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24 **UNITED STATES DISTRICT COURT**  
 25 **SOUTHERN DISTRICT OF CALIFORNIA**

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

27 Plaintiffs,

28 v.

ALEJANDRO MAYORKAS, *et al.*,

Defendants.

Case No. 3:23-cv-01367-AGS-BLM

Hon. Andrew G. Schopler

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1 **I. INTRODUCTION**

2 Plaintiffs are challenging Defendants’ policy that prohibited asylum seekers  
3 without CBP One appointments from accessing the U.S. asylum process at ports of  
4 entry on the U.S.-Mexico border (“POE”). Defendants issued binding guidance  
5 stating that noncitizens would be allowed to approach POEs and seek asylum,  
6 regardless of whether those noncitizens were lucky enough to secure an appointment  
7 through the CBP One app. But Defendants failed to follow that binding guidance  
8 from the very start, and instead refused to allow noncitizens without CBP One  
9 appointments to be processed at POEs. Defendants’ actions showed they were  
10 disregarding their own policy, their statutory obligation to inspect and process all  
11 arriving noncitizens, the Constitution, and the Alien Tort Statute.

12 Now, Defendants have promulgated an express turnback policy, albeit a  
13 temporary one. On June 3, 2024, President Biden issued a proclamation purporting  
14 to close the southern border when certain conditions are met (the “Proclamation”).  
15 On June 4, the Department of Homeland Security (“DHS”) and the Department of  
16 Justice (“DOJ”) issued an interim final rule that effectively precludes asylum for any  
17 noncitizen enters the United States without a CBP One appointment or between POEs.  
18 And DHS, Customs and Border Protection (“CBP”) and (presumably) Border Patrol  
19 and the Office of Field Operations (“OFO”) have issued memoranda implementing  
20 the proclamation. Defendants have said that it will be implemented “by preventing  
21 the entry of noncitizens described in the Proclamation at the international boundary  
22 line.” ECF No. 78 at 2. The result of these shortsighted policies will be predictable,  
23 preventable human suffering as noncitizens are forced to wait weeks or months in  
24 dangerous Mexican border towns—sometimes in the very communities from which  
25 they are fleeing persecution—in hopes of obtaining one of the scarce appointments  
26 allowing them to come to a POE and access the asylum process.

27 But while the Proclamation and related guidance will cause widespread harm,  
28

1 they have little impact on this case. The Proclamation, the new Interim Final Rule  
2 (“IFR”), and the DHS and CBP memoranda (collectively the “Proclamation  
3 Guidance”) are temporary by their own terms, and the policies that Plaintiffs  
4 challenged either remain in effect or will spring back into force once the  
5 preconditions for the Proclamation are no longer met. Accordingly, Plaintiffs’ claims  
6 remain live controversies.

7       Importantly, however, Defendants did not file all of the guidance referenced  
8 in the three exhibits that they attached to their one-page notice. Plaintiffs have asked  
9 Defendants to produce the memorandum referenced in ECF No. 78-3, entitled:  
10 “Processing Guidelines for Noncitizens Described in Presidential Proclamation,  
11 Securing the Border and Interim Final Rule, Securing the Border,” as well as any  
12 other memorandum implementing the Proclamation that was not disclosed. Despite  
13 claiming that these policies “are relevant to Plaintiffs’ claims in this matter,” ECF  
14 No. 78, Defendants have thus far refused to produce this guidance to Plaintiffs.  
15 Defendants cannot have it both ways. They should not be allowed to disclose some,  
16 but not all, of their policy pronouncements, and then argue that this Court should  
17 make decisions based on that artificially-limited set of information. If this Court takes  
18 any action based on the “notice,” it should compel Defendants to produce all of the  
19 relevant information regarding these supposedly “relevant” policy changes to  
20 Plaintiffs and this Court.

## 21 **II. FACTUAL DEVELOPMENT**

### 22 **A. On June 3, 2024, President Biden Issues a Proclamation Closing** 23 **the Border.**

24       On June 3, 2024, President Biden issued a Proclamation entitled “Securing the  
25 Border.” The Proclamation suspended and limited the entry of noncitizens effective  
26 June 5, 2024, but that closure “shall be discontinued” when the 7-consecutive-  
27 calendar day average of encounters between POEs is less than 1,500 daily encounters.  
28 Proclamation § 2(a). The suspension can be reinstated when border encounters

1 between POEs exceed an average of 2,500 daily encounters per day over a 7-day  
2 period.

3 On its face, the Proclamation appears to implement a CBP One Turnback Policy  
4 by prohibiting entry for most noncitizens without valid travel documents who lack a  
5 CBP One appointment (that is, those who do not present “pursuant to a prescheduled  
6 time and place”). Proclamation § 3(b)(v); *see also* ECF No. 1 ¶¶ 4-6. But the  
7 Proclamation also seems to preserve the discretion of CBP officers to allow  
8 noncitizens without CBP One appointments to wait for processing as operational  
9 capacity permits, consistent with the November 2021 memorandum.<sup>1</sup> *Cf.* ECF No.  
10 50-3 at 15<sup>2</sup> (requiring CBP officers to allow certain “undocumented noncitizens who  
11 are encountered at the border line . . . to wait in line” regardless of whether they have  
12 a CBP One appointment). Other guidance makes clear that the Proclamation is part  
13 of an explicit turnback policy, albeit a temporary one.

14 **B. Defendants Enact an Interim Final Rule Limiting Asylum**  
15 **Eligibility.**

16 DHS and DOJ then issued an interim final rule (the “IFR”) implementing the  
17 Proclamation. *Securing the Border*, published at 89 Fed. Reg. 48710 (June 7, 2024).<sup>3</sup>  
18 The IFR substantively limits asylum eligibility for noncitizens who enter the United  
19 States contrary to the Proclamation. *See* 89 Fed. Reg. 48732 (summarizing the rule).  
20 But the new IFR only applies “during emergency border circumstances,” i.e., during  
21 times when the measures in the Proclamation are in effect. 89 Fed. Reg. 48732; 48754.

22 The new IFR does not directly impact noncitizens’ ability to access POEs, as it  
23

24 \_\_\_\_\_  
25 <sup>1</sup> The Proclamation contains other exceptions that apply to particularly vulnerable  
26 noncitizens and ostensibly gives CBP some discretion to allow other noncitizens  
27 entry. *See* Proclamation § 3(b)(iii)-(vii).

27 <sup>2</sup> Unless otherwise indicated, page citations to ECF entries are to the automatically  
28 generated page numbers in the top heading of the ECF marking.

28 <sup>3</sup> <https://www.federalregister.gov/documents/2024/06/07/2024-12435/securing-the-border>.



1 primarily addresses the procedures for seeking and eligibility for humanitarian relief.  
2 Further, the IFR has already been challenged as contrary to the INA and the  
3 Administrative Procedure Act. *Las Americas Immigrant Advocacy Center v.*  
4 *Department of Homeland Security*, No. 1:24-cv-01702-RC, D.D.C. (filed June 12,  
5 2024).

6 **C. Defendants Promulgate Memoranda Closing the Border.**

7 On June 3, 2024, Defendant Alejandro Mayorkas, the Secretary of Homeland  
8 Security, issued a memorandum titled *Implementing the Presidential Proclamation,*  
9 *Securing the Border* (the “DHS Memorandum”). ECF 78-2. The DHS Memorandum  
10 instructed officers to “take all appropriate actions, consistent with applicable law,  
11 policy, and operational guidance, to implement the suspension and limitation on entry”  
12 in the Proclamation. ECF 78-2. The actions are to continue during any period in  
13 which the Proclamation is in effect.” ECF 78-2.

14 On June 4, 2024, CBP, through Defendant Troy Miller, issued a memorandum  
15 *Implementation of Presidential Proclamation, Securing the Border and Interim Final*  
16 *Rule, Securing the Border* (the “CBP Memorandum”). ECF 78-3. The CBP  
17 Memorandum provides that “[d]uring periods in which . . . the Presidential  
18 Proclamation and the IFR apply,” U.S. Border Patrol and OFO must follow  
19 procedures laid out in new operative guidance:

- 20 • *Implementation of Presidential Proclamation and Interim Final Rule,*  
21 *Securing the Border,* and
- 22 • *Processing Guidelines for Noncitizens described in Presidential*  
23 *Proclamation, Securing the Border and Interim Final Rule, Securing the*  
24 *Border* (“Processing Guidelines”).

25 The CBP Memorandum expressly provides that while the Proclamation and IFR  
26 are in effect, that guidance “supersede[s] the provisions in the November 1, 2021  
27 memorandum and the May 11, 2023 memorandum and muster, *Post-Tile 42 Port*  
28 *Operations*” that were at issue in Plaintiffs’ complaint and the preliminary injunction

1 briefing. ECF 78-3; *compare* ECF No. 1 ¶51; ECF No. 50-3 at 18-19.

2 **D. Defendants Provide Some Documents to Plaintiffs But Refuse to**  
 3 **Provide All Relevant Policy Guidance.**

4 Defendants provided some documents to this Court and Plaintiffs with their filing,  
 5 but not all the relevant guidance. ECF No. 78. Defendants assert that the guidance  
 6 “will be implemented at ports of entry by preventing the entry of noncitizens  
 7 described in the Proclamation at the international boundary line.” ECF No. 78 at 2.  
 8 However, none of the guidance documents that Defendants provided reference the  
 9 limit line or specify where or how Defendants will implement the Proclamation at  
 10 POEs.

11 On June 10, Plaintiffs requested additional documents from Defendants, including  
 12 the Processing Guidelines referenced in the CBP Memorandum, so that Plaintiffs  
 13 could evaluate the impact of the Proclamation and implementing guidance on this  
 14 case. *See* Declaration of Stephen Medlock, Ex. 1. Defendants refused to provide any  
 15 additional documents. *See Id.* Instead, Defendants again stated that unspecified OFO  
 16 guidance “provides that unless a traveler is excepted from the Proclamation, the  
 17 traveler shall not be permitted to cross the international boundary.” *Id.* at 1.

18 **III. THE PROCLAMATION AND RELATED GUIDANCE DO NOT**  
 19 **IMPEDE PLAINTIFFS’ CLAIMS.**

20 Plaintiffs brought six claims against Defendants for their violations of statutory,  
 21 treaty, and self-imposed policy obligations. ECF No. 1 ¶¶ 158–216. Based on  
 22 available information, the Proclamation and Proclamation Guidance do not impact  
 23 Plaintiffs’ claims.

24 **A. Plaintiffs’ *Accardi* Claim Is Not Moot.**

25 Plaintiffs’ first claim arises under the *Accardi* doctrine, which requires  
 26 administrative agencies to follow their own binding guidance, even when that  
 27 guidance exceeds statutory requirements. ECF No. 1 ¶159; *cf. United States ex rel.*  
 28 *Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). In particular, Plaintiffs allege that

1 Defendants are not following the November 1, 2021 memorandum that requires CBP  
2 officers to allow noncitizens to wait in line at POEs regardless of whether they have  
3 a CBP One appointment. ECF No. 1 ¶160-62; *see also* ECF No. 72 at 18-22.

4 The Proclamation and related guidance temporarily supersede the November  
5 2021 memorandum, and thus raise the specter of mootness. *See* ECF No. 78 at 2.  
6 However, Plaintiffs’ *Accardi* claim is not moot because temporary changes in  
7 executive policy do not moot claims.

8 “A case becomes moot only when it is impossible for a court to grant any  
9 effectual relief whatever to the prevailing party.” *Native Vill. of Nuiqsut v. Bureau of*  
10 *Land Mgmt.*, 9 F.4th 1201, 1208 (9th Cir. 2021). But “voluntary cessation of  
11 allegedly illegal conduct” does not moot the case unless “‘there is no reasonable  
12 expectation ...’ that the alleged violation will recur.” *Fikre v. Fed. Bureau of*  
13 *Investigation*, 904 F.3d 1033, 1037 (9th Cir. 2018) (citations omitted). It is the  
14 government’s “heavy burden” to show that its new policy moots a case. *Id.* The  
15 inquiry is whether “the government’s new position ‘could be easily abandoned or  
16 altered in the future.’” *Id.* at 1038. Under Ninth Circuit law, a voluntary change in  
17 official behavior moots an action “only when it is ‘absolutely clear’ to the court,  
18 considering the ‘procedural safeguards’ insulating the new state of affairs from  
19 arbitrary reversal and the government’s rationale for its changed practice(s), that the  
20 activity complained of will not reoccur.” *Id.* at 1039 (citations omitted).

21 Policies that are temporary on their face generally do not moot claims. *Western*  
22 *Oil & Gas Ass’n v. Sonoma Cnty.*, 905 F.2d 1287, 1291 (9th Cir. 1990). In *Western*  
23 *Oil & Gas*, two oil and gas industry associations challenged ordinances affecting off-  
24 shore oil and gas drilling, and the President enacted a moratorium on off-shore  
25 drilling and pre-lease negotiation during the appeal. *Id.* at 1289–90. The Ninth Circuit  
26 concluded that uncertainty as to when offshore leases would resume did not render  
27 the issue moot because “the issues they concern are likely to recur.” *Id.* at 1290. The  
28 Government itself “concede[d] that contested issues could arise again,” and the Ninth

1 Circuit found the case was not moot. *Id.*

2 Here, Plaintiffs’ *Accardi* claim is also likely to recur. The Proclamation and  
 3 implementing guidance are, by their own terms, temporary and will no longer apply  
 4 once border encounters decrease. Proclamation § 2(a); ECF No. 78 at 2 (asserting  
 5 that the November 2021 memorandum is superseded only “during the time period in  
 6 which the measures described in the Proclamation are in effect”). The issues raised  
 7 by Plaintiffs are thus “likely to recur,” particularly because Defendants have  
 8 routinely flouted their obligations under the November 2021 memorandum (and  
 9 other guidance) to inspect and process noncitizens without a CBP One appointment.  
 10 *See generally* ECF No. 39-1 at 15 (Plaintiffs’ Preliminary Injunction Motion at 7)  
 11 and Exs. 11, 14, 17 19, 20, 24, 27 thereto. Thus, it is not “absolutely clear” that  
 12 Defendants’ violations of the relevant guidance about the management and  
 13 processing of undocumented noncitizens will not recur in the future. *Fikre*, 904 F.3d  
 14 at 1039

15 **B. Plaintiffs’ Claims Under The APA Are Unaffected.**

16 **1. Plaintiffs’ Claims Under APA §706(2)(A), (C) Remain Live**  
 17 **As The Proclamation and Proclamation Guidance Are Not**  
**In Accordance With The Law.**

18 Plaintiffs also allege that turnbacks of asylum seekers without CBP One  
 19 appointments violate 8 U.S.C. § 1225 and § 1158. ECF No. 1 at ¶¶167-179. Here,  
 20 Plaintiffs claims are not moot. As both a Ninth Circuit motions panel and Judge  
 21 Bashant have found, “a class member’s first arrival [at a POE] trigger[s] a statutory  
 22 right to apply for asylum and have that application considered” under the asylum  
 23 rules in force at that time. *Al Otro Lado v. Wolf*, 952 F.3d 999, 1013–14 (9th Cir.  
 24 2020), (citations omitted); *Al Otro Lado, Inc. v. Mayorkas*, No. 17-CV-02366-BAS-  
 25 KSC, 2021 WL 3931890, at \*16 (S.D. Cal. Sept. 2, 2021).

26 The temporary changes resulting from the Proclamation and Proclamation  
 27 Guidance do not moot this claim. *See Fikre*, 904 F.3d at 1037. The Proclamation and  
 28 Proclamation Guidance will no longer apply once border encounters between POEs

1 decrease. Proclamation § 2(a); ECF No. 78 at 2 (asserting that the November 2021  
 2 memorandum is superseded only “during the time period in which the measures  
 3 described in the Proclamation are in effect”). Thus, it is likely that the statutory  
 4 violations alleged in the Complaint will recur. *Fikre*, 904 F.3d at 1039.<sup>4</sup>

5 Moreover, the Proclamation and Proclamation Guidance continues the same  
 6 unlawful practice of refusing to inspect and process arriving noncitizens, so the  
 7 “gravamen” of the challenge has not changed. *See League of Women Voters of*  
 8 *Indiana, Inc. v. Sullivan*, 5 F.4th 714, 721 (7th Cir. 2021). In *League of Women Voters*,  
 9 the plaintiffs challenged a state statute that conflicted with federal voting law, and  
 10 the state amended and replaced the statute with a nearly identical scheme. *Id.* at 719.  
 11 The Seventh Circuit held that “despite the different window dressing,” the new  
 12 scheme was “functionally identical to” the original scheme, and thus the issues were  
 13 not moot. *Id.*

14 Here, the new policies may provide temporary cover for Defendants, but they  
 15 also violate the INA, and the gravamen of Plaintiffs’ claims remains the same. Any  
 16 policy that prevents inspection and processing under the INA violates 8 U.S.C.  
 17 § 1225 and § 1158.

18 **2. Defendants’ Actions Remain Arbitrary And Capricious**  
 19 **Under APA § 706(2)(A), (C).**

20 Plaintiffs allege further that CBP implemented a “CBP One Turnback Policy”  
 21 that is arbitrary and capricious. ECF No. 1 at ¶¶180–188. Defendants have disputed  
 22 the existence of a CBP One Turnback Policy. ECF No. 68-1 at 24 (claiming the CBP  
 23 One Turnback Policy “does not exist”). But as explained in Plaintiffs’ response to

24 \_\_\_\_\_  
 25 <sup>4</sup> Further, those noncitizens who attempted to enter prior to the Proclamation and  
 26 Proclamation Guidance but were turned back should be inspected and processed  
 27 under the law in effect at the time of the attempted entry. *See Al Otro Lado, Inc. v.*  
 28 *Mayorkas*, 2021 WL 3931890, at \*16 & n.14; *Wolf*, 952 F.3d at at 1014 (“It is more  
 likely that the first arrival is governed by the eligibility requirements at the time the right  
 to be considered for asylum arose than that regulations imposed after the fact will cancel  
 out the earlier eligibility.”)

1 Defendants’ Motion to Dismiss, Plaintiffs have plausibly alleged the existence of a  
2 CBP One Turnback Policy. ECF No. 72 at 41-44. Indeed, as discussed below, the  
3 new Proclamation and Proclamation Guidance is strong evidence that such a policy  
4 exists, and Defendants are merely attempting to provide a new justification for their  
5 ongoing practices.

6 For the reasons discussed in Section B(1), the temporary changes resulting  
7 from the Proclamation and Proclamation Guidance do not moot this claim. *See Fikre*,  
8 904 F.3d at 1037. Once the number of border encounters between POEs decreases  
9 (or the Proclamation, IFR, and other guidance are suspended for other reasons), the  
10 unlawful CBP One Turnback Policy will presumably spring back into place. Thus, it  
11 is likely that the issues complained of by Plaintiffs will recur. *Id.* at 1039.

12 The Proclamation and Proclamation Guidance constitute strong evidence that  
13 Defendants have a CBP One Turnback Policy. The Proclamation expressly limits  
14 entry to those without valid travel documents who arrive “pursuant to a pre-scheduled  
15 time and place,” i.e., a CBP One appointment. Proclamation § 3(b)(v). While  
16 Defendants may argue that this is a new policy, it is consistent with Plaintiffs’  
17 allegations that Defendants have routinely refused to inspect and process noncitizens  
18 without a CBP One appointment. *See* ECF No. 1 ¶¶119; ECF No. 72 at 20. Because  
19 the core of this APA claim remains unchanged.

20 **3. Turnbacks Are Still Agency Action Unlawfully Withheld or**  
21 **Unreasonably Delayed Under APA § 706(1).**

22 The new Proclamation and Proclamation Guidance has no effect on Plaintiffs’  
23 fourth claim for relief under the APA. ECF No. 1 ¶¶ 189–198. Defendants challenge  
24 Plaintiffs’ fourth claim by arguing that Plaintiffs have not alleged a discrete or final  
25 agency action. *See* ECF No. 68-1 at 32–36. As Plaintiffs have explained, each  
26 individual turnback constitutes such an action for purposes of Plaintiffs’ APA claims,  
27 and the CBP One Turnback Policy itself is final agency action. ECF No. 72 at 44–  
28 46. The new Proclamation and related guidance do not affect this analysis. And

1 because the policy is temporary, it does not moot Plaintiffs’ challenge to turnbacks  
2 under the CBP One Turnback Policy (or otherwise). *See Fikre*, 904 F.3d at 1037.

3 **C. The Due Process And Alien Tort Statute Claims Are Unaffected.**

4 Plaintiffs’ final two claims under the Due Process Clause of the Fifth  
5 Amendment (ECF No. 1 ¶¶ 199–208) and the Alien Tort Statute, 28 U.S.C. § 1350  
6 (ECF No. 1 ¶¶ 209–216) are likewise unaffected by the Proclamation. The temporary  
7 changes brought about by the Proclamation do not moot these claims. *See Fikre*, 904  
8 F.3d at 1037.

9 **IV. DEFENDANTS SHOULD PRODUCE ALL “RELEVANT” POLICY**  
10 **GUIDANCE.**

11 Despite telling this Court that its policy changes “are relevant” to this case,  
12 ECF No. 78, Defendants have refused to produce all the operational guidance  
13 referenced in their filings, and vaguely suggested that some portion of the documents  
14 contain law enforcement sensitive information. Ex. 1 to Medlock Decl. Plaintiffs and  
15 this Court should not be left to guess what that operational guidance is or how it may  
16 be relevant to this case. If Defendants want to make an issue out of their recent policy  
17 changes, they should provide *all* relevant guidance to this Court and Plaintiffs.

18 **CONCLUSION**

19 For the foregoing reasons, the Proclamation and Proclamation Guidance have  
20 little, if any, impact on this case. Accordingly, this Court should deny Defendants’  
21 pending Motion to Dismiss.

1 Dated: June 20, 2024

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

1 I certify that I served a copy of this document on the Court and all parties by  
2 filing this document with the Clerk of the Court through the CM/ECF system, which  
3 will provide electronic notice and an electronic link to this document to all counsel  
4 of record.  
5

6 DATED: June 20, 2024

7 Respectfully submitted,

8  
9 s/ Stephen M. Medlock  
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