the Supreme Court has advised courts to exercise "a restrained conception of the discretion [it] should exercise in considering a new cause of action" under the ATS. *Id.* at 724-25. Specifically, the Court cited to the following five reasons:

> First, . . . the [modern] understanding that the law is not so much found or discovered as it is either made or created[;] . . . [s]econd, . . . an equally

> significant rethinking of the role of the federal courts in making it [;] . . . [t]hird, [the modern view that] a decision to create a private right of action is one better left to legislative judgment in the great majority of cases[;] . . . [f]ourth, . . . risks of adverse foreign policy consequences [; and] . . . fifth[,] . . . [the lack of a] congressional mandate to seek out and define new and debatable violations of the law of nations.

Presbyterian Church Of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 255 (2d Cir. 2009) (quoting *Sosa*, 542 U.S. at 725-28).

The norm at issue in this case is the duty of non-refoulement. The principle is defined in Article 33 of the United Nations Convention Relating to the Status of Refugees ("Refugee Convention") as follows:

> No Contracting State shall expel or return ("refouler") 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.

Jan. 31, 1967, 19 U.S.T. 6223, 6276 ("Article 33"). Plaintiffs have previously provided extensive citation to sources—including findings and conclusions from the Executive Committee of the United Nations High Commissioner for Refugees ("UNHCR"), the Oxford Encyclopedia of Human Rights, and academic journals and other scholarship—to establish that non-refoulement is a jus cogens norm. (*See* Pls.' Opp'n to Defs.' Mot. to Dismiss the SAC at 28-29, ECF No. 210 (citing to sources).) The UNHCR, in particular, has expressly

concluded that non-refoulement had achieved the status of a jus cogens norm "not subject to derogation." UNHCR Executive Cmty. Conclusion No. 79 (XLVII), General Conclusion on Int'l Protection (1996).

The more nuanced question in this case is whether the duty of non-refoulement is universally understood to provide protection to those who present themselves at a country's borders but are not within a country's territorial jurisdiction. This is analogous to the earlier question addressed by the Court regarding the scope of the INA provisions governing inspection and referral. (*See supra* Section II.C.1.) Concerning the ATS, however, the Court cannot rely on its previous interpretation of the relevant domestic statutes but must instead determine here, with reference to scholarship, judicial decisions, and "the general usage and practice of nations," whether this understanding of the duty of non-refoulement is specific, universal, and obligatory from which no derogation is permitted.

"Turnbacks" or "pushbacks" have been acknowledged in international legal literature as a "direct arrival prevention measure" that, on land, usually involve some tactics or measures "to prevent migrants from approaching or crossing the border" such that "screening for protection needs will be summary or non-existent." Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, U.N. Human Rights Council, at ¶ 51, U.N. Doc. A/HRC/37/50 (Nov. 23, 2018). Several international legal authorities have expressed that pushbacks are incompatible with the duty of non-refoulement because they deprive migrants of their right to seek international protection on an individualized basis. *Id.* ¶ 52;

see also Advisory Op. on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol ("Advisory Op."), U.N. High Comm'r for Refugees (UNHCR), ¶ 43 (Jan. 26, 2007). This is premised on the legal principle that the source of this duty, Article 33, applies extraterritorially to asylum seekers approaching land borders from contiguous countries. *See* UNHCR Advisory Op. ¶ 7 ("The prohibition of refoulement to a danger of persecution under international refugee law is applicable to any form of forcible removal, including . . . non-admission at the border. . . ."); UNHCR Executive Cmty. Conclusion No. 22 (XXXII), Protection of Asylum-Seekers in Situations of Large-Scale Influx (1981) ("In all cases the fundamental principle of non-refoulement—including non-rejection at the frontier—must be scrupulously observed."); *see also* Mark Gibney, Refugees, 4 Encyclopedia of Human Rights 315, 318 (Oxford University Press, 2009) ("In practice, [the duty of non-refoulement] means that a . . . state must either admit the person to its territory and process her claim for protection or send the person to a safe third state.").[19]

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[19] These resources do not expressly address whether the duty of non-refoulement is breached where a country turns back asylum seekers temporarily and processes them at a later date. However, many seem to embrace a broad view of this obligation as prohibiting any country from subjecting or exposing asylum seekers, for any amount of time, to foreseeable risks of violence (including not only persecution on a protected ground, but also ill-treatment, abuse, and other forms of bodily harm). Because the Court's conclusion here is that the extraterritorial application of the duty has not been established as a jus cogens norm, the Court need not de-

However, acceptance of this specific extraterritorial application of non-refoulement is not universal. Several countries have adopted pushback or "offshoring" policies that seek to "offload" the obligations of non-refoulement on other countries and "seal" borders from asylum seekers.[20] *See* Azadeh Erfani and Maria Garcia, "Pushing Back Protection: How Offshoring and Externalization Imperil the Right to Asylum," at 7, Nat'l Immigrant Justice Center and FWD.us (Aug. 3, 2021). This practices, in some form or another, has been implemented in some European Union members states and Australia. *See generally*, *id.*; *see also* Marianna Karakoulaki, et al., *Critical Perspectives on Migration in the Twenty-First Century*, at 144, (E-International Relations Publishing, July 30, 2018) (noting "states are able to significantly limit the activation of their Convention obligations through the implementation of 'non-arrival regimes' that aim to directly impede access to asylum"). This stems from significant disagreement over the scope and extent of countries' jurisdictions, within which they are obligated not to refoul asylum seekers. *See* Cathryn Costello and Itamar Mann, "Border Justice: Migration and Accountability for Human Rights Violations," 21 German L.J. 311, 313-14 & n.19 (Cambridge Univ. Press, March 3, 2020) (describing the definition of

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termine whether the duty of non-refoulement extends to these other circumstances.

[20] Evidence in this case demonstrates that some of these "offshoring" techniques are used by CBP in coordination with the Government of Mexico to interdict migrants en route to United States POEs. The Court does not address the lawfulness of any measures taken by CBP, beyond metering, regarding asylum seekers in contiguous countries.

"jurisdiction" in human rights treaties as "constantly contested").

This rift has manifested itself in judicial and tribunal determinations as well. Some courts have adopted an expansive understanding of jurisdiction and even applied it to find an extraterritorial duty regarding non-refoulement obligations.[21] The United States Supreme Court, however, has not. In *Sale v. Haitian Centers*

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[21] *See Hirsijamaa and Others v. Italy*, Application No. 27765/09, European Court of Human Rights ("ECHR") (2012) ("[T]he Italian border control operation of 'push-back' on the high seas, coupled with the absence of an individual, fair and effective procedure to screen asylum seekers, constitutes a serious breach of the prohibition of collective expulsion of aliens and consequently of the principle of non-refoulement."); *Bankovic et al. v. Belgium and 16 other contracting States (Admissibility)*, Application No. 52207/99, ECHR (Dec. 12, 2001) (recognizing exercise of extraterritorial jurisdiction when a "State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government"); *see also*, *Coard et al. v. United States*, Report No. 109/99, Case No. 10.951, Inter-American Comm. on Human Rights ("IACHR") (Sept. 29, 1999) (noting that extraterritorial application may be "required by the norms which pertain" and as such, the focus should not be "on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control"); *Loizidou v. Turkey (Preliminary Objections)*, Application No. 15318/89, ECHR (Feb. 23, 1995), Series A, No. 310, para. 62 (finding, in the context of the convention at issue, that "the concept of 'jurisdiction' under this provision is not restricted to the national territory of the High Contracting Parties" but also extends to "acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory").

Council, Inc., the Court held that "the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory[.]" 509 U.S. at 183 (1993). The Court in *Sale* relied heavily on statutory interpretation of the text of Article 33 and the "negotiating history" of this provision to conclude that it was not intended to apply outside the territorial seas of the United States. *See id.* at 179-87. The Court acknowledges that this precedent is almost three decades old, and its conclusion is dependent on an interpretation of Article 33 that has since been explicitly disagreed with by the UNHCR itself. UNHCR Advisory Op. ¶¶ 24 n.54, 28-29, 31; *see also The Haitian Centre for Human Rights et al. v. United States*, Inter-American Comm. on Human Rights, Case 10.675 (1997). Nonetheless, its interpretation of Article 33 remains binding precedent on this Court. *See Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) ("Binding authority within this regime cannot be considered and cast aside; it is not merely evidence of what the law is. Rather, caselaw on point is the law. If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect. Binding authority must be followed unless and until overruled by a body competent to do so."); *cf. Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir.

2005) ("[C]lear congressional action trumps customary international law and previously enacted treaties.").[22,23]

Abiding by non-refoulement principles in the instant circumstances is an objective toward which all countries —including this one—should undoubtedly strive. However, given both controlling case law and the ongoing debate over the proper scope of countries' jurisdictions, the Court regrettably cannot find that this norm is universally applied beyond borders. As such, the Court finds that the duty of non-refoulement as it applies to migrants at the border but physically outside the territorial United States is not a norm from which no derogation is permitted. *See Sosa*, 542 U.S. at 725 (limiting

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[22] The Department of Justice ("DOJ") also does not recognize the extraterritoriality of Article 33, even after the UNHCR stated that it applies extraterritorially. *See* Legal Obligations of the United States Under Article 33 of the Refugee Convention, Dep't of State Mem. Op. for the Legal Adviser (Dec. 12, 1991), accessed at https://www.justice.gov/file/23326/; U.S. observations on UNCHR Advisory Opinion on Extraterritorial Application of Non-Refoulement Obligations (Dec. 28, 2007), accessed at https://2001-2009.state.gov/s/l/2007/112631.htm.

[23] Although the law is not conclusive on customary international laws' relationship with domestic laws, lower courts have held that federal statutes have supremacy. *See, e.g.*, *Flores-Nova v. Att'y Gen. of U.S.*, 652 F.3d 488, 495 (3d Cir. 2011) (finding customary international law not binding on the court to the extent that it conflicted with a statute); *Payne-Barahona v. Gonzales*, 474 F.3d 1, 3-4 (1st Cir. 2007) (stating that where customary international law conflicts with a federal statute, "the clear intent of Congress would control"); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) (same); *Martinez-Lopez v. Gonzales*, 454 F.3d 500, 502-03 (5th Cir. 2006) (same). The Court finds no reason why this well-established rule establishing the supremacy of federal statutes over customary international law would not also apply to the decisions of the Supreme Court.

the international norms actionable under the ATS to only those that "rest on a norm of international character accepted by the civilized world"). In the absence of jus cogens norm, the Court finds Plaintiffs' ATS claim is not actionable as a matter of law.

V. Equitable Relief

Plaintiffs seek declaratory relief on the basis that Defendants violated the law by implementing turnbacks. (Pls.' Mem. of P. & A. at 38-39.) Further, Plaintiffs request a permanent injunction on the basis that the denial of access to the asylum process causes irreparable harm, no remedy at law will cure the violations, and access to the asylum process is both in the public interest and outweighs any burden to Defendants in complying with asylum procedure. (Pls.' Mem. of P. & A. at 36-38.) Defendants argue that equitable relief is unwarranted because Plaintiffs fail on the merits and raise several, specific objections to a permanent injunction, including based on 8 U.S.C. § 1252(f)(1) and an argument that vacatur, rather than an injunction, is the proper remedy here. (*See* Defs.' Mem. of P. & A. at 59 (citing *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1095 (9th Cir. 2011)).

Although the parties raise several arguments regarding this limitation, both parties agree that additional briefing on the scope of the remedy is warranted due to the complexity of the issues. (Defs.' Mem. of P. & A. at 58; Pls.' Reply at 16 n.11.) Because the parties request an additional opportunity to fully explore the legal questions related to the requested remedy, the Court orders further briefing below.

CONCLUSION

Accordingly, the Court orders as follows:

(1) As to Plaintiffs' first claim for ultra vires violations of the right to seek asylum under the INA, Plaintiffs' MSJ is **DENIED** and Defendants' MSJ is **GRANTED**;

(2) As to Plaintiffs' second claim for violations of APA § 706(1), Plaintiffs' MSJ is **GRANTED** and Defendants' MSJ is **DENIED**;

(3) As to Plaintiffs' second claim for violations of APA § 706(2), Plaintiffs' MSJ and Defendants' MSJ are **DENIED AS MOOT**;

(4) As to Plaintiffs' third claim for a violation of the Fifth Amendment's Due Process clause, Plaintiffs' MSJ is **GRANTED** and Defendants' MSJ is **DENIED**;

(5) As to Plaintiffs' fourth claim for a violation of the ATS, Plaintiffs' MSJ is **DENIED** and Defendants' MSJ is **GRANTED**;

(6) As to Plaintiffs' fifth claim for equitable relief, both parties are **DENIED WITHOUT PREJUDICE** pending further briefing on the following questions:

a. What remedy is appropriate in light of the Court's § 706(1) finding?

b. How does 42 U.S.C. § 265 ("Title 42") affect the implementation of a remedy in this case?

The parties shall submit their supplemental briefs regarding the appropriate remedy in this action, not to exceed 20 pages each, by **October 1, 2021**.

IT IS SO ORDERED.

DATED: September 2, 2021

/s/ CYNTHIA BASHANT
Hon. CYNTHIA BASHANT
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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

AL OTRO LADO, INC.; ABIGAIL DOE, BEATRICE DOE, CAROLINA DOE, DINORA DOE, INGRID DOE, ROBERTO DOE, MARIA DOE, JUAN DOE, URSULA DOE, VICTORIA DOE, BIANCA DOE, EMILIANA DOE, AND CESAR 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

[Filed: July 29, 2019]

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT
[ECF No. 192]

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[1] 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

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[1] 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.

since late 2016 there is an alleged pattern and practice amongst CBP officials at POEs along the U.S-Mexico 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.[2] 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

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[2] 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.)

"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.)[3]

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[3] 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 Sup-

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.

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

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); *Thuraissi-*

giam 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 [] 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 responsible for all of the acts" alleged. (*Id.* ¶ 39.) Defendants allegedly have denied access to the U.S. asylum process to noncitizens 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 corrobo-

rating 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 Mexican side." (*Id.*) 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 immi-

gration 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.*) Plaintiffs point to numerous other confirmations 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 Mexi-

can 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.[4] 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 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 ser-

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[4] 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.

vices 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*, 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." (*Id.* ¶¶ 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. (SAC ¶¶ 35, 196.) "César has been threatened numerous times with severe harm and death and kid-

napped 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. (SAC ¶¶ 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 ("Compl.").) After the Central District transferred the action to this Court on November 29, 2017, Defend-

ants 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 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (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).

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 (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. "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 (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 (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

Defendants argue that 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.

"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, (2012) (quoting *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)). The "political question doctrine" is a recognized "narrow exception" to the Judiciary's Article III responsibility. *Id.* at 195 (citing *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (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. 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 (1974) and quoting second *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (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 (1962)).

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. 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.

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.

The Court acknowledges that "[t]he exclusion of aliens is 'a fundamental act of sovereignty' by the political branches[.]" *Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018) (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (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 na-

tion[.]" *Knauff*, 338 U.S. at 542; *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1231 (9th Cir. 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*, 909 F.3d at 1232 (citing U.S. Const. art. II, § 2, cl. 1 (referring to President as "Commander in Chief"), *id.* § 3 (President's power to receive ambassadors)) (internal citations omitted). 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*, 909 F.3d at 1231 (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)) (internal citations omitted). 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 (1977) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

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 political branches' action to determine whether they exceed the constitutional or statutory scope of their authority." *E. Bay Sanctuary Covenant*, 909 F.3d at 1232 (citing *Hawaii*, 138 S. Ct. at 2419).

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 free-wheeling inquiry into the wisdom of immigration policy choices. *See Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 165-66 (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). "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). 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.

The Court acknowledges that there are some allegations that touch on alleged coordination with Mexican government officials.[5] (SAC ¶¶ 3, 7, 50-60.) The coor-

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[5] 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 cor-

dination, 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 jurisdiction. *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

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responding relief pursuant to the statutory provisions at issue in this case without contravening the act of state doctrine.

an unlawful agency action. The Court considers Defendants' arguments in turn and rejects each of them.

A. Al Otro Lado's APA Claims

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*, 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*, 909 F.3d 1219 (9th Cir. 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 1230-31, 1236-38. 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 1245 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 427 (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 asylum 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.[6]

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[6] 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

B. Section 706(1) APA Claims

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 (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. 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

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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*, 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*, 909 F.3d at 1244-45. 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* 1240-41.

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 analogous 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

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*, 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 du-

ties, 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.[7]

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[7] 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

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

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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.

a. New Individual Plaintiffs' Factual Allegations

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 al-

leged.'" *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(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.[8]

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 "encoun-

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[8] 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.

tered 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

The starting point of statutory interpretation is the statute's language. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). "[I]f the statutory language is plain," a court "enforce[s] it according to its terms." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citing *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (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 (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 (2014) (quoting *Maracich v. Spears*, 570 U.S. 48, 76 (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 artic-

ulation of certain immigration officer duties. The Court considers the relevant statutory text in light of these principles.

(1) 8 U.S.C. § 1158(a)(1)

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.[9] 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

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[9] The Court recognizes that the rule against surplusage "is not absolute." *Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (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.

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

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 dif-

ferent 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 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.

"Congress' use of a verb tense is significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333 (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.

This reading is buttressed by statutory provisions that Section 1158(a)(1) expressly incorporates. Sec-

tion 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)).

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 (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; *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (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.

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.*, 136 S. Ct. 2090, 2101 (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.

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 Australian Bank Ltd.*, 561 U.S. 247, 265 (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 in-

volves a permissible territorial application of Section 1158.

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

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 arriv-

ing 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 De-

fendants' 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

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

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 un-

> der 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.

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 *at-*

tempting 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 Section 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 "in-

herent 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).

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.*, 136 S. Ct. 1807, 1813 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (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 im-

mediate 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.*

"[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.").

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. 870, 890 (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*, No. C15-0813JLR, 2017 WL 3034447, at *7 n.6 (W.D. Wash. July 18, 2017); *Leigh v. Salazar*, No. 3:13-cv-00006-MMDVPC, 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 Turn-

back 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

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

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 Turn-

back 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

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.)

"[A]t the outset, there is reason to be skeptical of [Defendants'] position[.]" *Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (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 (1986); *Mach Mining, LLC v. EEOC*,

135 S. Ct. 1645, 1652-53 (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 (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 (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 ad-

mission 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.

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 (2014).

3. The Unlawfulness of the Alleged Turnback Policy

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.[10]

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[10] Because the Court concludes that these theories are together sufficient for Plaintiffs to state Section 706(2) claims, the Court de-

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 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*

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clines 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.)

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. (ECF No. 192-1 at 13.)

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 coexisting 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 seek-

ers 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.[11]

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

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[11] 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.)

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 ho*c 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*, 909 F.3d at 1230 (observing that "[i]n 1980, Congress codified our obligation to receive persons who are 'unable or unwill-

ing 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*, 909 F.3d at 1230.

Turning back prospective asylum applicants pursuant to an alleged executive policy 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 imposi-

tion 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 ("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*, 909 F.3d 1219, 1250 (9th Cir. 2018), *stay denied by*, *Trump v. E. Bay Sanctuary Covenant*, 139 S. Ct. 782, 2018 WL 6713079 (U.S. Supreme Court Dec. 21, 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 Covenant*, 909 F.3d at 1247. 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.* at 1247. 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.* at 1247-48. 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 1250-51.

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

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.").)[12]

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[12] 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

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*, 327 F. Supp. 3d at 1316 (relying on *Graham*).

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*, No. 19-16102, —F.3d—, 2019 WL 2865491, at *20 (9th Cir. July 3, 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

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the merits of Plaintiffs' constitutional claims. This argument underscores for the Court that non-APA review of Plaintiffs' constitutional claims is appropriate.

that claims challenging agency actions—particularly constitutional claims—may exist wholly apart from the APA.'" *Sierra Club*, —F.3d—, 2019 WL 2865491, at *20 (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

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 (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.

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

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 (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 ("[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 ("[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 (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. The Supreme Court stated that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 764. 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 762 (quoting *Reid v. Covert*, 354 U.S. 1, 74-75 (1957) (Harlan, J., concurring)).

Defendants rely heavily on *United States v. Verdugo-Urquidez*, 494 U.S. 259 (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. 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 (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. Defendants 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, 533 U.S. at 770).) 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. 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*, 533 U.S. at 765. 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

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 (1972). "In the enforcement of [congressional] policies, the Executive Branch of the Government must respect the procedural safeguards of due process[.]" *Id.* at 767. 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 . . .

(SAC ¶ 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.)

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 (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

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.

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 al-

ien. *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

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.

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. 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 v. Adelson*, 916 F.3d 1, 11 (D.C. Cir. 2019) (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. 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 Argen-*

tina, 965 F.2d 699, 714-15 (9th Cir. 1992) (quoting *United States v. Smith*, 18 U.S. 153, 160-61 (1820)).

Plaintiffs allege that the duty of non-*refoulement* is a *jus cogens* norm recognized by the law of nations. (SAC ¶¶ 227-35.)[13] And, in opposition to dismissal, Plaintiffs elaborate on these allegations 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

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[13] "As defined in the Vienna Convention on the Law of Treaties, a *jus cogens* norm, also 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 *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988)).

simply fail to grapple with Plaintiffs' allegations or arguments on whether non-*refoulement* is a norm that is recognized by the law of nations.[14]

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

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[14] 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 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.

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-r*efoulement* that qualifies as an international law norm under the law of nations.

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

Defendants' second argument is that the existence of a "comprehensive and exclusive scheme of legislation" under the INA "preempt[s] the enforcement of a free-standing 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*, 327 F. Supp. 3d at 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 *Jawa*'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 *Jawa*'s conclusion that "[t]here is no reason why plaintiffs cannot seek relief on alternative grounds." *Jama v*, 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 "where a controlling executive or legislative act does exist, customary international law is inapplicable." *See 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.

* * *

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.

IT IS SO ORDERED.

DATED: July 29, 2019

/s/ CYNTHIA BASHANT
Hon. CYNTHIA BASHANT
United States District Judge