

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA

3 AL OTRO LADO, INC., et al.,
4 Plaintiffs,
5 v.
6 Alejandro N. MAYORKAS, Secretary of
7 U.S. Department of Homeland Security,
8 et al.,
9 Defendants.

Case No.: 23-cv-1367-AGS-BLM
**ORDER GRANTING IN PART
DEFENDANTS’ MOTION TO
DISMISS (ECF 68)**

10 In this putative class action, plaintiffs accuse U.S. border officials of illegally turning
11 away asylum applicants who don’t schedule an appointment through a specific smartphone
12 application. The government denies any such policy exists and seeks dismissal.

13 **BACKGROUND**

14 In a prior lawsuit, immigrant-rights group Al Otro Lado, Inc., and others challenged
15 the “Government’s practice of systematically denying asylum seekers access to the asylum
16 process at ports of entry . . . along the U.S.-Mexico border.” *Al Otro Lado, Inc. v.*
17 *Mayorkas*, No. 17-cv-02366-BAS-KSC, 2021 WL 3931890, at *1 (S.D. Cal. Sept. 2,
18 2021). If the ports were “at capacity,” U.S. Customs and Border Protection officers
19 purportedly refused to “inspect [and process] asylum seekers” and would instead “turn
20 them back to Mexico.” *Id.* In 2022, the judge in that case declared this turnback practice
21 “unlawful.” *Al Otro Lado, Inc. v. Mayorkas*, No. 17-cv-02366-BAS-KSC, 2022 WL
22 3970755, at *1 (S.D. Cal. Aug. 23, 2022).

23 The parties dispute whether Customs and Border Protection later resumed a more
24 nuanced version of this turnback procedure. Plaintiffs claim that, following the end of
25 COVID-era restrictions, CBP adopted an unwritten “CBP One Turnback Policy,” in which
26 officers “turned back to Mexico” any asylum applicants who failed to schedule an
27 appointment using the “CBP One” mobile app. (ECF 1, at 7–8.) For example, in June 2023
28 Mexican citizen Luisa Doe endured days of “repeated error messages and glitches” with

1 the CBP One app, before finally seeking asylum at the San Ysidro port of entry without an
2 appointment. (*Id.* at 15–16.) “CBP officials blocked her from entering and told her she
3 needed a CBP One appointment.” (*Id.* at 16.) When she tried again the next month, CBP
4 staff reiterated that “the only way” to seek asylum “was through a CBP One appointment”
5 and “threatened to call Mexican officials to take her away if she did not leave.” (*Id.*) Denied
6 asylum seekers like Luisa Doe reputedly face “perilous conditions in Mexico,” including
7 “cramped and unsanitary” shelters, “abuse from local police and cartels,” and even
8 “kidnapping,” “torture,” and “rape.” (*Id.* at 47–49.)

9 The government denies that the CBP One Turnback Policy exists. According to
10 CBP’s public guidance, it will “inspect and process all arriving noncitizens,” with or
11 without appointments, and “regardless of whether they have used the CBP One app.”
12 Circumvention of Lawful Pathways, 88 Fed. Reg. 31314, 31358 (May 16, 2023).

13 Al Otro Lado, Luisa Doe, and the other plaintiffs sued various government officials
14 here to block the alleged CBP One Turnback Policy. They raise claims under the *Accardi*
15 doctrine, the Administrative Procedure Act, Fifth Amendment due process, and the Alien
16 Tort Statute. The government moves to dismiss all claims.

17 DISCUSSION

18 Before addressing the merits, this Court must ensure it has authority to hear this case.

19 I

20 MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

21 The government moves to dismiss on jurisdictional grounds under Federal Rule of
22 Civil Procedure 12(b)(1). Such a challenge “may be made either on the face of the
23 pleadings or by presenting extrinsic evidence.” *Warren v. Fox Family Worldwide, Inc.*,
24 328 F.3d 1136, 1139 (9th Cir. 2003). Although the government never specifies which type
25 of attack it intends, the Court treats the mootness challenge as a factual one and the
26 arguments about standing as facial challenges.

1 **A. Standing**

2 Federal courts may only hear cases when the plaintiffs have a “personal stake” in the
3 litigation, known as “standing.” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021).
4 To establish standing to sue, plaintiffs have the burden of showing that: “(1) they have
5 suffered an injury-in-fact, meaning an injury that is ‘concrete and particularized’ and
6 ‘actual and imminent,’ (2) the alleged injury is ‘fairly traceable’ to the defendants’ conduct,
7 and (3) it is ‘more than speculative’ that the injury is judicially redressable.” *East Bay*
8 *Sanctuary Covenant v. Biden*, 993 F.3d 640, 662–63 (9th Cir. 2021) (quoting *Lujan v.*
9 *Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). As to the organizational plaintiffs—
10 Al Otro Lado and Haitian Bridge Alliance—the government challenges all three of these
11 prongs. For the individual plaintiffs, however, it contests only redressability.

12 **1. Injury in Fact**

13 The government argues that the organizational plaintiffs lack an injury in fact
14 because they “do not challenge any exercise of governmental power directed at them,” but
15 instead “claim they are harmed by incidental effects of the government’s choices”
16 regarding others. (ECF 68-1, at 26.) But this is not the only avenue to standing. “[A]n
17 organization has direct standing to sue where it establishes that the defendant’s behavior
18 has frustrated its mission and caused it to divert resources in response to that frustration of
19 purpose.” *East Bay*, 993 F.3d at 663. To demonstrate injury in fact under this theory,
20 organizations must show that defendants’ practices “‘perceptibly impaired’ their ability to
21 perform the services they were formed to provide.” *Id.*

22 At a minimum, the CBP One Turnback Policy caused the organizational plaintiffs
23 to divert resources and “perceptibly impaired” their ability to provide mission-essential
24 services, evidencing injury in fact. *See East Bay*, 993 F.3d at 663. Take Al Otro Lado.
25 Its “mission is to uplift immigrant communities by defending the rights of migrants against
26 systemic injustices.” (ECF 1, at 10.) It does so by offering “free direct legal services on
27 both sides of the U.S.-Mexico border” and more particularly by providing “representation,
28 accompaniment, and human rights monitoring for thousands of asylum seekers in Tijuana

1 every year.” (*Id.* at 10–11.) Since the CBP One Turnback Policy’s “rollout” in “January
2 2023,” Al Otro Lado has purportedly “hired three additional staff in its Tijuana office”;
3 “raised funds to provide emergency humanitarian aid to certain migrants who have been
4 turned back” under that policy; and spent hundreds of staff hours “assisting migrants with
5 the app, as well as accompanying and advocating for those who want to present at a [port
6 of entry] without a CBP One appointment.” (*Id.* at 55–56.) These funds and resources
7 “would otherwise have been allocated to advancing [Al Otro Lado’s] mission.” (*Id.* at 55.)

8 In a similar vein, Haitian Bridge Alliance’s “mission is to assist Haitian and other
9 immigrants to acclimate to the United States and ensure their success in navigating their
10 new lives.” (ECF 1, at 11.) To pursue that goal, this nonprofit organization “regularly
11 brings delegations to the border” to: “provide legal orientations and Know Your Rights
12 trainings to migrants from Haiti, the Caribbean, and Africa”; “interview individuals and
13 family units to identify systemic issues uniquely affecting Black migrants”; assess
14 “individuals’ eligibility for relief”; and identify “those with vulnerabilities that may require
15 immediate assistance.” (*Id.*) Due to the CBP One Turnback Policy, the group “has been
16 forced to prioritize humanitarian services at the border,” to devise “new ‘know your rights’
17 programs for people stranded in Mexico,” to provide “assistance to Haitians struggling to
18 use CBP One,” to raise “funds to provide life-saving services to Haitian and other Black
19 migrants” in Mexico, and to “secure office space in Reynosa [Mexico] . . . to support the
20 many Haitians subject to” this policy. (*Id.* at 58.)

21 In addition, Haitian Bridge Alliance claims that the CBP One Turnback Policy has
22 endangered one of its funding sources: “California provides vital funds in exchange for
23 HBA’s provision of direct representation and legal orientations to asylum seekers in the
24 United States.” (*Id.*) “To continue to receive these funds, HBA must meet certain
25 benchmarks that are becoming increasingly difficult to attain given the significant strain
26 on HBA staff and diversion of resources to the border.” (*Id.*)

27 The Ninth Circuit’s *East Bay* decision blessed nearly identical factual scenarios and
28 arguments for organizational injury, including for Al Otro Lado itself. *See East Bay*,

1 993 F.3d at 663 (holding that Al Otro Lado and other groups established injury in fact—
2 and standing—when an asylum policy “caused the Organizations to divert their already
3 limited resources in response to the collateral obstacles [the policy] introduces for asylum-
4 seekers” and when “funding on which the Organizations critically depend [wa]s also
5 jeopardized by the” policy); *see also Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284,
6 1297 (S.D. Cal. 2018) (finding Al Otro Lado had organizational standing based, in part, on
7 its allegations of diverting “significant time and resources” in response to policy).

8 Attempting to wrench this case from *East Bay*’s protective embrace, the government
9 seeks to distinguish it factually and to undermine its precedential value. As for the facts,
10 the government supposes that the organizational plaintiffs’ complained-of resource
11 expenditures may be the result of “general migration circumstances or other policies,” not
12 the CBP One Turnback Policy. (ECF 68-1, at 27.) The problem is that the current record
13 doesn’t support this speculation. According to plaintiffs’ uncontradicted evidence, these
14 expenses were in direct response to the challenged policy, just as in *East Bay*. (*See, e.g.*,
15 ECF 39-16, at 30–31 (Al Otro Lado “hired four additional staff” to aid “migrants who have
16 been turned back for lack of a CBP One appointment.”); ECF 39-22, at 26–27 (detailing
17 Haitian Bridge Alliance’s resources diverted in “response to the CBP One Turnback
18 Policy”).)

19 Even if it cannot distinguish *East Bay*’s facts, the government suggests that Circuit
20 precedent must bow to two Supreme Court decisions: *United States v. Texas*, 599 U.S. 670
21 (2023), and *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024). This Court
22 remains “bound” by Ninth Circuit case law unless and until some “intervening higher
23 authority” is “clearly irreconcilable” with it. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir.
24 2003). Yet both High Court cases can be harmonized with *East Bay*. In *United States v.*
25 *Texas*, the Court held that two states lacked standing to sue the federal government to “alter
26 its arrest policy so that [it] arrests more noncitizens.” 599 U.S. at 676. But the *Texas*
27 holding was strictly limited to the “rare” lawsuits that seek to force the Executive Branch
28 into “making more arrests.” *Id.* at 684–85. For cases outside that arrest-and-prosecution

1 context (like *East Bay*), however, the *Texas* majority took pains to emphasize that “the
2 Federal Judiciary of course routinely and appropriately decides justiciable cases involving
3 statutory requirements or prohibitions on the Executive.” *Id.* at 684.

4 *East Bay* likewise fits within *FDA v. Alliance for Hippocratic Medicine*.
5 In *Hippocratic Medicine*, the Supreme Court rejected associational standing for plaintiff
6 medical associations who wished “to make a drug less available *for others*,” although they
7 admittedly did “not prescribe or use” that drug themselves. 602 U.S. at 374. According to
8 the Court, a pure “issue-advocacy organization” cannot “spend its way” to an injury in fact
9 “simply by expending money to gather information and advocate against” a policy. *Id.*
10 at 394–95. By contrast, an advocacy organization that also provided *services* could have
11 standing if the disputed policy “directly affected and interfered with”—or “perceptibly
12 impaired” its ability to offer—those services. *Id.* In *East Bay*, the Ninth Circuit held that
13 Al Otro Lado and other groups fell into this latter category. That is, the federal rule at issue
14 “‘perceptibly impaired’ their ability to perform the services they were formed to provide,”
15 which was an injury sufficient to support standing. 993 F.3d at 663.

16 Thus, rather than being “clearly irreconcilable,” *East Bay* is in line with the Supreme
17 Court’s guidance. *See Miller*, 335 F.3d at 900. Because the diversion of resources here
18 alone qualifies as injury in fact, this Court need not address the organizational plaintiffs’
19 arguments regarding physical and emotional injuries. (*See, e.g.*, ECF 1, at 56–59.)

20 **2. Fairly Traceable**

21 The organizational plaintiffs must also show that their injuries are “‘fairly traceable’
22 to the defendants’ conduct.” *East Bay*, 993 F.3d at 663. The government suggests that such
23 a finding is foreclosed by *Murthy v. Missouri*, 144 S. Ct. 1972 (2024), which was a case
24 about “one-step-removed” injuries arising from “the independent action of some third party
25 not before the court.” *See id.* at 1986. In *Murthy*, plaintiffs accused third-party social-media
26 platforms of “suppress[ing] protected speech,” yet they sued the government—not the
27 platforms—for this injury. *Id.* at 1981. Although plaintiffs claimed government officials
28 pressured these platforms into censorship, the Court held that the allegations failed “to

1 link” the third-party “social-media restrictions to the defendants’ communications with the
2 platforms.” *Id.* at 1988–89. By contrast, there’s no similar third-party-linkage concern here.
3 According to the complaint, government officials themselves were often the ones turning
4 away the asylum applicants who are the organizational plaintiffs’ clientele. As a direct
5 result of those actions, these plaintiffs purportedly incurred substantial costs and frustration
6 of their core business model. That causal connection suffices for standing purposes.

7 **3. Redressability**

8 Finally, the government insists that no plaintiff satisfies the last requirement of
9 standing: that their injuries are “judicially redressable.” *See East Bay*, 993 F.3d at 663.
10 According to the defense, a court order cannot remedy the alleged harms because: (1) the
11 “classwide injunctive relief Plaintiffs seek is precluded”; (2) as a result, “there can be no
12 ‘corresponding’ declaratory relief”; (3) at all events, “the CBP One Turnback Policy
13 doesn’t exist”; and (4) “even if it did exist,” this Court cannot take away CBP officers’
14 discretion “to manage intake at the international boundary line.” (ECF 68-1, at 23–24.)

15 First, it is true that 8 U.S.C. § 1252(f)(1) deprives district courts of “jurisdiction” to
16 order “class-wide injunctive relief” regarding how federal officials implement or enforce
17 the immigration laws at issue here. *Garland v. Aleman Gonzalez*, 596 U.S. 543, 546,
18 549–50 (2022). But this principle is best thought of as an affirmative defense, not a
19 jurisdiction-divesting issue of standing. *Cf. Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511
20 (2006) (cautioning against “erroneously conflat[ing]” jurisdictional rulings and “merits-
21 related determination[s]”). Although § 1252(f)(1) explicitly uses the term “jurisdiction,”
22 the Supreme Court has held that this statute merely “deprives courts of the power to issue
23 a specific category of remedies” and does not strip them of “subject matter jurisdiction.”
24 *Biden v. Texas*, 597 U.S. 785, 798, 801 (2022); *see Fleck & Assocs. v. City of Phoenix*,
25 471 F.3d 1100, 1106 n.4 (9th Cir. 2006) (noting that “standing is an aspect of subject
26 matter jurisdiction”). The question of whether a remedy is “available under federal law is
27 not part of the redressability analysis,” but rather the “inquiry into whether plaintiffs have
28 a valid cause of action.” *Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19, 34 (D.D.C. 2018).

1 Second, the government believes that—with a classwide injunction impossible—the
2 proposed class action cannot be sustained on declaratory relief alone. It points out that even
3 the Supreme Court has questioned whether Federal Rule of Civil Procedure 23(b)(2)’s
4 class-certification requirement can be met in this situation. *See Jennings v. Rodriguez*,
5 583 U.S. 281, 313 (2018) (discussing Rule 23(b)(2)’s reference to “final injunctive relief
6 or *corresponding* declaratory relief”). But a potential class-certification problem does not
7 undermine plaintiffs’ *standing* to seek such certification in the first instance. Plaintiffs’
8 request for class certification may ultimately be denied. But for jurisdictional purposes,
9 this Court has authority to issue a declaration, “whether or not further relief is or *could be*
10 sought.” 28 U.S.C. § 2201 (emphasis added); *see, e.g., Nielsen v. Preap*, 586 U.S. 392, 402
11 (2019) (ruling that district court “had jurisdiction to entertain the plaintiffs’ request for
12 declaratory relief” under § 1252(f)(1), even if it lacked jurisdiction to enter an injunction);
13 *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018) (holding that “8 U.S.C.
14 § 1252(f)(1)” “does not affect classwide declaratory relief” even though it bars “classwide
15 injunctive relief”).

16 The government’s third objection is that plaintiffs seek relief from “a policy that
17 does not exist.” (ECF 68-1, at 24.) Of course, plaintiffs emphatically assert the policy does
18 exist. (*See, e.g.,* ECF 1, at 41.) That factual debate is perhaps this suit’s primary bone of
19 contention. “[W]hen the issue of subject-matter jurisdiction is intertwined with an element
20 of the merits of the plaintiff’s claim,” “a court must leave resolution of material factual
21 disputes to the trier of fact.” *Leite v. Crane Co.*, 749 F.3d 1117, 1122 n.3 (9th Cir. 2014).
22 For standing purposes, plaintiffs have sufficiently alleged that there is such a policy.

23 Finally, the government points out that equitable relief would be fruitless, as this
24 Court cannot stop officers from exercising their statutory discretion at the border. This
25 seems to be another form of the “unreviewable agency discretion” argument that the prior
26 *Al Otro Lado* court rejected and that the government is consequently estopped from relying
27 on. *See* Part II.B, below (discussing collateral estoppel). Regardless, even if any
28 unconstitutional conduct persisted after this case, “a favorable declaratory judgment may

1 nevertheless be valuable to the plaintiff.” *See Steffel v. Thompson*, 415 U.S. 452, 469
2 (1974). Due solely to the “persuasive force” of a court opinion, “[e]nforcement policies . . .
3 may be changed.” *Id.* at 470. Also, by clarifying rights and obligations, a declaratory
4 judgment may stop a dispute from “escalating into additional wrongful conduct.” *Dow*
5 *Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 405 (S.D.N.Y. 2002). Immigration
6 officials’ discretion, then, does not render this case unsuitable for judicial disposition.

7 In sum, the motion to dismiss on standing grounds is denied.

8 **B. Mootness**

9 The government’s remaining jurisdictional argument is that all the “individual
10 claims are moot.” (ECF 68-1, at 22.) Notably, it doesn’t urge mootness based on the
11 President’s June 3, 2024 proclamation temporarily suspending certain noncitizen entries at
12 the southern border. (*See* ECF 81, at 10 (defense brief on proclamation); *see also*
13 ECF 78-1, at 10 (Presidential proclamation).) Rather, the defense contends that, since the
14 complaint was filed, all individual plaintiffs “have been inspected and processed” for
15 asylum. (ECF 68-1, at 22–23.)

16 Even so, the mootness inquiry doesn’t end there. A “limited” mootness exception
17 applies to claims that are “capable of repetition yet evading review.” *Belgau v. Inslee*,
18 975 F.3d 940, 949 (9th Cir. 2020). While the government “bears the burden to establish
19 that a once-live case has become moot,” *West Virginia v. EPA*, 597 U.S. 697, 719 (2022),
20 plaintiffs have “the burden of showing that the [mootness] exception applies,” *Department*
21 *of Fish & Game v. Federal Subsistence Bd.*, 62 F.4th 1177, 1181 (9th Cir. 2023) (cleaned
22 up). A “pre-certification class-action claim” qualifies for this exception if: “(1) the duration
23 of the challenged action is too short to allow full litigation before it ceases, and (2) there is
24 a reasonable expectation that the named plaintiffs could themselves suffer repeated harm
25 or it is certain that other persons similarly situated will have the same complaint.” *Belgau*,
26 975 F.3d at 949 (cleaned up).

27 This case meets both requirements. First, the challenged delays here—which are
28 measured in months (*see* ECF 1, at 14, 40; ECF 68-3, at 12)—are “too short for the judicial

1 review to ‘run its course,’” thereby evading review if mooted. *See Belgau*, 975 F.3d at 949;
2 *see also Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1019 (9th Cir.
3 2010) (deeming three years “too short”). Second, the claims are capable of repetition. The
4 Court can reasonably expect that the individual plaintiffs themselves may seek asylum
5 again, as each one “does not wish to return to his or her home country because of a fear of
6 violence.” *See Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1303–04 (S.D. Cal.
7 2018); (ECF 1, at 51–55). During any such asylum applications, the individual plaintiffs
8 would reasonably expect to again face the CBP One Turnback Policy. In fact, on the current
9 record, it is *certain* that future asylum seekers at our southern border will confront that
10 policy. (*See, e.g.*, ECF 39-14, at 5 (declaration of an Al Otro Lado worker that relief
11 workers “have observed CBP officers turning back asylum applicants on many
12 occasions”); ECF 39-16, at 3 (Al Otro Lado executive director’s declaration about similar
13 observations that “CBP officers refused to process” the vast majority of asylum-seekers
14 “without a CBP One appointment”); ECF 39-23, at 5 (report from a nonprofit describing
15 several other CBP One-related turnbacks); ECF 39-26, at 9 (aid worker/Ph.D. candidate’s
16 similar observations); ECF 39-28 (PBS news article reporting same).)

17 Thus, plaintiffs have demonstrated that this dispute remains justiciable under the
18 “capable of repetition, yet evading review” exception. *See Al Otro Lado*, 327 F. Supp. 3d
19 at 1303–04 (rejecting mootness challenge for similar reasons after the government
20 processed each plaintiff’s asylum application).

21 II

22 COLLATERAL ESTOPPEL

23 Before resolving the other dismissal arguments, the Court must consider plaintiffs’
24 request to bar the government from relitigating certain issues it lost in the earlier *Al Otro*
25 *Lado* case. (ECF 72, at 38–39.) Under the doctrine of collateral estoppel or issue
26 preclusion, “once a court has decided an issue of fact or law necessary to its judgment, that
27 decision is conclusive in a subsequent suit based on a different cause of action involving a
28 party to the prior litigation.” *United States v. Mendoza*, 464 U.S. 154, 158 (1984). When

1 plaintiffs seek such issue preclusion against the defense, it is known as “offensive”
2 collateral estoppel. Unlike most defendants, the federal government is protected from
3 “*nonmutual* offensive collateral estoppel,” that is, “use of collateral estoppel” by a plaintiff
4 who was “a non-party to [the] prior lawsuit.” *Id.* at 158–59. But “when the parties to the
5 two lawsuits are the same,” as here, the federal agency “may be estopped . . . from
6 relitigating a question.” *See id.* at 163. In both these actions, *Al Otro Lado* sued CBP and
7 Department of Justice officers in their “official capacities,” which is the “same as a suit
8 against the entity of which the officer is an agent.” *McMillian v. Monroe Cnty.*, 520 U.S.
9 781, 785 n.2 (1997) (cleaned up).

10 A plaintiff invoking offensive collateral estoppel must prove that: “(1) there was a
11 full and fair opportunity to litigate the identical issue in the prior action,” “(2) the issue was
12 actually litigated in the prior action,” “(3) the issue was decided in a final judgment,” and
13 “(4) the party against whom issue preclusion is asserted was a party or in privity with a
14 party to the prior action.” *See Syverson v. International Bus. Machines*, 472 F.3d 1072,
15 1078 (9th Cir. 2007). Trial courts retain “broad discretion to determine when [offensive
16 issue preclusion] should be applied.” *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331
17 (1979).

18 **A. “In” the United States and Fifth Amendment Rights**

19 The government does not contest collateral estoppel as to two issues that were fully
20 litigated and led to final judgment in the prior *Al Otro Lado* case. First, the government
21 previously argued that the asylum and expedited-removal provisions didn’t apply to
22 plaintiffs because they were not yet “in” the United States. At summary judgment, the prior
23 court rejected that view, holding that these statutes apply to “migrants who are ‘in the
24 process of arriving,” even if they are still “physically outside the international boundary
25 line.” *Al Otro Lado*, 2021 WL 3931890, at *10; *see also Al Otro Lado v. Wolf*, 952 F.3d
26 999, 1011 (9th Cir. 2020) (denying a stay pending appeal in that same case in part because
27 “the district court’s interpretation” of “in” “is likely correct”). Second, in the prior case,
28 the government maintained that plaintiffs who were turned back from the border could not

1 invoke the Fifth Amendment, because they were foreign citizens on foreign soil. The judge
2 disagreed, ruling that “the Fifth Amendment applies” to CBP’s refusal “to inspect and refer
3 class members for asylum under statute.” *Al Otro Lado*, 2021 WL 3931890, at *20.

4 There are several discretionary bases to decline offensive issue preclusion, but none
5 seem to pertain here, nor does the defense press any of them. *See Syverson*, 472 F.3d at
6 1079 (listing discretionary considerations). Thus, the government is collaterally estopped
7 from seeking a different result on these two questions in this suit. For that reason, the
8 defense’s motion to dismiss counts 2–4 is denied to the extent it relitigates these issues,
9 and the motion to dismiss the Fifth Amendment due-process claim (count 5) is denied
10 entirely. (*See* ECF 68-1, at 38–43.)

11 **B. Unreviewable Agency Discretion**

12 Finally, the government resists collateral estoppel on a third issue—whether CBP’s
13 border intake and processing decisions are unreviewable—on the grounds that it was not
14 “actually litigated” nor “necessary to decide the merits” of the prior litigation. (ECF 75,
15 at 19 n.6.) But the government is mistaken. In the original case, as here, the defense
16 objected that 5 U.S.C. § 701(a)(2) exempts Administrative Procedure Act claims from
17 judicial review when the “agency action is committed to agency discretion by law.”
18 *Compare Al Otro Lado, Inc. v. Mayorkas*, No. 17-cv-02366-BAS-KSC, ECF 192-1, at 24
19 (S.D. Cal. Nov. 29, 2018) (arguing against prior APA claims based on “the APA’s
20 prohibition on judicial review of agency action ‘committed to agency discretion by law’”
21 (quoting 5 U.S.C. § 701(a)(2))), *with* (ECF 68-1, at 36 (arguing that APA claims here
22 “should be dismissed” because “CBP’s management of intake and processing of
23 undocumented noncitizens” are “‘committed to agency discretion by law’ and
24 unreviewable under the APA” (quoting 5 U.S.C. § 701(a)(2))). The original judge even
25 noted: “Because the APA precludes review of ‘agency action . . . committed to agency
26 discretion by law,’ 5 U.S.C. § 701(a)(2), the Court must consider this argument before
27 addressing the merits of Plaintiffs’ claim that the alleged Turnback Policy is unlawful.”
28 *Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1209 (S.D. Cal. 2019). That court

1 went on to spurn the argument repeatedly. *See, e.g., Al Otro Lado*, 394 F. Supp. 3d at 1211
 2 (rejecting argument that “claims are unreviewable on the asserted basis of discretion
 3 committed to the agency”); *Al Otro Lado*, 2021 WL 3931890, at *11 (holding that
 4 additional “provisions still do not provide a basis for agency discretion that supplants
 5 Defendants’ duty to inspect and refer asylum seekers in [8 U.S.C.] § 1158(a)(1) and
 6 § 1225”). And this point was essential to deciding the merits of the last case. In fact, if
 7 § 701(a)(2)’s bar on judicial review applied, *Al Otro Lado* would have lost all its APA
 8 claims. *See Heckler v. Chaney*, 470 U.S. 821, 828 (1985) (holding that “before any [APA]
 9 review at all may be had, a party must first clear the hurdle of § 701(a)”).

10 All prerequisites for collateral estoppel are met on this last issue, and there are no
 11 apparent discretionary reasons to decline it. So, the government is estopped from arguing
 12 that the APA claims are unreviewable discretionary agency actions.

13 III

14 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

15 With the foregoing rulings in mind, the Court turns to the remaining aspects of the
 16 government’s Rule 12(b)(6) motion to dismiss. To survive such a motion, “a complaint
 17 must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is
 18 plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). Plaintiff must plead
 19 “factual content that allows the court to draw the reasonable inference that the defendant is
 20 liable for the misconduct alleged.” *Id.*

21 A. Zone of Interests

22 The government argues that the organizational plaintiffs must be dismissed because
 23 “their claimed resource-diversion injuries are not within the zone of interests sought to be
 24 protected by the relevant immigration statutes.” (ECF 68-1, at 27.) Specifically, the
 25 government contends that none of the relevant immigration laws “suggest that Congress
 26 intended to permit organizations to sue” to recoup their own “voluntary expenditures taken
 27 in response to an [agency’s] alleged failure to implement these provisions toward
 28 noncitizens in a particular manner.” (*Id.* at 28.)

1 Plaintiffs must indeed show that they “fall within the ‘zone of interests’ protected by
2 the statute in question.” *East Bay*, 993 F.3d at 667. But, in the Administrative Procedure
3 Act context, that test is not “especially demanding.” *Id.* In fact, the “zone-of-interests
4 analysis forecloses suit only when a plaintiff’s interests are so marginally related to or
5 inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed
6 that Congress authorized that plaintiff to sue.” *Id.* (cleaned up).

7 Once again, *East Bay* dictates our result. In that case, several organizational
8 plaintiffs—including Al Otro Lado—challenged a different asylum rule because it
9 “irreconcilably conflict[ed]” with the same asylum provisions relied on here. *See East Bay*,
10 993 F.3d at 659. The Ninth Circuit found that the organizational plaintiffs’ claims fell
11 “within the zone of interests” protected by the immigration provisions because the groups’
12 “purpose is to help individuals apply for and obtain asylum, provide low-cost immigration
13 services, and carry out community education programs with respect to those services.” *Id.*
14 at 668. “This is sufficient for the Court’s lenient APA test: at the very least, the
15 Organizations’ interests are ‘marginally related to’ and ‘arguably within’ the scope of the
16 statute.” *Id.* The Court sees no meaningful difference between *East Bay* and our case, nor
17 has the government suggested one. Thus, these claims too fall within the relevant zone of
18 interests.

19 **B. *Accardi* Claim**

20 In their first claim for relief, plaintiffs contend that the unwritten CBP One Turnback
21 Policy contravenes official CBP guidance, thereby violating the *Accardi* doctrine. (ECF 1,
22 at 61–63.) Under that doctrine, “an administrative agency is required to adhere to its own
23 internal operating procedures.” *Church of Scientology of Cal. v. United States*, 920 F.2d
24 1481, 1487 (1990) (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268
25 (1954)). The government moves to dismiss this claim for failing to adequately plead: (a) an
26 enforceable policy, (b) sufficient prejudice, or (c) a citation to the relevant legal provision.
27 The defense also seeks dismissal for the same reasons it challenges the other APA claims
28 (counts 2–4), as addressed in the next section. *See* Part III.C, below.

1 **1. Enforceable Policy**

2 The defense’s main argument is that the *Accardi* claim fails because the CBP
3 memoranda and guidance that plaintiffs rely on do not bind it. (*See* ECF 68-1, at 30.) The
4 *Accardi* doctrine “extends beyond formal regulations” and reaches “certain internal
5 policies.” *Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004). Even “memoranda issued
6 by the agency” may be “sufficient to establish a policy to which the agency was bound
7 under the *Accardi* doctrine.” *Id.* For *Accardi* purposes, “a policy capable of judicial review
8 requires sufficient formality to bind the agency.” *See Yavari v. Pompeo*, No. 2:19-cv-
9 02524-SVW-JC, 2019 WL 6720995, at *6 (C.D. Cal. Oct. 10, 2019).

10 In a different context, the Ninth Circuit has explained the strict requirements for
11 deeming an “agency pronouncement” “enforceable against [that] agency in federal court.”
12 *See United States v. Fifty-Three (53) Eclectus Parrots*, 685 F.2d 1131, 1136 (9th Cir.
13 1982). To be judicially enforceable, the agency guidance must: “(1) prescribe substantive
14 rules” and “(2) conform to certain procedural requirements.” *Id.* Mere “interpretive rules,
15 general statements of policy or rules of agency organization, procedure or practice” are not
16 enough. *Id.*

17 Plaintiffs’ strongest argument for an enforceable policy is found in the preamble to
18 the final rule Circumvention of Lawful Pathways, which was promulgated by the
19 Departments of Justice and Homeland Security. *See generally* Circumvention of Lawful
20 Pathways, 88 Fed. Reg. 31314 (May 16, 2023). First, the preamble appears to set forth
21 substantive rules. It makes specific statements of policy: “CBP’s policy is to inspect and
22 process all arriving noncitizens at [ports of entry], regardless of whether they have used the
23 CBP One app.” *Id.* at 31358. And key passages even suggest substantive rights, such as:
24 “All noncitizens who arrive at a [port of entry] *will be inspected* for admission into the
25 United States. . . . Individuals without appointments *will not be turned away.*” *Id.*
26 (emphasis added). Second, this rule—including its preamble—conforms to procedural
27 standards, as it was published in the Federal Register after the rule-amendment process.
28 *See Transportation Div. of the Int’l Ass’n of Sheet Metal, Air, Rail, & Transp. Workers v.*

1 *Federal R.R. Admin.*, 988 F.3d 1170, 1180 (9th Cir. 2021) (discussing the “APA’s
2 procedural requirements,” including “notice of proposed rulemaking” and an opportunity
3 for “interested persons” to express their views “for the agency’s consideration”). These are
4 not off-the-cuff remarks, but the agency’s public policy statement after reasoned
5 consideration. At this stage, the complaint plausibly establishes an enforceable policy for
6 *Accardi* purposes.

7 **2. Substantial Prejudice**

8 Next, the government contends that an agency’s “departure from internal rules
9 ‘is not reviewable except upon a showing of substantial prejudice to the complaining
10 party,’” meaning that there is a “significant possibility” that the alleged violation affected
11 “the ultimate outcome of the agency’s action.” (ECF 68-1, at 32 (quoting *American Farm*
12 *Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970), and *Carnation Co. v. Secretary*
13 *of Labor*, 641 F.2d 801, 804 n.4 (9th Cir. 1981)).) According to the defense, plaintiffs have
14 not pleaded “a ‘significant possibility’ that any departure from CBP’s internal guidance”
15 affected the “relevant administrative proceeding (here, inspection and processing).” (*Id.*)

16 But the government misconstrues the relevant agency action—and the relevant
17 injury—for this *Accardi* claim. Plaintiffs are not suing CBP for failing to *grant* them
18 asylum, but for *turning them away* from the port of entry without processing. That agency
19 action (or failure to act)—which purportedly violated CBP’s internal rules—“irreparably
20 injured” the individual plaintiffs, per the complaint, “by forcing them to return to and/or
21 wait in Mexico, where they face threats of further persecution and/or other serious harm.”
22 (ECF 1, at 62.) And it allegedly “irreparably injured” the organizational plaintiffs
23 “by frustrating their missions and forcing them to divert substantial resources away from
24 their core programs.” (*Id.* at 63.) Plaintiffs have adequately pleaded substantial prejudice.

25 **3. Omission of APA Citation**

26 Finally, the government raises a formalistic objection to plaintiffs’ failure to
27 “expressly invoke the APA for their *Accardi* claim” or to otherwise “identify a provision
28 of law supplying [them] with a cause of action.” (ECF 68-1, at 29.) This argument is

1 “entirely meritless.” *See Alvarez v. Hill*, 518 F.3d 1152, 1157 (9th Cir. 2008). Even if “the
2 statute was not cited in the complaint itself,” dismissal is improper when the “complaint
3 and subsequent filings provided . . . ‘fair notice’ of that claim.” *Id.*; *see also Johnson v.*
4 *City of Shelby*, 574 U.S. 10, 11 (2014) (“Federal pleading rules . . . do not countenance
5 dismissal of a complaint for imperfect statement of the legal theory supporting the claim
6 asserted.”). The government had fair notice here. Plaintiffs rely heavily on the
7 Administrative Procedure Act throughout their complaint and make clear in their response
8 that Count 1 is an APA claim. (*See* ECF 72, at 34.)

9 In sum, none of the arguments unique to the *Accardi* count warrant its dismissal. The
10 Court now turns to the motion to dismiss all APA claims, including the *Accardi* claim.

11 **C. APA Claims**

12 As relevant here, the Administrative Procedure Act gives courts authority, under
13 certain circumstances, to “compel” or to “hold unlawful and set aside *agency action*.”
14 5 U.S.C. § 706(1), (2) (emphasis added). The potential agency actions at issue here are the
15 CBP One Turnback Policy generally and each specific border turnback. The government
16 insists that these do not qualify as reviewable agency actions, as they all fail the test of
17 being “discrete” and the individual turnbacks are not “final.” (ECF 68-1, at 33.) Also, the
18 defense urges dismissal of any claims based on conduct by Mexican officials, since the
19 APA doesn’t recognize Mexico as an “agency.” (*Id.* at 34.)

20 In their response, plaintiffs clarified that their § 706(1) claims to compel agency
21 action are based only on the individual turnbacks, while the CBP One Turnback Policy is
22 the focus of their § 706(2) claims to hold agency actions unlawful. (*See* ECF 72, at 38.)

23 **1. “Discrete” Agency Action**

24 The government first criticizes these proffered agency actions for lacking the
25 required discreteness. Under the APA, the term “agency action” includes five broad
26 categories: “rule,” “order,” “license,” “sanction,” and “relief.” 5 U.S.C. § 551(13). “All of
27 those categories involve circumscribed, *discrete* agency actions,” and plaintiffs must allege
28 one to support each of their APA claims. *Norton v. Southern Utah Wilderness All.*, 542 U.S.

1 55, 62 (2004) (emphasis added). At bottom, the discreteness requirement forces plaintiffs
2 to focus their attack on a “particular ‘agency action’ that causes [them] harm,” rather than
3 seeking expansive “programmatic improvements” of agency behavior. *Id.* at 64.

4 Starting with the § 706(2) claims—to “hold unlawful and set aside agency action”—
5 plaintiffs rely on the CBP One Turnback Policy as the unlawful agency action. (*See*
6 ECF 72, at 38.) If such a policy exists, it qualifies as a discrete “rule” and thus an “agency
7 action.” *See* 5 U.S.C. 551(4) (defining “rule”). The government doesn’t quarrel with this
8 reasoning, only with the lack of evidence for the rule. Plaintiffs’ allegations don’t amount
9 to “a cohesive ‘turnback’ policy,” it says, for the complaint is an unconnected series of
10 “different types of actions with different impacts.” (ECF 68-1, at 33–34.)

11 That argument may carry the day later, but not at the pleading stage. Plaintiffs have
12 plausibly alleged that the CBP One Turnback Policy exists and is a discrete agency rule.
13 According to the complaint, across several ports of entry, different officers (presumably
14 under different supervisors) all started turning away asylum applicants at around the same
15 time and for the same reason: lack of a CBP One appointment. (*See, e.g.*, ECF 1, at 41
16 (alleging that “as of May 2023,” eight ports of entry “that are processing asylum seekers
17 are turning back almost all those who do not have a CBP One appointment”).) The alleged
18 policy is unwritten, but “agency action need not be in writing to be judicially reviewable.”
19 *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 138 (D.D.C. 2018). In other words, plaintiffs
20 have plausibly identified a discrete agency action to challenge—the adoption and
21 implementation of the alleged CBP One Turnback Policy—and are not seeking broad
22 “programmatic improvements” to CBP writ large. *See Norton*, 542 U.S. at 64.

23 That leaves only plaintiffs’ § 706(1) claim, which requires allegations of an “agency
24 action” that was “unlawfully withheld.” 5 U.S.C. § 706(1). Plaintiffs claim that the
25 individual turnbacks constituted the unlawful withholding of a required agency action:
26 inspection and asylum-processing relief. To satisfy the discreteness condition for this
27 claim, plaintiffs must assert that CBP “failed to take a *discrete* agency action that it is
28 *required to take.*” *See Norton*, 542 U.S. at 64. With each individual turnback, CBP failed

1 to take a discrete agency action, that is, providing “relief.” *See* 5 U.S.C. § 551(13), (11)(B).
2 And these were actions it was required to take. As the prior *Al Otro Lado* court held, CBP
3 had “specific statutory duties to inspect and refer every applicant for admission who
4 approaches a [port of entry].” *See Al Otro Lado*, 2021 WL 3931890, at *9; *see also Al Otro*
5 *Lado, Inc. v. Mayorkas*, No. 17-cv-02366-BAS-KSC, 2022 WL 3970755, at *1 (S.D. Cal.
6 Aug. 23, 2022) (declaring unlawful CBP’s “denial of inspection or asylum processing to
7 [noncitizens] . . . who are in the process of arriving in the United States”). In addition to
8 those statutory duties, this Court has already determined that plaintiffs adequately pleaded
9 a parallel binding agency policy. *See* Part II.B, above.

10 For both APA theories, plaintiffs have sufficiently alleged “discrete” agency action.

11 **2. “Final” Agency Action**

12 According to the government, the § 706(1) claim suffers from a second problem:
13 none of the alleged turnbacks were “final” actions. (ECF 68-1, at 35.) Under the APA,
14 judicial review of an “agency action” must generally wait until it is “final.” 5 U.S.C. § 704.
15 Yet the prior *Al Otro Lado* court held that “no ‘final agency action’ is necessary for [a]
16 § 706(1) claim” like the one here. *See Al Otro Lado*, 2021 WL 3931890, at *8 (collecting
17 cases). That court reasoned that the finality requirement makes sense for challenging an
18 agency action under § 706(2) (“hold unlawful and set aside agency action”), but it is an
19 awkward prerequisite for a § 706(1) failure-to-act claim, when final action has been
20 “unlawfully withheld or unreasonably delayed.” This Court need not wade into that debate,
21 however. To the extent § 706(1) claims require finality, each turnback was a final action.

22 For an “agency action to be ‘final,’” the action must: (1) “mark the consummation
23 of the agency’s decisionmaking process,” and (2) “be one by which rights or obligations
24 have been determined, or from which legal consequences will flow.” *Bennett v. Spear*,
25 520 U.S. 154, 177–78 (1997) (cleaned up). The government contests only the second
26 element, arguing that the individual turnbacks did “not fix the legal relations between the
27 parties.” (*See* ECF 68-1, at 36.) After all, it reckons, each individual plaintiff eventually
28 received an asylum interview.

1 Much like its arguments on the *Accardi* claim, the defense misconstrues the legal
2 rights allegedly denied. *See* Part III.B.2, above. Plaintiffs’ case is not about the right to
3 asylum, but the right to be inspected and processed—and not turned away—upon first
4 presenting at a port of entry. At the very least, the turnback denied them that right. Put
5 another way, with each turnback CBP wrongfully “determined” that plaintiffs lacked a
6 “right[]” to inspection and asylum processing before being returned to Mexico. *See*
7 *Bennett*, 520 U.S. at 178. In that sense, each one was a “final” agency action.

8 **3. Mexican Authorities’ Actions**

9 Finally, the government asks this Court to dismiss all claims based on “actions taken
10 by Mexican officials” or other actors outside the Department of Homeland Security, as
11 these “are not *agency* actions that can be evaluated under the APA.” (ECF 75, at 22;
12 ECF 68-1, at 34.) It is true that “the APA does not extend to an entity that is not a federal
13 agency.” *Western State Univ. of S. Cal. v. American Bar Assn.*, 301 F. Supp. 2d 1129, 1133
14 (C.D. Cal. 2004); *see* 5 U.S.C. § 701(b)(1) (defining “agency”). Nor does the APA
15 authorize this Court to compel or vacate the conduct of Mexican officials.

16 Nonetheless, the APA does extend to CBP, which allegedly works in “close
17 coordination” with Mexican authorities to implement the CBP One Turnback Policy. (*See*
18 ECF 1, at 42.) For instance, according to the complaint, CBP “regularly requests” help
19 from “Mexican immigration and law enforcement officers” in “clearing the backlog of
20 people at the San Ysidro [port of entry] who do not have CBP One appointments.” (ECF 1,
21 at 42; *see also id.* at 45 (describing similar teamwork at two other ports of entry).) While
22 this Court may lack authority over Mexican officials, the APA empowers federal courts to
23 address *CBP*’s actions, including any improper cross-border collaboration.

24 On the other hand, plaintiffs’ expansive relief requests go well beyond addressing
25 *CBP*’s conduct. They seek an injunction that “binds other persons who are in active concert
26 or participation with any of the Defendants,” presumably including Mexican officials.
27 (ECF 1, at 71.) Injunctive relief may be unavailable. *See* 8 U.S.C. § 1252(f)(1) (forbidding
28 lower courts from “enjoin[ing]” immigration processing in some circumstances). But, to

1 the extent plaintiffs request a binding order to directly control the actions of Mexican and
2 other non-agency personnel, that request is dismissed as outside the APA’s ambit.¹

3 **D. Alien Tort Statute Claim (Non-Refoulement)**

4 In their final cause of action, plaintiffs claim relief through the Alien Tort Statute,
5 which gives district courts “original jurisdiction of any civil action by an alien for a tort
6 only, committed in violation of the law of nations or a treaty of the United States.”
7 28 U.S.C. § 1350. This statute was originally passed to “furnish jurisdiction” for three
8 international offenses: “violation of safe conducts, infringement of the rights of
9 ambassadors, and piracy.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720, 724 (2004). But
10 the law does not “categorically preclude[] federal courts from recognizing [a new] claim
11 under the law of nations.” *Id.* at 725. Parties suing based on newer international norms face
12 a “high bar” to show that the “international character” of that claim has been “accepted by
13 the civilized world and defined with a specificity comparable to” the original three. *Doe I*
14 *v. Cisco Sys.*, 73 F.4th 700, 714 (9th Cir. 2023). In particular, plaintiffs must “demonstrate
15 that the alleged violation is of a norm that is specific, universal, and obligatory.” *Jesner v.*
16 *Arab Bank, PLC*, 584 U.S. 241, 257–58 (2018) (cleaned up).

17 “Non-refoulement” is just such a norm, say plaintiffs. The non-refoulement duty
18 forbids countries from deporting refugees anywhere that their “life or freedom would be
19 threatened on account of” certain characteristics like their “race, religion, [and]
20 nationality.” Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259,
21 6276, T.I.A.S. No. 6577. The government’s primary objection regards the universality
22 requirement. It argues that this principle has not reached universal international acceptance,
23 at least for the manner plaintiffs seek to use it. (*See* ECF 68-1, at 44–45.)

24
25 ¹ In a footnote, the government states that the act-of-state and political-question
26 doctrines require dismissal of the allegations concerning Mexican officials. (*See* ECF 68-1,
27 at 35 n.8.) Given the importance and complexity of those doctrines, this Court declines to
28 address these points, which “were bare assertions with no supporting argument” or “only
argued in passing.” *See Christian Legal Soc. Chapter of Univ. of Cal. v. Wu*, 626 F.3d 483,
487 (9th Cir. 2010) (cleaned up).

1 This claim boils down to a “nuanced question”: Is non-refoulement “universally
2 understood to provide protection to those who present themselves at a country’s borders
3 but are not within [that] country’s territorial jurisdiction”? *Al Otro Lado*, 2021 WL
4 3931890, at *21. No. The international community has not universally embraced “this
5 specific extraterritorial application of non-refoulement.” *Id.* at *22. The Supreme Court
6 once surveyed the ongoing debate about whether this norm imposes extraterritorial
7 obligations. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 182 & nn.40–41 (1993)
8 (collecting authorities and noting that non-refoulement’s “failure to prevent the
9 extraterritorial reconduction of aliens has been generally acknowledged (and regretted”).
10 And the United States itself explicitly rejects any “extraterritorial” “non-refoulement
11 obligation.” U.S. Observations on UNCHR Advisory Opinion on Extraterritorial
12 Application of Non-Refoulement Obligations (Dec. 28, 2007), [https://2001-](https://2001-2009.state.gov/s/l/2007/112631.htm#_ftnref2)
13 [2009.state.gov/s/l/2007/112631.htm#_ftnref2](https://2001-2009.state.gov/s/l/2007/112631.htm#_ftnref2) [<https://perma.cc/9DKA-N3V4>].

14 In addition, the last *Al Otro Lado* court pointed out that border “turnback” policies
15 have “been implemented in some European Union member[] states and Australia.” *Al Otro*
16 *Lado*, 2021 WL 3931890, at *22. Plaintiffs criticize this rationale because violations of a
17 “norm of international law” do not “diminish or undermine its ‘binding effect.’” (ECF 72,
18 at 57 (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 n.15 (2d Cir. 1980).) But the
19 issue is whether “extraterritorial” non-refoulement is a norm in the first place. In the case
20 plaintiffs rely on, “every actual State recognized”—and agreed to be bound by—the
21 “prohibition of torture,” even if that norm was only “honored in the breach.” *Filartiga*,
22 630 F.2d at 884 n.15. Not so here. Non-refoulement has yet to clear the “high bar” of
23 universal acceptance. *See Doe I*, 73 F.4th at 714. So, the Alien Tort Statute claim must fall.

24 CONCLUSION


25 Thus, the government’s motion to dismiss is granted in part as follows:

- 26 1. Any portion of the *Accardi* and APA claims (counts 1–4) that seeks to enjoin or
27 bind persons outside of U.S. federal agencies, such as Mexican officials, is
28 **DISMISSED.**

1 2. The Alien Tort Statute claim (count 6) is **DISMISSED**.

2 Those dismissals are without leave to amend. For one, plaintiffs do not request an
3 opportunity to amend or explain how they would qualify for one. (*See generally* ECF 72.)
4 More importantly, for the two dismissed grounds any amendment appears to be “futile,”
5 since “no set of facts” can cure the identified defects. *See Missouri ex rel. Koster v. Harris*,
6 847 F.3d 646, 656 (9th Cir. 2017). The dismissal motion is otherwise denied.

7 Dated: September 30, 2024

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9 _____
10 Hon. Andrew G. Schopler
11 United States District Judge
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