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15
 16 **UNITED STATES DISTRICT COURT**
 17 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**
 18 **(San Diego)**

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

20 *Plaintiffs,*

21 v.

22 ALEJANDRO N. MAYORKAS,
 23 Secretary of Homeland Security, *et al.*,
 24 in their official capacities,

25 *Defendants.*

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

Hon. Andrew G. Schopler

26 **MEMORANDUM IN**
 27 **SUPPORT OF MOTION TO**
 28 **DISMISS COMPLAINT**

Hearing Date: December 15, 2023

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INTRODUCTION

1
2 This Court should dismiss Plaintiffs’ Complaint (ECF 1). Plaintiffs claim that
3 Defendants, the U.S. Department of Homeland Security (DHS) and U.S. Customs
4 and Border Protection (CBP), have a policy or widespread practice of turning noncit-
5 izens without documents sufficient for admission away from all Class A land-border
6 U.S. ports of entry (POEs) across the U.S.-Mexico Border if they have not scheduled
7 an appointment to present at the port. Although the Federal Government has the in-
8 herent statutory authority and discretion to manage the flow of travelers across its
9 shared border with Mexico, CBP’s stated policy is not to turn noncitizens without
10 documents sufficient for admission (“undocumented noncitizens”) away from POEs,
11 although such noncitizens may be required to wait to enter the United States to be
12 inspected.

13 Plaintiffs claim that CBP’s alleged practice violates its own policies, the Ad-
14 ministrative Procedure Act (APA), due process, and the non-refoulement doctrine.
15 The individual Plaintiffs, however, have since received the relief they seek—“access
16 to the U.S. asylum process”—and the relief they seek on behalf of the putative class
17 is barred by statute. Further, there is no cohesive policy on which to base classwide
18 relief. The organizational Plaintiffs do not have standing to seek relief relating to
19 policies concerning the enforcement of immigration law as to third parties. Regard-
20 less of standing, however, Plaintiffs’ APA claims fail at the threshold because they
21 have not identified an actual agency “turnback” policy that could possibly be evalu-
22 ated by this Court under APA standards, and they seek to dictate how CBP should
23 manage intake at POEs of undocumented noncitizens, which is committed to agency
24 discretion. Plaintiffs’ APA and due process claims also should be dismissed because
25 the statutory asylum, inspection, and referral obligations on which they are premised
26 do not extend to those—like Plaintiffs and the proposed class—who are still in Mex-
27 ico. Plaintiffs’ due process claim is entirely duplicative of the APA claims in that it
28 is premised solely upon alleged deprivation of a statutory interest and does not allege

1 the elements of a procedural due process claim. Plaintiffs’ *Accardi* claim for en-
 2 forcement of agency procedures is not cognizable because it is not premised on an
 3 enforceable procedure and there is no administrative prejudice to Plaintiffs or others
 4 similarly situated. Finally, Plaintiffs’ claim for alleged non-refoulement violations
 5 under the Alien Tort Statute is not actionable because there is no universally ac-
 6 cepted norm of non-refoulement that extends to those still outside the United States.

7 BACKGROUND

8 A. Background on Immigration Processing at Ports of Entry.

9 CBP’s Office of Field Operations (OFO) is responsible for “coordinat[ing] the
 10 enforcement activities of [CBP] at United States air, land, and sea ports of entry.”
 11 6 U.S.C. § 211(g). These statutory obligations—including deterring and preventing
 12 entry of terrorists, guarding against illegal entry of individuals, illicit drugs, agricul-
 13 tural pests, and contraband, and facilitating and expediting the flow of legitimate
 14 travelers and trade, *id.*—apply at all U.S. POEs, including the Class A land POEs¹
 15 along the U.S.-Mexico border. Compl. ¶¶ 42 (naming 20 such POEs), 44. These
 16 POEs fall within the jurisdiction of four Field Offices: San Diego, Tucson, El Paso,
 17 and Laredo. *Id.* ¶ 43.

18 By regulation, an “[a]pplication to lawfully enter the United States shall be
 19 made in person to a U.S. immigration officer at a U.S. port-of-entry when the port is
 20 open for inspection.” 8 C.F.R. § 235.1(a). Under the Immigration and Nationality
 21 Act (INA), Title 8 of the U.S. Code, a noncitizen² “present in the United States who
 22 has not been admitted or who arrives in the United States (whether or not at a desig-
 23 nated port of arrival . . .)” is “deemed an applicant for admission.” 8 U.S.C.
 24 § 1225(a)(1). Under Section 1225(a)(3), “[a]ll aliens . . . who are applicants for ad-
 25 mission or otherwise seeking admission or readmission to or transit through the

26
 27 ¹ “Class A means that the port is a designated Port-of-Entry for all aliens.” 8 C.F.R.
 28 § 100.4.

² “Noncitizen” as used here refers to an “alien” as defined at 8 U.S.C. § 1101(a)(3).

1 United States shall be inspected by immigration officers.” 8 U.S.C. § 1225(a)(3).

2 The INA also provides that noncitizens in the United States may apply for
3 asylum, a form of discretionary relief from removal for noncitizens who demon-
4 strate, among other things, that they have been persecuted or have a well-founded
5 fear of persecution in their country of nationality on account of a protected ground.
6 *See* 8 U.S.C. § 1158(a), (b)(1)(A); *see also id.* § 1101(a)(42). Section 1158(a) states:

7 Any alien who is physically present in the United States or who arrives
8 in the United States (whether or not at a designated port of arrival and
9 including an alien who is brought to the United States after having been
10 interdicted in international or United States waters), irrespective of such
11 alien’s status, may apply for asylum in accordance with this section or,
12 where applicable, section 1225(b) of this title.

13 8 U.S.C. § 1158(a)(1). Additionally, noncitizens may not be removed to a country
14 where they more likely than not would be persecuted on account of a protected
15 ground or tortured. 8 U.S.C. § 1231(b)(3) (statutory withholding of removal); Pub.
16 L. No. 105-277, div. G, § 2242 (Oct. 21, 1998) (codified at 8 U.S.C. § 1231 note), 8
17 C.F.R. §§ 208.16(c), 208.17(a), 1208.16(c), 1208.17(a) (protection under Article 3
18 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treat-
19 ment or Punishment (CAT)).

20 When a CBP officer inspects a noncitizen at a POE and determines the noncit-
21 izen lacks a valid travel document sufficient for admission, the noncitizen is pro-
22 cessed for appropriate removal proceedings under the INA. This may include pro-
23 cessing under the expedited removal procedures at Section 1225(b), which provide
24 generally that the noncitizen may be removed without further review. 8 U.S.C.
25 § 1225(b)(1)(A). But if the noncitizen processed for expedited removal “indicates
26 either an intention to apply for asylum under section 1158 of this title or a fear of
27 persecution, the officer shall refer the [noncitizen] for an interview by an asylum
28 officer under subparagraph (B).” *Id.*, § 1225(b)(1)(A)(ii). The asylum officer then
conducts a “credible fear interview” to determine whether the noncitizen will be

1 referred for further consideration of their claim to asylum or other protection. *Id.*,
2 § 1225(b)(1)(B); 8 C.F.R. § 208.30. DHS has discretion to process inadmissible ar-
3 riving noncitizens for expedited removal under Section 1225(b)(1) or to place them
4 in Section 1229a removal proceedings pursuant to Section 1225(b)(2)(A), where the
5 noncitizens may raise claims for humanitarian protection before an immigration
6 judge. *See Matter of E-R-M-*, 25 I. & N. Dec. 520, 521–24 (BIA 2011).

7 **B. The *AOL I* Litigation, Title 42 Orders, and November 2021 Guidance.**

8 In 2017, Plaintiff *Al Otro Lado* and individual noncitizens brought a lawsuit
9 claiming that CBP had engaged in what Plaintiffs termed “turnbacks” at Class A
10 POEs along the U.S.-Mexico Border. *See* Second Am. Compl., *Al Otro Lado, Inc.*
11 *v. Mayorkas*, No. 17-cv-2366, ECF No. 189 (Nov. 13, 2018). The plaintiffs in *AOL*
12 *I* asserted that “turnbacks” were unlawful on several grounds, including that they
13 infringed upon rights and obligations under the INA, at 8 U.S.C. §§ 1158(a) and
14 1225(a) and (b), as to noncitizens who approach a port of entry but have not crossed
15 the border into the United States. *See id.* The government, in turn, argued that those
16 statutes did not apply to noncitizens still in Mexico. *See, e.g., Al Otro Lado v. Mayor-*
17 *kas*, 2021 WL 3931890, at *10 (S.D. Cal. Sept. 2, 2021). The *AOL I* court concluded
18 that these statutes applied to “migrants who are ‘in the process of arriving,’ which
19 includes ‘aliens who have not yet come into the United States, but who are “attempt-

20 ing to” do so’ and may still be physically outside the international boundary line at
21 a POE.” *Id.* (quoting *Al Otro Lado v. Nielsen*, 394 F. Supp. 3d 1168, 1205 (S.D. Cal.
22 2019)). After certifying a class, the *AOL I* court determined on summary judgment
23 that CBP had engaged in “turnbacks” of asylum seekers through its prior practices
24 of metering, prioritization-based queue management, or similar practices. *Al Otro*
25 *Lado*, 2021 WL 3931890, at *1 n. 1, 9-10. The court also concluded that such turn-
26 backs that occur without express statutory authority constitute a withholding of
27 CBP’s obligation to inspect and refer asylum seekers pursuant to 8 U.S.C.
28 §§ 1225(a)(3) and (b)(1)(A)(ii), and for the same reason constitute a violation of due

1 process. *Id.* at *18, 20. The *AOL I* court described the “turnbacks” at issue as CBP
2 officers “affirmatively turning asylum seekers away from the border” through vari-
3 ous practices. *Id.* at *9. The Court did not define these “turnbacks” to include coor-
4 dination “with Mexican officials to ‘control the flow’ of migrants seeking asylum
5 before they reached the border.” *Id.*; *see also id.* at *22 n.20. The Court subsequently
6 entered a declaratory judgment, *see Al Otro Lado v. Mayorkas*, 2022 WL 3970755
7 (S.D. Cal. Aug. 23, 2022), but concluded that classwide injunctive relief was pro-
8 hibited under 8 U.S.C. § 1252(f)(1), because any such order would enjoin or restrain
9 CBP’s efforts to operate 8 U.S.C. § 1225. *Al Otro Lado, Inc. v. Mayorkas*, 619 F.
10 Supp. 3d 1029, 1045 (S.D. Cal. 2022). The cross-appeal from final judgment is fully
11 briefed with argument scheduled for November 28, 2023. *See Al Otro Lado, Inc. v.*
12 *Mayorkas*, No. 22-55988 (9th Cir.).

13 While *AOL I* was pending in district court, the COVID-19 pandemic altered
14 the processing of undocumented noncitizens. From March 20, 2020, until May 11,
15 2023, most undocumented noncitizens who sought to enter the United States at its
16 borders were subject to a series of public health orders in effect to combat the pan-
17 demic (Title 42 Orders). Under those orders, covered noncitizens were generally
18 stopped at the border or expelled to Mexico or their home countries without pro-
19 cessing under the immigration statutes. *See, e.g.*, 86 Fed. Reg. 42,828 (Aug. 5, 2021).

20 In November 2021, CBP rescinded its prior guidance and issued a memoran-
21 dum to OFO regarding the management and processing of undocumented nonciti-
22 zens at POEs along the U.S.-Mexico border (November 2021 Guidance). *See Compl.*
23 ¶ 51; Defs.’ Ex. 1 (Nov. 2021 Guidance).³ Recognizing that the Title 42 orders were
24 still in effect at the time of its issuance, the Guidance contemplates that it will apply

25
26 ³ The November 2021 Guidance is properly considered because it is incorporated by
27 reference into the Complaint, which refers “extensively to the document”; the Guid-
28 ance also “forms the basis of” Plaintiffs’ *Accardi* claim. *Kanfer v. Pharmacare US,*
Inc., 142 F. Supp. 3d 1091, 1099 (S.D. Cal. 2015) (quoting *United States v. Ritchie*,
342 F.3d 903, 908 (9th Cir. 2003)).

1 once they are lifted, and instructs OFO “to consider and take appropriate measures,
2 as operationally feasible, to increase capacity to process undocumented noncitizens
3 at Southwest Border POEs, including those who may be seeking asylum and other
4 forms of protection.” Defs.’ Ex. 1, at 1, 2. “Possible additional measures include the
5 innovative use of existing tools such as the CBP One mobile application, which en-
6 ables noncitizens seeking to cross through land POEs to securely submit certain bi-
7 ographic and biometric information prior to arrival and thus streamline their pro-
8 cessing upon arrival.” *Id.* “Importantly, however, asylum seekers or others seeking
9 humanitarian protection cannot be required to submit advance information in order
10 to be processed at a Southwest Border land POE.” *Id.* The memorandum permits
11 CBP to staff the border line to manage safe and orderly travel into the POE, but
12 “undocumented noncitizens who are encountered at the border line should be per-
13 mitted to wait in line, if they choose, and proceed into the POE for processing as
14 operational capacity permits.” *Id.* It instructs: “Absent a POE closure, officers also
15 may not instruct travelers that they must return to the POE at a later time or travel to
16 a different POE for processing.” *Id.*

17 In early 2023, the President announced the expiration of the public health
18 emergency effective May 11, 2023, which would cause the then-operative Title 42
19 Order to end. *See* Circumvention of Lawful Pathways (NPRM), 88 Fed. Reg. 11,704,
20 11,708 (Feb. 23, 2023). The end of the Title 42 Order was expected to cause the
21 number of migrants seeking to irregularly enter the United States at the southwest
22 border to surge to or remain at all-time highs—an estimated 11,000 migrants daily.
23 *See* Circumvention of Lawful Pathways, 88 Fed. Reg. 31,314, 31,331 (May 16,
24 2023). To address this expected spike in the number of migrants at the southwest
25 border seeking to enter the United States without authorization, the Department of
26 Justice and DHS promulgated the Circumvention of Lawful Pathways Rule, effec-
27 tive May 11, 2023 (the Rule). *Id.* at 31,314, 31,324; *see also* 88 Fed. Reg. at 11,704;
28 Compl. ¶ 52. The Rule provides that most noncitizens who enter the United States

1 during a two-year period at the southwest land border or adjacent coastal borders
2 after traveling through a country other than their native country are subject to a re-
3 buttable presumption of asylum ineligibility unless they avail themselves of orderly
4 processes for entry into the United States or seek and are denied asylum or other
5 protection in a third country. 88 Fed. Reg. at 31,321–23. Noncitizens may be ex-
6 cepted from the presumption, however, if they followed the orderly process of
7 “[p]resent[ing] at a port of entry, pursuant to a pre-scheduled time and place,” or
8 “presented at a port of entry without a pre-scheduled time and place” but can
9 “demonstrate[] by a preponderance of the evidence that it was not possible to access
10 or use the DHS scheduling system due to language barrier, illiteracy, significant
11 technical failure, or other ongoing and serious obstacle.” 8 C.F.R. §§ 208.33(a)(2),
12 1208.33(a)(2). They also may be able to rebut the presumption by demonstrating
13 that exceptionally compelling circumstances exist. *Id.* §§ 208.33(a)(3)(i),
14 1208.33(a)(3)(i). Thus, noncitizens who have already traveled to Mexico with the
15 intent of entering the United States can avoid the presumption of asylum ineligibility
16 by prescheduling an appointment to present at a land-border POE for orderly pro-
17 cessing. 8 C.F.R. §§ 208.33(a)(1), 1208.33(a)(1). CBP currently uses CBP One to
18 allow noncitizens to make such appointments. 88 Fed. Reg. at 31,317. For this pur-
19 pose, CBP One allows “noncitizens located in Central or Northern Mexico who seek
20 to travel to the United States” to submit information in advance and schedule an
21 appointment to present themselves at” eight southwest-border POEs: Nogales,
22 Brownsville, Eagle Pass, Hidalgo, Laredo, El Paso, Calexico, and San Ysidro. *See*
23 “Advance Submission and Appointment Scheduling,” [https://www.cbp.gov/about/
24 mobile-apps-directory/cbpone](https://www.cbp.gov/about/mobile-apps-directory/cbpone) (last visited Sept. 13, 2023); Compl. ¶ 87. There are
25 currently 1,450 such appointments available per day. *See CBP One Appointments
26 Increased to 1,450 Per Day* (June 30, 2023), <https://www.cbp.gov/newsroom/national-media-release/cbp-one-appointments-increased-1450-day>. Use of appoint-
27 ments allows these POEs to streamline in-person processing and efficiently manage
28

1 the flow into POEs of undocumented noncitizens. Compl. ¶ 69; 88 Fed. Reg. at
 2 31,318. As the Rule’s preamble states, an appointment is “not a prerequisite to ap-
 3 proach a POE . . . [or be] inspected or processed,” but use of CBP One will allow
 4 noncitizens to avoid the presumption and avoid “waiting in long lines of unknown
 5 duration at POEs.” 88 Fed. Reg. at 31,317–18, 31,332, 31,365.

6 **C. The Complaint.**

7 Al Otro Lado (AOL) and Haitian Bridge Alliance (HBA) (Organizational
 8 Plaintiffs), and nine noncitizens (Individual Plaintiffs)⁴ allege that CBP has a “policy
 9 and widespread practice” of “turning back arriving noncitizens without CBP One
 10 Appointments and thereby denying them access to the U.S. asylum process” at Class
 11 A POEs along the U.S.-Mexico border. Compl. ¶ 1. Plaintiffs claim that under this
 12 alleged “CBP One Turnback Policy,” asylum seekers who approach a POE from
 13 Mexico “are typically met at or near the ‘limit line’ [international boundary] . . . by
 14 CBP officers or Mexican authorities who . . . are acting at the behest of CBP. If the
 15 asylum seekers do not have a CBP One appointment confirmation or present at a
 16 date or time different from the designated appointment slot, they are turned back to
 17 Mexico.” *Id.* ¶ 5. The Complaint asserts the “CBP One Turnback Policy” and each
 18 application thereof violates the APA as arbitrary and capricious, contrary to law or
 19 in excess of statutory authority, and withholding or unreasonably delaying required
 20 agency action, and that it violates the agency’s stated policies, due process, and a
 21 customary international-law obligation of non-refoulement.

22 The Complaint contains allegations relating to only certain POEs. As to the
 23 Nogales POE in Arizona, Plaintiffs allege that there is a line of undocumented
 24 noncitizens waiting for processing, and that CBP regularly processes noncitizens
 25 from that line. *See id.* ¶ 113. They allege that noncitizens are “prevented from pre-
 26 senting,” but that appears to be based solely on their allegation that the line does not
 27

28 _____
⁴ Former Plaintiff Alexander Doe voluntarily dismissed his claims. *See* ECF 35.

1 move quickly. *Id.* Plaintiffs also allege that a Mexican municipal agency has sought
2 to manage that line through a QR system, but they do not allege any CBP involve-
3 ment in that system. *Id.* ¶¶ 114–15.

4 As to the San Ysidro POE, Plaintiffs allege that CBP Officers have told un-
5 documented noncitizens “they could not be processed without an appointment.” *Id.*
6 ¶ 96. They also allege that Mexican officials have prevented or discouraged undoc-
7 umented noncitizens from waiting in line to enter the POE, and that CBP “requests
8 [the] assistance [of Mexican immigration and law enforcement officers] in clearing
9 the backlog of people.” *See id.* ¶¶ 97-99. Six of the nine Individual Plaintiffs allege
10 experiences at the San Ysidro POE: Plaintiffs Guadalupe and Somar Doe allege that
11 they went to the San Ysidro POE in early June 2023 and were told that they needed
12 a CBP One appointment or could wait in line. *See id.* ¶ 20. They allege that they then
13 attempted to present at the “Ped West” entrance to that POE in late July 2023, and
14 that the CBP Officer made suggestions as to how to obtain a CBP One appointment,
15 and in response to an AOL staff member’s inquiry about placement on “an emer-
16 gency list,” referred them to Mexican immigration officials at the “Ped East” en-
17 trance. *Id.* ¶ 20. Diego Doe alleges that a CBP Officer at the POE told him on July
18 26, 2023, to “speak to Mexican immigration officials about his issues with the [CBP
19 One] app.” *Id.* ¶ 13. Elena Doe alleges that on an unspecified date, she approached
20 the “Ped West” entrance to the POE and was told by a Mexican immigration official
21 that she could not get through without a CBP One appointment; she alleges she re-
22 turned to the San Ysidro POE in mid-July and CBP officers “refused to allow her to
23 proceed” so she left. *Id.* ¶ 17. Michelle Doe alleges that in mid-July 2023, a CBP
24 Officer at the POE said that “people cannot cross without using the CBP One App.”
25 *Id.* ¶ 12. Luisa Doe alleges that she went twice to the San Ysidro POE in June and
26 July 2023, and that “CBP officials blocked her from entering and told her she needed
27
28

1 a CBP One appointment [to seek asylum].” *Id.* ¶ 19.⁵

2 As to the El Paso POE (Paso Del Norte crossing), some allegations indicate
3 that undocumented noncitizens were told that they could not immediately cross, and
4 that noncitizens have waited to be processed. *See id.* ¶¶ 101 (indicating that families
5 were waiting in June 2023 to enter the POE), 102 (alleging that a CBP officer told a
6 family that they could not cross at that time), 105 (reporting that an individual was
7 told that the POE was at capacity). Plaintiffs also allege that noncitizens have been
8 told by CBP officers at the international boundary line (the midpoint of the bridge)
9 that they needed appointments to present at the POE or were turned back after having
10 crossed the midpoint into U.S. territory. *Id.* ¶¶ 101–04. One Individual Plaintiff’s
11 allegations relate to this POE: Pablo Doe alleges that in early July 2023, he was told
12 by two CBP officers at the midpoint of the Paso Del Norte bridge that “he could not
13 apply for asylum without a CBP One appointment.” *Id.* ¶ 15.

14 As to the Brownsville and Hidalgo POEs (both within the Laredo Field Office,
15 *see* <https://www.cbp.gov/about/contact/ports/field-office/laredo>), Plaintiffs allege
16 that Mexican officials prevent undocumented noncitizens from approaching the
17 POEs. Compl. ¶¶ 106–09, 112. They vaguely allege that Mexican officials are “car-
18 rying out orders” and have referenced “CBP Orders.” *Id.* ¶ 106. Plaintiffs also allege
19 four instances of CBP officers at the Brownsville and Hidalgo POEs turning away
20 undocumented noncitizens who did not have appointments, but they generally do
21 not explain what the CBP officers said to these noncitizens. *Id.* ¶ 110–11. No Indi-
22 vidual Plaintiff alleges having been turned back at these POEs or any POE within
23 the Laredo Field Office by either CBP or Mexican officials. Plaintiff Natasha Doe
24 alleges that other migrants discouraged her from presenting at the Eagle Pass POE

25
26 ⁵ Another Individual Plaintiff, Laura Doe, alleges that she was turned back by CBP
27 Officers from the Otay Mesa POE (located within the San Diego Field Office, *see*
28 <https://www.cbp.gov/about/contact/ports/field-office/san-diego>) because she did not
have a CBP One appointment. Compl. ¶ 16. The Otay Mesa POE does not schedule
CBP One appointments, *see* Compl. ¶ 87 n.9

1 within this field office. *Id.* ¶ 15.

2 Each Individual Plaintiff has since received a CBP One appointment, either in
3 the ordinary course or as a result of agreements related to this litigation. *See* Defs.’
4 Ex. 2 (Watson Decl.) ¶¶ 18–19.

5 LEGAL STANDARDS

6 Federal courts lack the power to adjudicate claims absent jurisdiction. *Gunn*
7 *v. Minton*, 568 U.S. 251, 256 (2013). “A jurisdictional challenge under Rule 12(b)(1)
8 may be made either on the face of the pleadings or by presenting extrinsic evidence.”
9 *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). The
10 plaintiff bears the burden of establishing subject matter jurisdiction. *Chandler v.*
11 *State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010).

12 A complaint may be dismissed under Rule 12(b)(6) for the lack of a cogniza-
13 ble legal theory or the absence of sufficient facts alleged under a cognizable legal
14 theory. *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1121 (9th Cir. 2008).
15 In reviewing a complaint under Rule 12(b)(6), all material allegations of fact are
16 taken as true, and the facts are construed in the light most favorable to the non-
17 moving party. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court need not,
18 however, accept a plaintiff’s legal conclusions. *Id.* at 678.

19 ARGUMENT

20 **I. The Individual Plaintiffs’ Claims Should Be Dismissed as Moot and for** 21 **Lack of Standing to Seek Relief for the Proposed Class.**

22 First, each Individual Plaintiff seeks through this lawsuit to “access the asy-
23 lum process at a POE,” which Plaintiffs define as inspection and processing. Compl.
24 ¶¶ 12–21, 34. Since the filing of the Complaint, however, all Individual Plaintiffs
25 have been inspected and processed, and their individual claims are moot. *See* Defs.’
26 Ex. 2, ¶¶ 18–19. “A claim is moot if it has lost its character as a present, live contro-
27 versy.” *Am. Rivers v. Nat’l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir.
28 1997), *as amended* (Sept. 16, 1997) (cleaned up). “A case becomes moot when

1 interim relief or events have deprived the court of the ability to redress the party’s
2 injuries.” *United States v. Alder Creek Water Co.*, 823 F.2d 343, 345 (9th Cir. 1987).
3 Here, the Individual Plaintiffs have obtained the relief they sought. No declaration
4 or other relief from this Court could redress the Individual Plaintiffs’ injury because
5 that claimed injury no longer exists, and there is no indication that they will be sub-
6 ject to the same alleged conduct again. There is thus no “effective relief” the Court
7 can grant the Individual Plaintiffs. *See Am. Rivers*, 126 F.3d at 1123; *Jiali T. v.*
8 *Mayorkas*, 2023 WL 5985509, at *2 (S.D. Cal. Sept. 13, 2023) (claims are moot
9 where plaintiffs “received all of the relief they sought”). Moreover, because Plain-
10 tiffs do not adequately allege a borderwide “turnback” policy (see *infra* § IV(A)),
11 the relation-back doctrine applicable to class claims should not apply here, because
12 it is not “certain that other persons similarly situated will continue to be subject to
13 the challenged conduct.” *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 76,
14 133 (2013); *Olson v. Brown*, 594 F.3d 577, 583 (7th Cir. 2010) (“[T]he ‘inherently
15 transitory’ exception to the mootness doctrine,” requires “that there will likely be a
16 constant class of persons suffering the deprivation complained of in the complaint”).

17 But regardless of whether Plaintiffs have adequately alleged an ongoing prac-
18 tice that could apply to a putative class, there is no effective relief this Court could
19 grant to that class, even if the class were certified. No effective classwide remedy is
20 available, and Plaintiffs thus lack Article III standing to sue on behalf of a putative
21 class. “To establish standing, a plaintiff must show an injury in fact caused by the
22 defendant and redressable by a court order.” *United States v. Texas*, 143 S. Ct. 1964,
23 1970 (2023). Here, the class claims are not redressable by a court order. First, as this
24 Court recently held, the classwide injunctive relief Plaintiffs seek is precluded by 8
25 U.S.C. § 1252(f)(1) and *Aleman Gonzalez v. Garland*, 142 S. Ct. 2057 (2022). ECF
26 62; Tr. of Mot. Hrg. 8–10, 29 (Oct. 13, 2023). Such an injunction would compel the
27 government to take actions to implement the covered statutory provisions of inspec-
28 tions and credible-fear processing contained in Section 1225, which is squarely

1 prohibited by Section 1252(f)(1). *Id.* at 8; *see also Al Otro Lado*, 619 F. Supp. 3d at
2 1045. Second, Plaintiffs cannot obtain an order “setting aside” the so-called “CBP
3 One Turnback Policy,” Compl. §VIII(E), because they have not alleged the existence
4 of an actual policy that could be “set[] aside” under the APA, 5 U.S.C. § 706(2) (*see*
5 *infra* § IV(A)), and in any event that relief would seemingly either operate to “enjoin
6 or restrain” Defendants’ implementation of Section 1225 as prohibited by Section
7 1252(f)(1), or would not redress the claimed injuries of Plaintiffs or the proposed
8 class. *See Texas*, 143 S. Ct. at 1979 (Gorsuch, J., concurring); *California v. Texas*,
9 141 S. Ct. at 2115 (2021) (finding no redressability where court order would have
10 no practical effect). The same analysis demonstrates that the declaratory relief Plain-
11 tiffs seek likewise is either unavailable or cannot redress their injuries. Further, be-
12 cause injunctive relief is precluded, there can be no “corresponding” declaratory re-
13 lief, such that the requirements to certify a class under Rule 23(b)(2) are not met.
14 *See Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018) (questioning whether declar-
15 atory relief alone that does not *correspond* to injunctive relief can sustain a class).

16 The injuries alleged in this case are likewise not redressable because Plaintiffs
17 seek to enjoin, vacate, or declare unlawful a policy that does not exist. *See infra* §
18 IV(A); Compl. § VIII (seeking relief against the “CBP One Turnback Policy”). But
19 even if it did exist, invalidating or enjoining a particular policy would not prevent
20 CBP Officers from engaging in their discretionary statutory authority to manage in-
21 take at the international boundary line. *See infra* § IV(C); *Texas*, 143 S. Ct. at 1979
22 (Gorsuch, J., concurring) (noting that vacatur of challenged prosecutorial guidelines
23 would have no effect on underlying exercise of prosecutorial discretion). As dis-
24 cussed below, the statutes allow and contemplate this exercise of discretion, and in-
25 validating a so-called policy cannot take away that discretion. For these reasons, the
26 Individual Plaintiffs’ claims should be dismissed for lack of jurisdiction.

27 **II. The Organizational Plaintiffs Lack Article III and Statutory Standing.**

28 The Organizational Plaintiffs have not identified a “legally and judicially

1 cognizable” injury “fairly traceable” to the alleged “turnback” practices that would
2 be redressed by a favorable decision as required to have Article III standing, *Texas*,
3 143 S. Ct. at 1970; *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013), and as
4 non-regulated parties they are not within the zone of interests of the relevant immi-
5 gration statutes.

6 *First*, the Organizational Plaintiffs’ alleged indirect harms from practices re-
7 lated to the alleged non-implementation of immigration laws are not a cognizable
8 injury for purposes of Article III. Plaintiffs’ claims challenge CBP’s alleged policy
9 or practice of turning away noncitizens who lack CBP One appointments without
10 inspection and thus without providing “access to the asylum process.” Compl. ¶¶
11 162, 173, 185–86, 191–94, 202–03, 205, 211, 214. They define the “asylum process”
12 as the “right to be inspected and processed at a POE.” Compl. ¶ 34. Regardless of
13 the truth of their allegations, the Organizational Plaintiffs are not the subject of the
14 alleged policy or practice and thus have no standing to require immigration inspec-
15 tion by the Executive. “[A] private citizen”—including an organization—“lacks a
16 judicially cognizable interest in the prosecution or nonprosecution of another.”
17 *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). An individual similarly has “no
18 judicially cognizable interest in procuring enforcement of the immigration laws”
19 against someone else. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984). The Su-
20 preme Court recently applied this rule to hold that two States lacked standing to
21 challenge the Executive’s immigration enforcement policies. *Texas*, 143 S. Ct. at
22 1970. The Court held that the State’s asserted indirect injury allegedly flowing from
23 the Executive’s exercise of immigration enforcement discretion with respect to
24 noncitizens—expenditures on incarceration and social services for “noncitizens who
25 should be (but are not being) arrested by the Federal Government,” *id.* at 1969—was
26 not judicially cognizable. *See id.* at 1970–71.

27 These principles control here. Although the claims in *Texas* involved agency
28 guidance as to whether to arrest and prosecute immigration violators, the nature of

1 the alleged conduct challenged here does not differ in any meaningful way for pur-
2 poses of the standing analysis. The Organizational Plaintiffs here challenge CBP’s
3 discretionary management of its POEs and its exercise of its immigration enforce-
4 ment obligations at those POEs—including the inspection and referral duties under
5 Sections 1225(a)(3), 1225(b)(1)(A)(ii), 1225(b)(2)—on the basis that they will make
6 or have made additional expenditures or taken other voluntary steps in response to
7 an alleged “CBP One Turnback Policy,” Compl. ¶¶ 10–11, 141–151. Essentially, the
8 Organizational Plaintiffs are seeking to require CBP to perform its immigration in-
9 spection duties in a particular way, which is similar to the states’ claims in *Texas*
10 that sought to dictate DHS’s immigration prosecution policies. And the Organiza-
11 tional Plaintiffs’ claimed injuries—voluntary expenditures and diversion of re-
12 sources—amount to the same type of indirect harm that the *Texas* court rejected. The
13 Organizational Plaintiffs do not challenge any exercise of governmental power di-
14 rected at them or claim a deprivation of their own rights under immigration statutes,
15 but instead claim they are harmed by incidental effects of the government’s choices
16 with respect to certain noncitizens. And as in *Texas*, the Organizational Plaintiffs’
17 claims—to the extent they seek relief that would undermine prioritization of CBP
18 One appointments—threaten to upset substantial foreign-policy interests underlying
19 the Pathways Rule’s incentives for use of appointments at POEs along the U.S.-
20 Mexico border. *See* 88 Fed. Reg. at 31,317 (noting the approach taken in the Rule is
21 “critical to the United States’ ongoing engagements with regional partners, in par-
22 ticular the Government of Mexico, regarding migration management in the region”).

23 Second, the alleged harms to the Organizational Plaintiffs are not fairly trace-
24 able to the alleged policy or practice. AOL claims it expended costs beginning in
25 January 2023 (while the Title 42 Orders were still in effect) “associated with the
26 rollout of the CBP One Turnback Policy.” Compl. ¶ 141. But, according to Plaintiffs,
27 this alleged “policy” was not announced and is contrary to CBP’s November 2021
28 Guidance, *see* Compl. ¶¶ 51, so Plaintiffs could not have occurred costs preparing

1 for its “rollout.” Nor can the Organizational Plaintiffs claim injury based on costs
2 they have voluntarily incurred to counteract potential governmental action. *See*
3 *Clapper*, 568 U.S. at 415. AOL and HBA also claim costs associated with helping
4 noncitizens use the CBP One app or providing accommodations for those awaiting
5 CBP One appointments, *see* Compl. ¶¶ 142, 149–50, but their suit does not challenge
6 CBP One itself. Further, the Complaint claims impacts to staff members, *see id.* ¶¶
7 146–47, 151, but does not explain how those impacts stem from the particular “turn-
8 back” practices challenged here, rather than from general migration circumstances
9 or other policies. *See California*, 141 S. Ct. at 2120 (injury must stem from the par-
10 ticular statutory provision challenged, not from related provisions). For these rea-
11 sons, the Organizational Plaintiffs lack a cognizable injury traceable to the chal-
12 lenged conduct that could support Article III standing.

13 Third, the Organizational Plaintiffs’ alleged harms are not redressable for the
14 same reasons the putative class claims are not redressable: there is no effective relief
15 this Court can grant. *See supra* § I. As AOL and HBA are not “individual aliens,” 8
16 U.S.C. § 1252(f)(1) precludes entry of the coercive relief they seek.

17 Finally, even if the Organizational Plaintiffs could establish Article III stand-
18 ing, their APA claims must be dismissed because their claimed resource-diversion
19 injuries are not within the zone of interests sought to be protected by the relevant
20 immigration statutes. *See Air Courier Conference of Am. v. Am. Postal Workers Un-*
21 *ion*, 498 U.S. 517, 523 (1991). The APA does not “allow suit by every person suf-
22 fering injury in fact.” *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 395 (1987). To be
23 “aggrieved” under the APA, 5 U.S.C. § 702, “the interest sought to be protected by
24 the complainant [must] be arguably within the zone of interests to be protected or
25 regulated by the statute . . . in question.” *Clarke*, 479 U.S. at 396. When a plaintiff
26 is not itself the object of the challenged regulatory action, it has no right of review
27 if its “interests are so marginally related to or inconsistent with the purposes implicit
28 in the statute that it cannot reasonably be assumed that Congress intended to permit

1 the suit.” *Id.* at 399.

2 Plaintiffs’ APA claims are based on the INA, and in particular, the asylum
3 statute, 8 U.S.C. § 1158, the provision requiring inspection of noncitizens, 8 U.S.C.
4 § 1225(a)(3), the provision regarding referral for credible-fear interviews at 8 U.S.C.
5 § 1225(b)(1)(A)(ii), and the provision regarding placement in § 1229a removal pro-
6 ceedings at 8 U.S.C. § 1225(b)(2). Neither the INA generally, nor any of these pro-
7 visions, suggest that Congress intended to permit organizations to sue over their vol-
8 untary expenditures taken in response to an alleged failure to implement these pro-
9 visions toward noncitizens in a particular manner. *See INS v. Legalization Assistance*
10 *Project*, 510 U.S. 1301, 1302 (1993) (O’Connor, J., in chambers) (determining that
11 organizations that “provide legal help to immigrants” were not within zone of inter-
12 ests of immigration statute granting limited amnesty that was “clearly meant to pro-
13 tect the interests of undocumented aliens, not the interests of organizations”). Indeed,
14 the asylum statute provides to the contrary: “Nothing in this subsection shall be con-
15 strued to create any substantive or procedural right or benefit that is legally enforce-
16 able by any party against the United States or its agencies or officers or any other
17 person.” 8 U.S.C. § 1158(d)(7). And all these statutory provisions are addressed only
18 to the noncitizens regulated by the INA. That the INA carefully prescribes a scheme
19 of judicial review of asylum and removal issues that affords only noncitizens—not
20 third-party organizations—an opportunity to challenge them underscores that immi-
21 gration-services organizations like Plaintiffs are not within the zone of interests pro-
22 tected by the asylum and expedited removal statutes. *See* 8 U.S.C. § 1252(a)(5),
23 (b)(9), (e), (g).⁶

24
25 ⁶ Although the *AOL I* court previously held that AOL was within the zone of interests
26 of the INA, *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1301 (S.D. Cal.
27 2018), that legal ruling is not persuasive because it was issued before the Supreme
28 Court made clear in the *Texas* case that third parties like the Organizational Plaintiffs
have no cognizable interest in the way the Executive conducts immigration

1 **III. Plaintiffs Have Not Stated a Claim Under *Accardi*.**

2 Plaintiffs' First Claim for Relief for Defendants' alleged failure to follow their
 3 own policy cannot succeed as a matter of law. *First*, the Complaint does not ex-
 4 pressly identify a cause of action for their *Accardi* claim. *See* Compl. ¶¶ 158–66. A
 5 plaintiff lacks a cognizable legal theory when he fails to identify a provision of law
 6 supplying him with a cause of action. *See, e.g., Salsman v. Access Sys. Americans,*
 7 *Inc.*, 2011 WL 1344246, at *3 (N.D. Cal. Apr. 8, 2011) (dismissing a complaint
 8 because it “d[id] not identify the provision of the [Uniform Commercial Code] . . .
 9 that now provides [the plaintiff] with a cause of action”). The Supreme Court in
 10 *Accardi* established a principle that courts can require administrative agencies to
 11 abide by their own regulations or certain internal policies. *See United States ex rel.*
 12 *Accardi v. Shaughnessy*, 347 U.S. 260 (1954). But it did not abrogate the require-
 13 ment that a plaintiff must identify a cause of action permitting him to bring his claim
 14 to federal court, nor did it create a new private right of action. *See id.* It is the APA
 15 that provides a private litigant with a cause of action to challenge government action
 16 that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
 17 with law,” or that is taken “without observance of procedure required by law.”
 18 5 U.S.C. § 706(2)(A), (D); *see also United States v. Calderon-Medina*, 591 F.2d
 19 529, 531 (9th Cir. 1979) (“While courts have generally invalidated adjudicatory ac-
 20 tions by federal agencies which violated their own regulations promulgated to give
 21 a party a procedural safeguard, the basis for such reversals is not the Due Process
 22 Clause, but rather a rule of administrative law.”) (cleaned up); *Brown v. Haaland*,

23 _____
 24 enforcement. It lacks preclusive effect for the same reason, as well as because the
 25 question of statutory standing of the organization was not necessary to the judgment
 26 on the merits for the certified class. *Janjua v. Neufeld*, 933 F.3d 1061, 1065 (9th Cir.
 27 2019) (for issue preclusion to apply, the issue must have been “necessary to decide
 28 the merits”); *Herrera v. Wyoming*, 139 S. Ct. 1686, 1697 (2019) (“Even when the
 elements of issue preclusion are met . . . an exception may be warranted if there has
 been an intervening change in the applicable legal context.” (cleaned up)).

1 2023 WL 5004358, at *4–5 (D. Nev. Mar. 6, 2023) (dismissing due process claim
 2 and explaining that plaintiffs “may bring [an] *Accardi* claim under the APA”). But
 3 although Plaintiffs have since acknowledged that their claim should be brought un-
 4 der the APA, *see* ECF 60 at p. 3, they did not expressly invoke the APA for their
 5 *Accardi* claim. *See* Compl. ¶¶ 158–66. Accordingly, their claim as pleaded must at
 6 a minimum be amended to invoke the APA.

7 Regardless, Plaintiffs’ *Accardi* claim still fails as a matter of law because the
 8 *Accardi* doctrine does not apply to the guidance and statements Plaintiffs seek to
 9 enforce here: the November 2021 Guidance, statements in the preamble to the Path-
 10 ways Rule, and the structure of the Rule. Compl. ¶¶ 160–162. “Not all agency policy
 11 pronouncements . . . can be considered regulations enforceable in federal court.”
 12 *United States v. Fifty-Three Eclectus Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982);
 13 *Jane Doe I v. Nielsen*, 357 F. Supp. 3d 972, 1000 (N.D. Cal. 2018) (same). “To have
 14 the force and effect of law, enforceable against an agency in federal court, the agency
 15 pronouncement must (1) prescribe substantive rules—not interpretive rules, general
 16 statements of policy or rules of agency organization, procedure or practice—and (2)
 17 conform to certain procedural requirements.” *Id.* (quotation marks and citations
 18 omitted). Likewise, courts distinguish rules benefiting the agency from rules bene-
 19 fitting private parties. *Lopez v. FAA*, 318 F.3d 242, 247 (D.C. Cir. 2003); *see also*,
 20 *e.g.*, *Morton v. Ruiz*, 415 U.S. 199, 204 n.6 (1974) (affirming order directing the
 21 Bureau of Indian Affairs to follow an internal policy the “purpose of” which was “to
 22 *provide necessary financial assistance to*” covered individuals) (emphasis added).
 23 Courts will only mandate compliance with internal rules that are “intended primarily
 24 to confer important procedural benefits upon individuals in the face of otherwise
 25 unfettered discretion,” *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532,
 26 538–39 (1970), or when the case involves “an agency [that is] required by rule to
 27 exercise independent discretion [but] has failed to do so,” *id.* at 539.

28 The November 2021 Guidance is not judicially enforceable under the *Accardi*

1 doctrine because it is a non-substantive rule of agency procedure that guides OFO
2 conduct and is not “intended primarily to confer important procedural benefits upon
3 individuals.” *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538 (1970).
4 The memo “provides updated guidance” to the southwest-border field offices “for
5 the management and processing” of undocumented noncitizens. Defs.’ Ex. 1 at 1.
6 Nothing about the November 2021 Guidance suggests it was intended to effectuate
7 any right to seek asylum in the United States or provide any other rights to nonciti-
8 zens. It operates on the duties of CBP officers and the management of POEs. Unlike
9 in cases in which *Accardi* has been successfully invoked, the November 2021 Guid-
10 ance does not set forth any procedural protections, such as notice provisions or in-
11 terview procedures, that would be applicable to noncitizens during inspection or sub-
12 sequent proceedings. *See Damus v. Nielsen*, 313 F. Supp. 3d 317, 324 (D.D.C. 2018)
13 (parole directive at issue “establishes certain minimum procedures and processes
14 that are to be utilized in making [discretionary parole] determinations,” including
15 written notice and explanation to noncitizen); *Emami v. Nielsen*, 365 F. Supp. 3d
16 1009, 1020 (N.D. Cal. 2019) (focusing on requirement in visa waiver procedures
17 that applicant be permitted to submit evidence of their eligibility for a waiver at the
18 visa interview). To the extent Plaintiffs claim a right to be inspected for admission
19 to the United States, no such statutory right exists, as 8 U.S.C. § 1225 only imposes
20 “duties” on immigration officers. *Al Otro Lado*, 394 F. Supp. 3d at 1205.

21 Likewise, statements in a preamble to an agency rule like the Pathways Rule
22 are “not legally binding,” *Peabody Coal Co. v. Dir., Off. of Workers’ Comp. Pro-*
23 *grams*, 746 F.3d 1119, 1125 (9th Cir. 2014), and thus not enforceable under *Accardi*.
24 Nor does the fact that the Rule contemplates an exception for those who were unable
25 to schedule an appointment create an enforceable procedural right of the type Plain-
26 tiffs claim in their Complaint. To be amenable to judicial enforcement, a purported
27 policy “requires sufficient formality to bind the agency.” *Yavari v. Pompeo*, No. 19-
28 cv-2524, 2019 WL 6720995, at *6 (C.D. Cal. Oct. 10, 2019) (citing *Alcaraz v. INS*,

1 384 F.3d 1150, 1162 (9th Cir. 2004)). The *Accardi* doctrine can apply to “[r]egula-
 2 tions with the force and effect of law,” *Accardi*, 347 U.S. at 265, or certain “internal
 3 operating procedures,” *Church of Scientology v. United States*, 920 F.2d 1481, 1487
 4 (9th Cir. 1990). But something as formless as the *structure* of a regulation cannot be
 5 enforceable as a binding procedure under *Accardi*.

6 In any event, a departure from internal rules “is not reviewable except upon a
 7 showing of substantial prejudice to the complaining party.” *Am. Farm Lines*, 397
 8 U.S. at 539. The prejudice inquiry looks to whether the alleged violation created a
 9 “significant possibility . . . [of] affect[ing] the ultimate outcome of the agency’s ac-
 10 tion.” *Carnation Co. v. Secretary of Labor*, 641 F.2d 801, 804 n.4 (9th Cir. 1981).
 11 Plaintiffs do not plead, and cannot demonstrate, a “significant possibility” that any
 12 departure from CBP’s internal guidance “affected the ultimate outcome of the
 13 agency’s action” as to the relevant administrative proceeding (here, inspection and
 14 processing). *Id.* Even if the November 2021 Guidance and the preamble or structure
 15 of the Rule were amenable to judicial enforcement, Plaintiffs have not pleaded the
 16 type of prejudice necessary to state a claim. For all these reasons, Plaintiffs’ *Accardi*
 17 claim should be dismissed.

18 **IV. Plaintiffs’ APA Claims Fail at the Threshold.**

19 Plaintiffs’ First,⁷ Second, Third, and Fourth Claims for Relief under the APA,
 20 5 U.S.C. §§ 706(1) and 706(2), should also be dismissed for lack of discrete and
 21 final agency action and because CBP’s management of POEs is committed to agency
 22 discretion. These claims—and the viability of the class allegations—are premised
 23 on the existence of a borderwide policy or widespread practice of “turnbacks,” but
 24 their allegations do not support the existence of a cohesive, discrete policy or prac-
 25 tice that could be evaluated under the APA. Nor does each instance of the alleged
 26 conduct—whether that conduct constitutes an affirmative turnback or a failure to

27 _____
 28 ⁷ As discussed just above (*supra* § II), the APA is the only proper vehicle for Plain-
 tiffs’ *Accardi* claim in their First Claim for Relief.

1 allow immediate access to the POE in U.S. territory—constitute final agency action
 2 within the meaning of the APA, because it does not fix any legal obligations. Further,
 3 the management of intake of noncitizens at POEs is committed to agency discretion
 4 by law, and is thus not reviewable under the APA.

5 **A. The Complaint Does Not Identify a Discrete “Agency Action.”**

6 The APA authorizes suit by “[a] person suffering legal wrong because of
 7 agency action, or adversely affected or aggrieved by agency action within the mean-
 8 ing of a relevant statute.” *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 61
 9 (2004) (quoting 5 U.S.C. § 702). “[A]gency action’ is defined in § 551(13) to in-
 10 clude ‘the whole or a part of an agency rule, order, license, sanction, relief, or the
 11 equivalent or denial thereof, or failure to act.’” *Id.* at 62. These are “circumscribed,
 12 discrete agency actions, as their definitions make clear.” *Id.* APA challenges can
 13 succeed only where the plaintiff “identif[ies] a discrete ‘agency action’ that fits
 14 within the APA’s definition of that term.” *Wild Fish Conservancy v. Jewell*, 730
 15 F.3d 791, 801 (9th Cir. 2013). It is “entirely certain” that an “entire ‘program’ . . .
 16 cannot be laid before the courts for wholesale correction under the APA.” *Lujan v.*
 17 *Nat’l Wildlife Fed’n*, 497 U.S. 871, 892–93 (1990).

18 There is no question that the Complaint fails to identify an actual policy doc-
 19 ument, regulation, or official agency decision like “a memorandum that formally
 20 articulate[s] the agency’s position,” *Wild Fish Conservancy*, 730 F.3d at 801, that
 21 reflects a policy of “turning back” noncitizens without appointments. To the con-
 22 trary, Plaintiffs assert that DHS and CBP’s November 2021 Guidance “prohibit[s]
 23 Turnbacks.” Compl. ¶ 51. Plaintiffs thus do not challenge a particular agency policy
 24 that applies to the putative class that is amenable to review under the APA.

25 There are also “no allegations connecting any of [the complained-of] conduct
 26 with an unwritten policy created by the Defendants.” *Al Otro Lado*, 327 F. Supp. 3d
 27 at 1320. Regardless of how Plaintiffs define “turnback”—which is not entirely clear
 28 from the Complaint—the allegations do not evidence a cohesive “turnback” policy.

1 Instead, the allegations amount to different types of actions with different impacts.
2 As to the Nogales POE, Plaintiffs allege that there is a line of undocumented noncit-
3 izens waiting to be processed and that CBP regularly processes noncitizens from that
4 line. Compl. ¶ 113. They do not allege that CBP Officers have affirmatively turned
5 back anyone at this POE, but appear to allege only that CBP is not processing indi-
6 viduals from the line quickly enough. *See id.* As to the remaining POEs addressed
7 in the Complaint, Plaintiffs allege a variety of practices depending on the event, time
8 frame, or POE. Some allegations reflect that CBP Officers have not immediately
9 permitted a noncitizen to cross the international boundary to access the POE, but the
10 Complaint does not specify whether the noncitizen was permitted to wait to cross.
11 *Id.* ¶¶ 12, 13, 102. Some allegations reflect that CBP expressly advised noncitizens
12 they could wait in line to be processed. *Id.* ¶ 20. Some allegations reflect that CBP
13 Officers encouraged noncitizens to use or seek help with the CBP One app. *Id.* ¶¶ 13,
14 18. Other allegations reflect that CBP Officers advised noncitizens that they re-
15 quired appointments to seek or apply for asylum. *Id.* ¶¶ 15, 19, 101, 104. Many al-
16 legations concern Mexican officials using exit controls or other tactics to impact
17 access to U.S. POEs. *See id.* ¶¶ 99, 106. Regardless of the accuracy of these allega-
18 tions, different communications made by different CBP Officers and varying actions
19 taken by Mexican officials do not reflect the existence of any particular “turnback”
20 policy, and do not amount to a “‘discrete’ action[] by an agency” amenable to APA
21 review. *Bark v. U.S. Forest Service*, 37 F. Supp. 3d 41, 50 (D.D.C. 2014) (quoting
22 *Norton*, 542 U.S. at 63).

23 Indeed, the U.S. government’s manner of managing the flow of undocu-
24 mented noncitizens in a variety of different ways at different times at different POEs
25 do not amount to one agency action. *See, e.g., Wild Fish Conservancy*, 730 F.3d at
26 801 (government’s operation of dams with periodic closing of dam gates is “not ...
27 a discrete ‘agency action’”). Further, actions taken by Mexican officials or others
28 non-DHS actors are not *agency* actions that can be evaluated under the APA. *See 5*

1 U.S.C. §§ 702, 704 (providing for judicial review of “agency action”); *W. State Univ.*
 2 *of S. California v. Am. Bar Ass’n*, 301 F. Supp. 2d 1129, 1133 (C.D. Cal. 2004) (“By
 3 its own language, the APA does not extend to an entity that is not a federal agency .
 4 . . .”). And the Complaint does not allege any discrete, reviewable action CBP has
 5 taken with respect to its alleged coordination with Mexican officials across the bor-
 6 der.⁸ For these reasons, the allegations do not demonstrate a discrete agency action
 7 that this Court can review under the APA.

8 **B. “Turnbacks” Are Not Final Agency Action.**

9 As there is no agency policy or similar action capable of review under the
 10 APA, there is certainly no “final” agency action at issue. Plaintiffs may argue that,
 11 regardless of whether there is an agency policy, each “turnback” constitutes a re-
 12 viewable agency action. Yet they cannot amalgamate a variety of individual deci-
 13 sions into one class action for review. As noted, it is not entirely clear from the
 14 Complaint what Plaintiffs believe constitutes a “turnback.” And, in any event, each
 15 “turnback” is not “final” for purposes of APA review. *See* 5 U.S.C. § 704 (providing
 16 for judicial review of “final agency action for which there is no other adequate
 17

18 ⁸ Moreover, claims arising from Mexican officials’ conduct are subject to dismissal
 19 under the act-of-state doctrine. *See Sea Breeze Salt, Inc. v. Mitsubishi Corp.*, 899
 20 F.3d 1064, 1069 (9th Cir. 2018). And to the extent that Plaintiffs’ claims for relief
 21 seek to prohibit Defendants from “coordinating” with Mexican government officials
 22 as they manage the flow of undocumented noncitizens, this claim is squarely predi-
 23 cated on a political question: whether and to what extent it is lawful for the United
 24 States to (allegedly) coordinate with the government of Mexico regarding the flow
 25 of travel across the countries’ shared border. All claims and requests for relief that
 26 would require resolution of that question are outside the Court’s jurisdiction. *Corrie*
 27 *v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007). The political question doc-
 28 trine “excludes from judicial review those controversies which revolve around pol-
 icy choices and value determinations constitutionally committed for resolution to the
 halls of Congress or the confines of the Executive Branch,” *Japan Whaling Ass’n v.*
American Cetacean Society, 478 U.S. 221, 230 (1986), as well as the “specific tac-
 tical measures allegedly taken” to implement those policy choices, *Bancoult v.*
McNamara, 445 F.3d 427, 436 (D.C. Cir. 2006).

1 remedy in a court”). Agency action is final when it “mark[s] the consummation of
 2 the agency’s decisionmaking process” and is an action “by which rights or obliga-
 3 tions have been determined, or from which legal consequences will flow.” *Bennett*
 4 *v. Spear*, 520 U.S. 154, 178 (1997). “The general rule” under the second *Bennett*
 5 prong is that agency action must “impose an obligation, deny a right, or fix some
 6 legal relationship” to be final. *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264
 7 (9th Cir. 1990). No individual alleged “turnback” can be “final” under *Bennett* be-
 8 cause it does not “give[] rise to direct and appreciable legal consequences” as to the
 9 affected Individual Plaintiff or putative class members. *U.S. Army Corps of Engi-*
 10 *neers v. Hawkes Co.*, 578 U.S. 590, 598 (2016). A “turnback” does not fix the legal
 11 relations between the parties. As evidenced by the experience of the Individual
 12 Plaintiffs—four of whom received CBP One appointments in the ordinary course
 13 even before they filed their preliminary-injunction motions—a noncitizen who may
 14 be “turned back” is in the same legal position that he would be otherwise. The noncit-
 15 izen may still wait to cross the border into the POE or may obtain an appointment
 16 through CBP One and present at a POE.⁹

17 **C. Management of Intake at POEs Is Committed to Agency**
 18 **Discretion.**

19 Plaintiffs’ APA claims should be dismissed for the independent reason that
 20 they ask the Court to review CBP’s management of intake and processing of undoc-
 21 umented noncitizens, which implicates the “complicated balancing of a number of
 22 factors which are peculiarly within [the agency’s] expertise,” and is therefore “com-
 23 mitted to agency discretion by law” and unreviewable under the APA. 5 U.S.C. §
 24 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

25 Congress has charged DHS and CBP with managing POEs in a safe and

26 ⁹ The *AOL I* court held that final agency action was not necessary to claim withhold-
 27 ing of agency action under 5 U.S.C. § 706(1). See *Al Otro Lado*, 2021 WL 3931890,
 28 at *8. Defendants disagree on this point, and in any event Plaintiffs’ Fourth Claim
 for Relief is the only one brought under 5 U.S.C. § 706(1).

1 orderly manner that balances competing priorities including combatting terrorism,
2 managing and securing the safety of the borders, and ensuring orderly and efficient
3 flow of lawful traffic and commerce. *See* 6 U.S.C. §§ 111(b)(1), 202, 211(c), (g)(3);
4 8 U.S.C. § 1103(a)(1), (3), (5). Managing the intake and processing of undocu-
5 mented noncitizens—those with and without appointments—allows CBP to balance
6 its multiple missions and “manage the flows [of migrants] in a safe and efficient
7 manner.” 88 Fed. Reg. at 31,318. Such mission-balancing and resource-management
8 is a core matter for executive discretion, *see Heckler*, 470 U.S. at 831, which is es-
9 pecially important in the context of border management, as it implicates the “dy-
10 namic nature of relations with other countries,” *Arizona v. United States*, 567 U.S.
11 387, 397 (2012), like Mexico and other regional partners. And neither the statutes
12 nor the November 2021 Guidance provide a meaningful standard against which to
13 judge CBP’s discretion relating to the timing of inspection of individuals without
14 appointments who are waiting to enter the POE.

15 Plaintiffs will likely argue that this discretion is overridden by mandatory stat-
16 utory duties of inspection and referral under Section 1225. *See, e.g., Al Otro Lado*,
17 394 F. Supp. 3d at 1211. This argument fails because these statutory duties do not
18 extend to those still outside the United States. *Infra* § V. But even if the statutes did
19 apply extraterritorially, CBP and DHS must be able to exercise discretion over bor-
20 der management to control whether and how to exercise their duty to inspect indi-
21 viduals under Section 1225(a)(3) (the precursor to any referral or processing duties
22 under Section 1225(b)). The Supreme Court has made clear that even seemingly
23 mandatory duties give way to discretion in the law-enforcement context, including
24 immigration law enforcement. *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S.
25 748, 761 (2005) (noting the “deep-rooted nature of law-enforcement discretion, even
26 in the presence of seemingly mandatory legislative commands”); *City of Chicago v.*
27 *Morales*, 527 U.S. 41, 62 n.32 (1999); *Reno v. Am.-Arab Anti-Discrimination*
28 *Comm.*, 525 U.S. 471, 483 (1999) (recognizing “discretion to abandon” removal

1 efforts despite mandatory statutory language). This complaint cannot be used to ob-
 2 tain supervision over individualized discretionary decisions made at each POE each
 3 day.

4 Accordingly, Plaintiff cannot assert an APA claim challenging an alleged de-
 5 nial or delay of inspection and processing—even one based on alleged violation of
 6 CBP’s guidance—because DHS and CBP’s management of intake at POEs is com-
 7 mitted to their discretion, and there are no meaningful standards by which to judge
 8 that exercise of discretion.

9 **V. The Asylum and Expedited Removal Statutes Do Not Extend Beyond**
 10 **the U.S. Territory.**

11 Plaintiffs’ Second, Third, Fourth, and Fifth Claims for Relief are expressly or
 12 necessarily premised on their assertion that noncitizens who approach a POE are
 13 entitled to inspection and processing under the expedited removal statute in conjunc-
 14 tion with the asylum statute. *See, e.g.*, Compl. ¶¶ 169–70, 185, 193, 202. Yet these
 15 statutes do not apply to noncitizens who are still in Mexico. These claims should
 16 thus be dismissed as a matter of law because Plaintiffs cannot show any statutory
 17 entitlement to inspection and processing by those who approach a POE.

18 Under the INA, “[a]ny alien who is physically present *in* the United States or
 19 who arrives *in* the United States . . . may apply for asylum.” 8 U.S.C. § 1158(a)(1)
 20 (emphases added). If an inadmissible noncitizen “who is arriving *in* the United
 21 States” and is processed for expedited removal indicates an intention to apply for
 22 asylum or a fear of persecution to an immigration officer, the officer “shall refer the
 23 alien for an interview by an asylum officer.” *Id.* § 1225(b)(1)(A)(ii) (emphasis
 24 added). These provisions unambiguously require a noncitizen to be *in* the United
 25 States to apply for asylum, and for immigration officers to have any obligation to
 26 inspect noncitizens for admission, process them for expedited removal, or refer them
 27 for a credible-fear interview with an asylum officer. Defendants recognize that the
 28 *AOL I* court held that these provisions apply not only to those in the United States

1 but also to those who are “in the process of arriving in” the United States because
2 they have approached the border with an intent to enter at a POE. *See Al Otro Lado*,
3 2021 WL 3931890, at *10 (citing *Al Otro Lado*, 394 F. Supp. 3d at 1198–1205).
4 Defendants raise this argument to preserve it, particularly given that the appeal from
5 the *AOL I* judgment—in which Defendants challenge that holding—is scheduled to
6 be argued on November 28.¹⁰

7 The *AOL I* court’s reasoning was incorrect. That court reasoned that the pre-
8 sent-tense phrase “arrives in” in the asylum statute, Section 1158(a)(1), shows that
9 arrival is not a discrete event of physically being within the United States, but is
10 instead a process that begins before arrival. But Section 1158(a)(1) does not speak
11 to a *process* of arrival. It permits a noncitizen to apply for asylum the moment the
12 noncitizen “is physical[ly] present *in*” or “arrives *in*” the United States. 8 U.S.C. §
13 1158(a)(1) (emphases added). The statute’s use of the simple present tense creates a
14 nexus between a noncitizen’s right to apply for asylum and his current physical pres-
15 ence or arrival “*in the United States.*” 8 U.S.C. § 1158(a)(1). The present-tense
16 phrase “arrives in” speaks to the present moment of arrival, not some potential arri-
17 val in the future. *See United States v. Balint*, 201 F.3d 928, 933 (7th Cir. 2000) (not-
18 ing that the present tense “often indicates contemporaneous action, . . . particularly
19 in the simple present tense”). A statute’s use of present-tense language is also meant
20 to indicate that the provision applies prospectively. *Carr v. United States*, 560 U.S.
21 438, 448 (2010). While the present-tense usage indicates that those who “arrive in”
22 the United States in the future may apply for asylum at the time they arrive, it does
23 not mean that someone who has not yet arrived in the United States may apply for
24

25 ¹⁰ Neither this Court nor the Ninth Circuit is bound by the Ninth Circuit stay panel’s
26 predictive analysis that the *AOL I* Court’s statutory interpretation “has considerable
27 force.” *See Al Otro Lado v. Wolf*, 952 F.3d 999, 1013 (9th Cir. 2020). This analysis
28 was for purposes of evaluating a stay request and is not binding on the merits. *See*
Doe v. San Diego Unified Sch. Dist., 19 F.4th 1173, 1177 n.4 (9th Cir. 2021).

1 asylum.

2 The definition of the verb “arrive” reinforces that conclusion. “When we say
3 that a person ‘arrives’ in a location, we mean he *reaches* that location, not that he is
4 somewhere on his travels toward it. An alien thus ‘arrives in’ the United States or he
5 does not; there is no in-between.” *Al Otro Lado*, 952 F.3d at 1028 (Bress, J., dissent-
6 ing); *see also* The Oxford English Dictionary 651 (2d ed. 1989) (defining “arrive”
7 as “to come to the end of a journey, to a destination, or to some definitive place”);
8 The American Heritage Dictionary of the English Language 102 (3d ed. 1992) (de-
9 fining “arrive” as “to reach a destination”). Thus, “[o]ne who ‘arrives in the United
10 States’ is one who, at the very least, has crossed *into* the United States.” *Al Otro*
11 *Lado*, 952 F.3d at 1028 (Bress, J., dissenting).¹¹

12 This same reasoning applies to the use of the words “arrives in” and “arriving
13 in” in Sections 1225(a)(1) and 1225(b)(1)(A)(ii). Although the present-progressive
14 phrase “arriving in” in Section 1225(b)(1)(A)(ii) could denote a process of arrival,
15 nothing in either Section 1158 or 1225 indicates that such a process begins *before* a
16 noncitizen crosses the border. To the contrary, “the words of a statute must be read
17 in their context and with a view to their place in the overall statutory scheme.” *Davis*
18 *v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809 (1989). Section 1225 as a whole

19
20 ¹¹ The *AOL I* court incorrectly reasoned that because 1158(a)(1)’s reference to a
21 noncitizen “who is physically present in the United States” covers noncitizens within
22 the United States, the reference to a noncitizen “who arrives in the United States”
23 must mean another group—*i.e.*, noncitizens “who may not yet be in the United
24 States, but who [are] in the process of arriving in the United States through a POE.”
25 *Al Otro Lado*, 394 F. Supp. 3d at 1199–1200. But Congress’s inclusion of both
26 groups of noncitizens in Sections 1158(a)(1) and 1225(a)(1) is not surplusage but
27 instead reflects a longstanding legal fiction that noncitizens who “arrive[] at a port
28 of entry—for example, an international airport” are “on U.S. soil, but [are] not con-
sidered to have entered the country” and are “treated . . . as if stopped at the border.”
DHS v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020). By using both phrases, Con-
gress made clear that those who arrive at a port of entry may apply for asylum, not-
withstanding the legal fiction that they were stopped at the border.

1 focuses on the inspection of “[a]n alien present in the United States who has not been
 2 admitted or who arrives in the United States,” 8 U.S.C. § 1225(a)(1), and on the
 3 “remov[al]” of such noncitizens “from the United States,” *id.* § 1225(b)(1)(A)(i); *see*
 4 *also id.* § 1225(b)(2)(C) (permitting the Government to “return” a noncitizen “who
 5 is arriving on land” from a contiguous foreign territory back to that territory pending
 6 removal proceedings). Indeed, one cannot be removed “from” a particular location
 7 without first being present in that location. Section 1225 thus indicates that a process
 8 of “arriving in the United States” begins when a noncitizen crosses the border and
 9 generally continues until the Government makes a final admissibility determination.
 10 *See Matter of M-D-C-V-*, 28 I. & N. Dec. 18, 23 (BIA 2020) (holding that a noncitizen
 11 “apprehended just inside the border upon crossing into the United States . . . is
 12 properly considered to be ‘arriving’” under 8 U.S.C. § 1225(b)(2)(C)); 8 C.F.R. §
 13 1001.1(q) (providing that “[t]he term arriving alien means an applicant for admission
 14 coming or attempting to come into the United States *at a port-of-entry*,” and that
 15 “[a]n arriving alien remains an arriving alien even if paroled” (emphasis added)).

16 Because Plaintiffs’ Second through Fifth Claims for Relief are based on a
 17 claimed statutory entitlement that does not exist, these claims fail as a matter of law.

18 **VI. Plaintiffs Cannot State a Due Process Claim.**

19 Plaintiffs’ Fifth Claim for Relief asserts a due process violation that is entirely
 20 derivative of their claims that the agency is acting contrary to the immigration statute.
 21 Their claim is that withholding or delay of a claimed statutory “right to be inspected
 22 and processed at a POE” also violates due process. Compl. ¶¶ 202–03, 205.
 23 Even if Plaintiffs were correct that “turnbacks” withhold a statutory right, however,
 24 a deprivation of a statutory privilege does not equate to a violation of the Due Process
 25 Clause, which is about ensuring adequate procedures surrounding deprivations
 26 of protected interests. *See Snowden v. Hughes*, 321 U.S. 1, 11 (1944) (“Mere violation
 27 of a . . . statute does not infringe the federal Constitution.”); *Pinnacle Armor, Inc. v. United States*,
 28 648 F.3d 708, 716 (9th Cir. 2011) (a procedural due process

1 claim “hinges on proof of two elements: (1) a protect[ed] liberty or property interest
2 ... and (2) a denial of adequate procedural protections.”). Just as in the *Accardi* con-
3 text, the failure of an agency to follow its procedures is not the same as a violation
4 of due process. *See Brown v. Holder*, 763 F.3d 1141, 1148 (9th Cir. 2014) (“[T]he
5 ... failure of an agency to follow its regulations is not a violation of due process.”).
6 Here, Plaintiffs merely equate a claimed statutory violation with a due process vio-
7 lation, without explaining why procedural due process interests—such as notice and
8 opportunity to be heard—are implicated. As such, they have failed to state a claim
9 for a due process violation.

10 Regardless, “it is long settled as a matter of American constitutional law that
11 foreign citizens outside U.S. territory do not possess rights under the U.S. Constitu-
12 tion.” *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 140 S. Ct. 2082,
13 2086 (2020) (collecting cases). That is especially true in the immigration context,
14 where “certain constitutional protections available to persons inside the United
15 States are unavailable to aliens outside of our geographic borders.” *Zadvydas v. Da-*
16 *vis*, 533 U.S. 678, 693 (2001). The Supreme Court’s “rejection of extraterritorial
17 application of the Fifth Amendment [is] emphatic.” *United States v. Verdugo-Ur-*
18 *quidez*, 494 U.S. 259, 269 (1990); *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950).
19 Those on Mexican soil—like the Individual Plaintiffs at the time they claim to have
20 been “turned back”—have no basis to invoke the Fifth Amendment. Although the
21 *AOL I* court determined that the Fifth Amendment applies in a similar context, it
22 relied on the “functional approach” of *Boumediene v. Bush*, 553 U.S. 723 (2008),
23 and concluded that because the alleged conduct was presumably conducted by CBP,
24 the Fifth Amendment applied. *Al Otro Lado*, 394 F. Supp. 3d at 1218–21; *see also*
25 *Al Otro Lado*, 2021 WL 3931890, at *18–20. But *Boumediene* is about asserted
26 rights in Guantanamo Bay, not about whether the Fifth Amendment applies extra-
27 territorially to noncitizens located in a foreign, sovereign state in areas the U.S. Gov-
28 ernment does not control. *Boumediene*, 553 U.S. at 732. Nor is *Boumediene* “about

1 immigration at all.” *Thuraissigiam*, 140 S. Ct. at 1981. That decision did nothing to
2 undermine the principle that a noncitizen seeking admission has no constitutional
3 rights regarding their application for asylum. *Landon v. Plasencia*, 459 U.S. 21, 32
4 (1982); *Mendoza-Linares v. Garland*, 51 F.4th 1146, 1148 (9th Cir. 2022). For these
5 reasons, Plaintiffs’ due process claim should be dismissed.

6 **VII. Plaintiffs Cannot State a Claim under the Alien Tort Statute.**

7 Finally, Plaintiffs’ Sixth Claim for Relief should be dismissed, because it
8 would be an extraordinary exercise of judicial power to recognize a new cause of
9 action for claimed non-refoulement violations against the United States under the
10 Alien Tort Statute (ATS), 28 U.S.C. § 1350. The ATS confers jurisdiction on a fed-
11 eral district court over a civil action by a noncitizen for “a tort only, committed in
12 violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350.
13 This language is “strictly jurisdictional” and does not create a cause of action. *See*
14 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713–14, 724 (2004). There were only three
15 specific offenses against the law of nations recognized at the time the ATS was en-
16 acted (“violation of safe conducts, infringements of the rights of ambassadors, and
17 piracy”)—none of which Plaintiffs invoke. *Id.* To recognize a new cause of action
18 over which the ATS confers jurisdiction, the plaintiff must first demonstrate “that
19 the alleged violation is ‘of a norm that is specific, universal, and obligatory.’” *Jesner*
20 *v. Arab Bank*, 138 S. Ct. 1386, 1399 (2018) (quoting *Sosa*, 542 U.S. at 732). Then,
21 even if the norm at issue meets these requirements, “it must be determined further
22 whether allowing th[e] case to proceed under the ATS is a proper exercise of judicial
23 discretion.” *Jesner*, 138 S. Ct. at 1399 (citing *Sosa*, 542 U.S. at 732–33). The “deci-
24 sion to create a private right of action is one better left to legislative judgment in the
25 great majority of cases,” and Congress has not authorized courts “to seek out and
26 define new and debatable violations of the law of nations.” *Sosa*, 542 U.S. at 727,
27 728, 729. Here, the Court should not recognize a new cause of action.

28 *First*, the United States has not waived its sovereign immunity for suit for

1 alleged violations of customary international law. The ATS itself does not waive the
2 United States’ sovereign immunity. *E.g.*, *Quintero Perez v. United States*, 8 F.4th
3 1095, 1100–01 (9th Cir. 2021). The *AOL I* court held that the APA supplies the
4 waiver of sovereign immunity for Plaintiffs’ ATS claim, because they seek injunc-
5 tive and declaratory relief. *See Al Otro Lado*, 327 F. Supp. 3d at 1308 (citing 5 U.S.C.
6 § 702; *Navajo Nation v. Dep’t of the Interior*, 876 F.3d 1144, 1172 (9th Cir. 2017)).
7 Yet this ruling was unnecessary to the Court’s later decision that the claim was not
8 actionable. *See, e.g.*, *Affiliated Ute Citizens of State of Utah v. Ute Indian Tribe of*
9 *Uintah & Ouray Rsrv.*, 22 F.3d 254, 256 (10th Cir. 1994). And there is no reason to
10 believe that Congress, when enacting the APA’s 1976 waiver provision, contem-
11 plated that it was waiving sovereign immunity for future actions for nonmonetary
12 relief against the United States for alleged violations of international law. Further,
13 as discussed below, there is substantial reason to decline to recognize a cause of
14 action against the United States even if the APA could supply the waiver of sover-
15 eign immunity for an ATS tort claim.

16 *Second*, the conduct alleged does not constitute violations of a sufficiently
17 specific international law norm. Here, there is no “general assent of civilized na-
18 tions” to the norm Plaintiffs assert, *see Presbyterian Church of Sudan v. Talisman*
19 *Energy, Inc.*, 582 F.3d 244, 254 (2d Cir. 2009), because non-refoulement is not uni-
20 versally defined to prohibit the alleged conduct Plaintiffs complain of. *See, e.g.*,
21 *Quintero Perez*, 8 F. 4th at 1107 (Friedland, J., concurring) (ATS plaintiff must es-
22 tablish that the *particular type* of extrajudicial killing at issue is a violation of a non-
23 derogable norm). As the *AOL I* court held, there is no universal norm “understood
24 to provide protection to those who present themselves at a country’s borders but are
25 not within a country’s territorial jurisdiction.” *Al Otro Lado*, 2021 WL 3931890, at
26 *21. The *AOL I* court’s ruling in this regard applies equally to the conduct alleged
27 by Plaintiffs in this action—alleged turnbacks before the noncitizens cross the
28

1 international boundary—and requires dismissal of Plaintiffs’ ATS claim here.¹² As
 2 the *AOL I* court explained, both other states’ practices and controlling U.S. case law
 3 negates a finding of a universal norm. Plaintiffs’ allegations that a customary non-
 4 refolement norm exists as to asylum-seekers are primarily based on the language
 5 of, and nation-states’ accession to, Article 33 of the Refugee Convention. Compl.
 6 ¶¶ 35-36 (citing Article 33 of the Refugee Convention and authorities interpreting
 7 it). But the U.S. Supreme Court analyzed the language of Article 33 in *Sale v. Hai-*
 8 *tian Centers Council, Inc.*, 509 U.S. 155 (1993), and determined it did not create
 9 obligations as to individuals outside a nation’s territory. *See id.* at 179–87; *Al Otro*
 10 *Lado*, 2021 WL 3931890, at *22. *Sale* also relied on the Convention’s history, which
 11 suggests that the non-refoulment clause does not impose obligations regarding “mass
 12 migrations across frontiers,” in contradiction to Plaintiffs’ allegation (at ¶ 210) that
 13 the norm is universally understood to apply at the border. *See Sale*, 509 U.S. at 185,
 14 186. It is thus at minimum debatable that non-refoulement principles contemplate
 15 any obligation toward individuals still outside a nation’s territory, and “acceptance
 16 of [the] specific extraterritorial application of non-refoulement [that Plaintiffs al-
 17 lege] is not universal.” *Id.* at *22.

18 *Third*, even if there were a sufficiently specific, universal norm at issue, the
 19 Court should nonetheless decline under *Sosa*’s second step to create a novel tort
 20 action against the United States for non-refoulement violations. The separation-of-
 21 powers concerns that “apply with particular force in the context of the ATS,” *Jesner*,
 22 138 S. Ct. at 1403, counsel strongly against recognizing a new cause of action here.
 23 Although the United States acceded to Article 33 of the Refugee Convention when
 24

25 ¹² “[A] final judgment retains its collateral estoppel effect, if any, while pending
 26 appeal.” *Collins v. D.R. Horton, Inc.*, 505 F.3d 874 (2007). Collateral estoppel may
 27 be applied defensively against HBA because AOL and the *AOL I* class should not
 28 be able to avoid that result by adding a party to this litigation with aligning interests
 that were adequately represented in the first lawsuit by the same counsel. *See gen-*
erally Taylor v. Sturgell, 553 U.S. 880, 894–95 (2008).

1 it signed on to the 1967 Protocol Relating to the Status of Refugees (Protocol), *INS*
2 *v. Stevic*, 467 U.S. 407, 416 (1984), that Protocol is non-self-executing, and noncit-
3 izens thus have no domestically enforceable rights thereunder. *Khan v. Holder*, 584
4 F.3d 773, 783 (9th Cir. 2009). The withholding of removal provision at 8 U.S.C. §
5 1231(b)(3)(A) embodies U.S. non-refoulement obligations under the Protocol, but
6 the same section provides that “[n]othing in this section shall be construed to create
7 any substantive or procedural right or benefit that is legally enforceable by any party
8 against the United States or its agencies or officers or any other person.” 8 U.S.C.
9 § 1231(h). Congress also placed limitations on judicial review and available relief
10 relating to statutory withholding of removal. *See* 8 U.S.C. §§ 1252(a)(5), (b)(9),
11 (f)(1). In light of these Congressional limits on enforceable rights under Article 33
12 and available relief, recognizing a federal common-law claim for non-refoulement
13 violations would be manifestly contrary to the Supreme Court’s instruction to exer-
14 cise “great caution” in recognizing causes of action under the ATS. *See Sosa*, 542
15 U.S. at 727–28.

16 It would likewise be an extraordinary exercise of judicial authority to create a
17 cause of action against the United States for alleged violations of customary inter-
18 national law. The ATS was intended to provide for personal liability and thus “to
19 promote harmony in international relations by ensuring foreign plaintiffs a remedy
20 for international-law violations in circumstances where the absence of such a remedy
21 might provoke foreign nations to hold the *United States* accountable.” *Jesner*, 138
22 S. Ct. at 1406 (emphasis added); *Sosa*, 542 U.S. at 724. Nothing in the statute or
23 history suggests that it was intended to impose liability against the United States.
24 For these reasons, Plaintiffs’ ATS claim is not actionable and should be dismissed.

25 CONCLUSION

26 This Court should dismiss Plaintiffs’ Complaint for lack of jurisdiction or fail-
27 ure to state a claim.
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DATED: November 13, 2023

Respectfully submitted,
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CERTIFICATE OF SERVICE

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

DATED: September 13, 2023

Respectfully submitted,

/s/ Katherine J. Shinnors
KATHERINE J. SHINNORS
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United States Department of Justice

EXHIBIT 1

1300 Pennsylvania Avenue, NW
Washington, DC 20229



**U.S. Customs and
Border Protection**

Commissioner

November 1, 2021

MEMORANDUM FOR: William A. Ferrara
Executive Assistant Commissioner
Office of Field Operations

FROM: Troy A. Miller
Acting Commissioner
U.S. Customs and Border Protection

SUBJECT: **Guidance for Management and Processing of
Undocumented Noncitizens at Southwest Border
Land Ports of Entry**

This memorandum provides updated guidance for the management and processing of noncitizens who, without proper documents (“undocumented noncitizens”), present at land ports of entry (POEs) along our Southwest Border, including those who may be seeking humanitarian protection in the United States. This memorandum also rescinds and supersedes the November 27, 2019 memorandum from the former Commissioner, *Prioritization-Based Queue Management*; and CBP Office of Field Operations (OFO) April 27, 2018 and April 30, 2020 memoranda, *Metering Guidance*. Today, Secretary Mayorkas rescinded Secretary Nielsen’s June 5, 2018 memorandum, *Prioritization-Based Queue Management*, upon my recommendation.

The ability to process undocumented noncitizens in a timely manner is impacted by a wide range of factors, including staffing constraints, outdated infrastructure, and significantly at this time, the COVID-19 pandemic. The COVID-19 pandemic specifically has limited processing and holding capacity based on protocols to protect the workforce, the noncitizens whom we encounter at the POEs, and the American public. The Centers for Disease Control and Prevention’s August 2, 2021 Public Health Order, which was issued pursuant to Title 42 of the U.S. Code and suspends the introduction of certain non-citizens into the United States for public health reasons, remains in force, and we will continue to implement it as applicable. At all times, the capacity to process undocumented noncitizens must take into account CBP’s other vital priorities, including our mission to protect public safety and national security, interdict the flow of narcotics and contraband, and facilitate lawful trade and travel.

Guidance for Management and Processing of Undocumented Noncitizens at the SWB LPOEs
Page 2

Even before the COVID-19 pandemic, processing capacity was limited due to increasingly large volumes of lawful trade and travel. During the five years preceding the pandemic, CBP processed, on average, 326 inadmissible individuals each day at POEs across the Southwest land border. At the same time, CBP apprehended, on average, a much larger number—1,266 individuals each day—between POEs.

As a complement to enforcement efforts between POEs and to incentivize an alternative to such unlawful crossings, I instruct Southwest Border OFO management to consider and take appropriate measures, as operationally feasible, to increase capacity to process undocumented noncitizens at Southwest Border POEs, including those who may be seeking asylum and other forms of protection. As part of this effort, CBP personnel should continue to employ and should further accelerate ongoing steps to leverage technological and processing efficiencies to streamline POE processing.

Possible additional measures include the innovative use of existing tools such as the CBPOne™ mobile application, which enables noncitizens seeking to cross through land POEs to securely submit certain biographic and biometric information prior to arrival and thus streamline their processing upon arrival. OFO also should accelerate ongoing efforts to digitize processing at POEs and more effectively use data to increase throughput. In developing these solutions, CBP should, as appropriate, collaborate with interested non-governmental organizations and other key partners, consistent with applicable privacy protections and civil rights and civil liberties.

Importantly, however, asylum seekers or others seeking humanitarian protection cannot be required to submit advance information in order to be processed at a Southwest Border land POE. The submission (or lack thereof) of advance information should not influence the outcome of any inspection. CBP will continue to make admissibility and processing determinations on a case-by-case-basis at the POE.

A POE's capacity to process undocumented noncitizens is influenced by operational realities and circumstances that could change day to day and could include unanticipated incidents, emergencies, or challenges. However, POEs must strive to process all travelers, regardless of documentation status, who are waiting to enter, as expeditiously as possible, based on available resources and capacity. At all times, the capacity to process undocumented noncitizens must take into account CBP's other vital priorities, including our mission to protect public safety and national security, interdict the flow of narcotics and contraband, and facilitate lawful trade and travel.

CBP may manage the intake of undocumented noncitizens at POEs, including by providing staffing at the border line to facilitate and manage safe and orderly travel into the POE. In all cases, however, undocumented noncitizens who are encountered at the border line should be permitted to wait in line, if they choose, and proceed into the POE for processing as operational capacity permits. Absent a POE closure, officers also may not instruct travelers that they must return to the POE at a later time or travel to a different POE for processing. Officers also may not preclude those in line from departing and returning at a later time. Once in the United States, an individual must be inspected and processed by CBP Officers and may not be directed to return across the land border without appropriate processing.

Guidance for Management and Processing of Undocumented Noncitizens at the SWB LPOEs
Page 3

Based on past, current, and expected volumes of individuals seeking entry at Southwest Border land POEs, there may be extended wait times in processing lines.

This Administration has outlined a comprehensive strategy to expand safe, orderly, and humane pathways for migration, including for noncitizens who may be seeking protection to access the United States. *See* Executive Order 14010, 86 FR 8267 (2021). This guidance is issued in furtherance of that strategy and is effective immediately.

EXHIBIT 2

operational needs, coordinating field operations, and collecting and sharing mission-critical information with key stakeholders. The Incident Response Branch has maintained oversight of OFO's assistance in operations for the enforcement of the Centers for Disease Control and Prevention's (CDC) Title 42 public health Order and transition at termination.

2. I am familiar with the above-captioned case. I am aware that the plaintiffs in this case challenge OFO's treatment of noncitizens without documents sufficient for lawful admission (referred to here as "undocumented noncitizens") who approach POEs on the southwest border (SWB) without a CBP One appointment, alleging that OFO has a policy of turning back such individuals.

Policy and Operational Guidance

3. Within OFO, Directorates at OFO Headquarters (HQ), including the Operations Directorate, are responsible for establishing and distributing policy and guidance that is applicable to OFO Field Offices across the country. All such national-level policy and guidance is binding on the field. Local leadership at the POE level may interpret OFO's national guidance, to operations at that particular location, thus providing appropriate messaging about that policy and how it may impact local operations. Field leadership also has the authority to establish local guidance or protocols, based upon the unique needs and physical realities of each location. However, in all cases, such local guidance must be consistent with the relevant HQ guidance, which must also be distributed. A memorandum constitutes formal guidance which provides background, context, and expectations for the field to follow. The accompanying written muster contains the detailed procedures associated with the memorandum explaining how to operationalize the guidance that is being addressed, and is typically explained in such a way

that is easy for the officer to understand. The muster might include more detail such as screenshots of the secondary system or examples of situations related to the guidance.

4. On November 1, 2021, the Acting Commissioner of CBP issued a memorandum titled, *Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry*. A true and accurate copy is attached as Exhibit A to this declaration. This memorandum directed Field Offices to take steps to increase processing of undocumented noncitizens, including through the use of technology to help facilitate processing. The memorandum articulated that all undocumented noncitizens seeking to enter a POE must be processed as expeditiously as possible, and that undocumented noncitizens are not required to use available CBP technology to submit advance information in order to be processed. The memorandum further directed officers not to instruct travelers that they must return to the POE at a later time, or travel to a different POE for processing, absent a POE closure. This memorandum was distributed to the SWB field offices on or about November 2, 2021.

5. Following the issuance of the November 2021 memorandum, OFO developed and issued operational guidance instructing ports to process undocumented noncitizens consistent with the November 2021 memorandum, the 2022 declaratory judgment in *Al Otro Lado v Mayorkas*, and the anticipated end of the Title 42 public health Order. This HQ policy guidance outlined general principles, including the instruction that port leadership should take operationally feasible steps to increase their capacity to process undocumented noncitizens. The HQ policy guidance further directed each Field Office on the SWB to apply the general principles outlined in the policy and develop their own operational plans for their specific operational environments. In accordance with this guidance, each Field Office developed their

own local protocols and procedures for processing migrants following the lifting of Title 42, which addressed details such as how many people may be safely processed at a particular POE, where and how many officers to assign at a given location, and steps to ensure safe conditions for individuals waiting in line.

6. On May 11, 2023, OFO HQ issued a memorandum and an associated muster titled *Post-Title 42 Port Operations* to all Field Offices. A true and accurate redacted copy of that memorandum and muster is attached as Exhibit B to this declaration. The memorandum and muster contained in Exhibit B contain redactions to protect sensitive information, including the contact information of CBP personnel. It also includes redactions to certain information which is law enforcement sensitive, including screen shots of OFO's processing systems and details of how OFO exercises its law enforcement discretion to take certain enforcement actions. As noted above, it is typical for OFO HQ to issue guidance to the field in this manner. This memorandum described the lifting of the Title 42 public health Order and directed OFO to return to the inspection and processing of all noncitizens arriving in the United States pursuant to Title 8 of the U.S. Code. Accordingly, the memorandum outlined that noncitizens could no longer be prevented entry under Title 42 at the U.S.-Mexico international boundary line, nor could they be subject to Title 42 expulsions. The memorandum specified that OFO personnel may not "turn back, redirect, or prevent any noncitizen without appropriate documents sufficient for admission from applying for entry at any POE." The memorandum further specified that undocumented noncitizens are strongly encouraged, but not required, to use the CBP One mobile application to schedule an appointment to present at a POE. All POEs were reminded to process noncitizens in accordance with the November 2021 memorandum.

7. I have personally discussed the requirements of the OFO HQ policies discussed above with officials across the SWB, as part of at least weekly engagements with Field Office leadership and SWB POE managers, since the policies were issued and most recently in a discussion with these same individuals on August 16, 2023. In these conversations, I have reiterated and emphasized to the field that all noncitizens who present themselves at a POE to apply for admission, regardless of whether they have scheduled an appointment through CBP One, must be processed as soon as operationally able, and may not be turned away from POEs.

CBP One's Role in Maintaining Safe and Secure Conditions at the Border and Harm if CBP Were Prevented from Using the App

8. The scheduling capability available in the CBP One mobile application for undocumented noncitizens to schedule an appointment at a POE is a critical tool for OFO in its efforts to ensure a safe and secure environment for the travelling public and to increase the number of such noncitizens processed at POEs on the SWB. Information submitted in advance as part of the process also enables POEs to streamline processing of noncitizens upon arrival. Specifically, the advance information received via the CBP One mobile application enables POEs to vet noncitizens prior to their arrival, which provides a mechanism for POEs to more efficiently manage and allocate limited resources to process different groups of noncitizens. For example, if advance vetting reveals that a noncitizen with an appointment has criminal history or may pose a public safety risk, OFO can plan for sufficient resources to address those risks upon arrival. Similarly, vetting may reveal that there are multiple family units arriving with appointments, and thus the POE can plan for and ensure they are equipped to meet the humanitarian needs of such families. Moreover, noncitizens who arrive with a CBP One appointment arrive at a pre-arranged, planned time, and in orderly groups. The POEs expect

their arrival and can ensure sufficient staffing and resources to safely and efficiently process the individuals, in most cases at the pre-arranged time and location within the POE.

9. The use of the CBP One mobile application thus helps to enable ports to process more undocumented noncitizens than they can process without the appointment system. Importantly, this appointment system allows CBP to distribute resources to all of its mission sets at POEs, including the processing of lawful trade and travel and protecting national security, while still tending to the important mission of processing undocumented noncitizens. From a safety standpoint, CBP One also benefits noncitizens. This is because the ability to schedule an appointment means that noncitizens seeking to enter the United States are not required to wait outside a POE to be processed where they may be exposed to the elements, such as high temperatures and potential safety risks.

10. CBP strives to maximize the number of available CBP One appointments. While noncitizens are encouraged to schedule an appointment through CBP One, an appointment is not required to access a U.S. POE. That said, POEs prioritize the processing of those with CBP One appointments. OFO's ability to process noncitizens who arrive without appointments varies based on operational realities that are unique to each POE. Since May 12, 2023, CBP data shows that, as of August 23, 2023, that OFO has processed approximately 112,000 noncitizens who provided advance information and scheduled their arrival through CBP One and approximately 47,000 noncitizens who did not schedule their arrival. At the eight POEs that provide CBP One appointments, these numbers, by Field Office, are as follows: El Paso: approximately 16,000 noncitizens who provided advance information and scheduled their arrival through CBP One and approximately 6,000 noncitizens who did not schedule their arrival; Laredo: approximately 57,000 noncitizens who provided advance information and scheduled their arrival through CBP

One and approximately 19,500 noncitizens who did not schedule their arrival; San Diego: approximately 32,000 noncitizens who provided advance information and scheduled their arrival through CBP One and approximately 12,000 noncitizens who did not schedule their arrival; Tucson: approximately 6,000 noncitizens who provided advance information and scheduled their arrival through CBP One and approximately 4,000 noncitizens who did not schedule their arrival. CBP also continues to take steps to improve the CBP One app, including but not limited to, enhancing the user experience to better serve users seeking to schedule an appointment.

11. If CBP were prevented from prioritizing the processing of noncitizens with appointments who submitted advance information, or prevented from using such appointments to manage travel into the POEs, I expect that there would be significant harm to port operations, as well as to noncitizens themselves. Such an action would, in fact, likely serve to *decrease* the number of such noncitizens able to be processed, and would require OFO to divert additional staffing and resources to the processing of such individuals. Such diversion of resources has, in the past, had a significant negative impact on OFO operations, as well as on the broader U.S. public and U.S. economy.

12. In the absence of the ability to prioritize those with appointments and to manage the pace of processing undocumented noncitizens, POEs can quickly become overcrowded as more undocumented noncitizens are required to be held at the POEs. Overcrowding can have disastrous effects because OFO's facilities are short-term holding facilities designed to hold a limited number of individuals for a limited period of time. As such, OFO's facilities lack showers, beds, laundry facilities, and space for exercise and recreation. Similarly, OFO's facilities lack equipment necessary to meet the needs of families with small children or individuals with unique medical needs. The limited design and function of OFO's facilities

makes it difficult for OFO to segregate vulnerable populations from the rest of those in custody. Additionally, as the numbers of individuals able to be processed decreases, wait times would likely increase for all arriving individuals. Individuals may end up waiting on bridges outside POEs for extended periods of time, exposed to the elements and without access to showers, hygiene supplies, or toilet facilities. Limiting the use of CBP One and decreasing the number processed per day would only exacerbate any humanitarian concerns.

Allegations Related to Noncitizens without CBP One Appointments

13. In my role as Director of the Incident Response Branch, I am aware of certain allegations and issues relating to the processing of undocumented noncitizens at certain SWB POEs, particularly those who arrive without CBP One appointments. CBP generally receives such complaints and becomes aware of issues through non-governmental organizations (NGOs), as part of CBP's extensive outreach and engagement with such entities. I am aware that, at the local level, Port and Field Office leadership engage regularly with NGOs and other entities to address and to resolve identified issues. At the HQ level, similar national level engagements occur recurrently with NGOs and other entities to address concerns.

14. I am aware of allegations that noncitizens without CBP One appointments were refused access to POEs, were "turned back," or were told that they must make a CBP One appointment to enter the POE. OFO has learned that in some of the alleged situations, the noncitizens in question were not, in fact, refused access to POEs, but were rather informed by CBP officers that they may need to wait to enter the POE for a period of time due to resource and capacity constraints. In other alleged situations, OFO discovered that when wait times for those without CBP One appointments were expected to be long, CBP officers informed

undocumented noncitizens about the existence of the CBP One appointment process, as an option if they did not wish to wait at the physical border.

15. I am also generally aware that allegations have been made by individual noncitizens who claim that they have been unable to access POEs. OFO has looked into these allegations and discovered that, at times, undocumented noncitizens without a CBP One appointment may have been prevented from accessing a U.S. POE by officials of the Mexican government. Mexico, as a sovereign country, has the right to manage migration in whatever manner it deems appropriate, and accordingly, has implemented certain exit controls applicable to noncitizens leaving Mexican territory. CBP does not, in any way, direct or control the Mexican government or direct them to take any actions on Mexican soil.

16. That said, OFO communicates regularly with the Mexican government about all manner of cross-border issues, including vehicle and cargo wait times, medical and other emergencies, and potential safety and security risks. Additionally, OFO sometimes receives advance notification from Mexican authorities about groups of noncitizens enroute to POEs for whom OFO may wish to provide specialized attention upon arrival, such as unaccompanied children or individuals needing immediate emergency care. In these situations, the Mexican government provides this type of information for awareness and as a courtesy. In none of OFO's interactions with the Mexican government does OFO require the Mexican government to take certain action.

17. I am also aware that several bridges which abut or span the U.S.-Mexico border in Texas are owned and operated by commercial companies, by private owners, or by the local municipality, on either or both the U.S.- and Mexican side of the border. These entities may have their own fees for use, rules or policies, and may make their own independent decision

about who may enter the bridge. CBP similarly does not have any role, to include input, in any such restrictions.

Plaintiffs' Processing

18. I understand that, independent of the above captioned case, several of the individual noncitizen plaintiffs have received appointments through their previously established CBP One registrations and appointment applications. These noncitizen plaintiffs include: an individual known as Pablo Doe, who received a CBP One appointment scheduled for August 18, 2023 at El Paso, Texas; an individual known as Natasha Doe, who received a CBP One appointment scheduled for August 23, 2023 at Laredo, Texas; an individual known as Elena Doe, who received a CBP One appointment scheduled for August 22, 2023 at San Ysidro, California; and an individual known as Alexander Doe (though I understand that Alexander Doe has withdrawn his claim), who received a CBP One appointment scheduled for August 10, 2023 at San Ysidro, California.

19. Further, OFO manually scheduled CBP One appointments for 16 individuals who I understand to be either individual noncitizen plaintiffs in the above captioned case, proceeding under the pseudonyms of Diego Doe, Luisa Doe, Laura Doe, Somar Doe, Guadalupe Doe, Michelle Doe, or noncitizen plaintiffs' accompanying family members. These appointments were scheduled for August 18, and August 19, 2023 at the San Ysidro POE. I am aware that these named individual noncitizen plaintiffs and their family members may have encountered difficulties exiting Mexico and entering the San Ysidro POE. I understand that these challenges, if true, were the result of exit controls implemented by the Mexican government specifically related to whether the individuals had confirmed CBP One appointment. As noted above, CBP does not, in any way, direct or control the Mexican government nor play any role in

any decisions by the Mexican government \ I nonetheless understand that all 16 individuals have been processed at the San Ysidro POE consistent with the manually scheduled CBP One appointments.

20. I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 13th day of September, 2023.

STEPHANIE E WATSON Digitally signed by STEPHANIE E WATSON
Date: 2023.09.13.16:21:41 -0400'

Stephanie Watson
Director, Incident Response Branch
Operations Directorate
Office of Field Operations
U.S. Customs and Border Protection

EXHIBIT A

1300 Pennsylvania Avenue, NW
Washington, DC 20229



**U.S. Customs and
Border Protection**

Commissioner

November 1, 2021

MEMORANDUM FOR: William A. Ferrara
Executive Assistant Commissioner
Office of Field Operations

FROM: Troy A. Miller
Acting Commissioner
U.S. Customs and Border Protection

SUBJECT: **Guidance for Management and Processing of
Undocumented Noncitizens at Southwest Border
Land Ports of Entry**

This memorandum provides updated guidance for the management and processing of noncitizens who, without proper documents (“undocumented noncitizens”), present at land ports of entry (POEs) along our Southwest Border, including those who may be seeking humanitarian protection in the United States. This memorandum also rescinds and supersedes the November 27, 2019 memorandum from the former Commissioner, *Prioritization-Based Queue Management*; and CBP Office of Field Operations (OFO) April 27, 2018 and April 30, 2020 memoranda, *Metering Guidance*. Today, Secretary Mayorkas rescinded Secretary Nielsen’s June 5, 2018 memorandum, *Prioritization-Based Queue Management*, upon my recommendation.

The ability to process undocumented noncitizens in a timely manner is impacted by a wide range of factors, including staffing constraints, outdated infrastructure, and significantly at this time, the COVID-19 pandemic. The COVID-19 pandemic specifically has limited processing and holding capacity based on protocols to protect the workforce, the noncitizens whom we encounter at the POEs, and the American public. The Centers for Disease Control and Prevention’s August 2, 2021 Public Health Order, which was issued pursuant to Title 42 of the U.S. Code and suspends the introduction of certain non-citizens into the United States for public health reasons, remains in force, and we will continue to implement it as applicable. At all times, the capacity to process undocumented noncitizens must take into account CBP’s other vital priorities, including our mission to protect public safety and national security, interdict the flow of narcotics and contraband, and facilitate lawful trade and travel.

Guidance for Management and Processing of Undocumented Noncitizens at the SWB LPOEs
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Even before the COVID-19 pandemic, processing capacity was limited due to increasingly large volumes of lawful trade and travel. During the five years preceding the pandemic, CBP processed, on average, 326 inadmissible individuals each day at POEs across the Southwest land border. At the same time, CBP apprehended, on average, a much larger number—1,266 individuals each day—between POEs.

As a complement to enforcement efforts between POEs and to incentivize an alternative to such unlawful crossings, I instruct Southwest Border OFO management to consider and take appropriate measures, as operationally feasible, to increase capacity to process undocumented noncitizens at Southwest Border POEs, including those who may be seeking asylum and other forms of protection. As part of this effort, CBP personnel should continue to employ and should further accelerate ongoing steps to leverage technological and processing efficiencies to streamline POE processing.

Possible additional measures include the innovative use of existing tools such as the CBPOne™ mobile application, which enables noncitizens seeking to cross through land POEs to securely submit certain biographic and biometric information prior to arrival and thus streamline their processing upon arrival. OFO also should accelerate ongoing efforts to digitize processing at POEs and more effectively use data to increase throughput. In developing these solutions, CBP should, as appropriate, collaborate with interested non-governmental organizations and other key partners, consistent with applicable privacy protections and civil rights and civil liberties.

Importantly, however, asylum seekers or others seeking humanitarian protection cannot be required to submit advance information in order to be processed at a Southwest Border land POE. The submission (or lack thereof) of advance information should not influence the outcome of any inspection. CBP will continue to make admissibility and processing determinations on a case-by-case-basis at the POE.

A POE's capacity to process undocumented noncitizens is influenced by operational realities and circumstances that could change day to day and could include unanticipated incidents, emergencies, or challenges. However, POEs must strive to process all travelers, regardless of documentation status, who are waiting to enter, as expeditiously as possible, based on available resources and capacity. At all times, the capacity to process undocumented noncitizens must take into account CBP's other vital priorities, including our mission to protect public safety and national security, interdict the flow of narcotics and contraband, and facilitate lawful trade and travel.

CBP may manage the intake of undocumented noncitizens at POEs, including by providing staffing at the border line to facilitate and manage safe and orderly travel into the POE. In all cases, however, undocumented noncitizens who are encountered at the border line should be permitted to wait in line, if they choose, and proceed into the POE for processing as operational capacity permits. Absent a POE closure, officers also may not instruct travelers that they must return to the POE at a later time or travel to a different POE for processing. Officers also may not preclude those in line from departing and returning at a later time. Once in the United States, an individual must be inspected and processed by CBP Officers and may not be directed to return across the land border without appropriate processing.

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Based on past, current, and expected volumes of individuals seeking entry at Southwest Border land POEs, there may be extended wait times in processing lines.

This Administration has outlined a comprehensive strategy to expand safe, orderly, and humane pathways for migration, including for noncitizens who may be seeking protection to access the United States. *See* Executive Order 14010, 86 FR 8267 (2021). This guidance is issued in furtherance of that strategy and is effective immediately.

EXHIBIT B

1300 Pennsylvania Avenue, NW
Washington, DC 20229



**U.S. Customs and
Border Protection**

May 11, 2023

MEMORANDUM FOR: Executive Directors, Headquarters
Directors, Field Operations
Office of Field Operations

FROM:

Casey Durst **PII**
Executive Director, Operations
Office of Field Operations

Matthew S. Davies **PII**
Executive Director, Admissibility and Passenger Programs
Office of Field Operations

SUBJECT: Post-Title 42 Port Operations

On Thursday, May 11, 2023 at 23:59 ET, the Centers for Disease Control and Prevention (CDC) will lift the Title 42 Public Health Order. Moreover, the Department of Homeland Security (DHS) will no longer require noncitizen, non-lawful permanent resident travelers entering the United States via land ports of entry (POEs) and ferry terminals to be fully vaccinated against COVID-19 and provide related proof of vaccination upon request. The lifting of Title 42 will affect POE operations for Office of Field Operations (OFO) personnel as U.S. Customs and Border Protection (CBP) resumes all Title 8 processing operations.

OFO will return to inspecting and processing all noncitizens arriving in the United States pursuant to Title 8 of the U.S. Code. As such, noncitizens will no longer have their entry prevented or be subject to Title 42 expulsions. These changes in OFO's operational landscape will be addressed through strategic resource leveraging in the following areas of consideration: pre-processing steps, port security, inspecting of all travelers including noncitizens, and efficient, safe release from POEs.

As OFO returns to processing undocumented noncitizen applicants for admission under Title 8, noncitizens who lack documents sufficient for admission are strongly encouraged, but not required, to use the CBP One™ mobile application to schedule an appointment to present at a POE. All POEs will process noncitizens in accordance with the November 1, 2021 memorandum titled, *Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry*, and their respective field office plans. OFO will not turn back, redirect, or prevent any noncitizen without appropriate documents sufficient for admission from applying for entry at any POE in a safe, orderly, and humane manner.

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Post-Title 42 Port Operations

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OFO will manage the intake of noncitizens arriving at POEs, as operationally feasible, including the identification and funneling of noncitizens that have utilized CBP One™ to schedule their arrival. Where feasible, travelers will be processed in the following priority order upon arrival:

1. U.S. Citizens, Lawful Permanent Residents, and Trusted Travelers
2. Travelers in possession of valid entry documents
3. Noncitizens with CBP One™ scheduled arrivals
4. Noncitizens without CBP One™ scheduled arrivals

Should the integrity of POEs or the safety of OFO personnel and the traveling public become jeopardized by operational realities, the Acting Commissioner's authority to temporarily close a POE is delegated to Senior Executive Service members. To maintain the integrity of POEs and safety of OFO personnel and the traveling public, POEs will take active, preventative measures when necessary, including the suspension of operations when required due to security concerns.

Please ensure this memorandum and the attached muster are distributed to port personnel. Should you require additional information on operational matters, please contact Petra Horne, Deputy Executive Director, Operations, at PII [REDACTED] for policy concerns related to the processing of applicants for admission, please contact Emilia Bakopoulos, (A) Deputy Executive Director, Admissibility and Passenger Programs, a PII [REDACTED]

Muster

Date: May 11, 2023

Topic: Post-Title 42 Port Operations

Headquarters POCs: Operational Concerns: Incident Response Branch

PII [REDACTED]

Admissibility Policy Concerns: SEAL PII [REDACTED]

Overview: On May 11, 2023, at 23:59 ET, the Centers for Disease Control and Prevention's (CDC) will lift the Title 42 Public Health Order. In alignment with the termination of the Presidential Proclamation on air travel, the Department of Homeland Security (DHS) will no longer require noncitizen, non-lawful permanent resident travelers entering the United States via land ports of entry (POEs) and ferry terminals to be fully vaccinated against COVID-19 and provide related proof of vaccination upon request (Title 19 Temporary Travel Restrictions). With the lifting of these restrictions, U.S. Customs and Border Protection (CBP), Office of Field Operations (OFO) personnel at POEs will ensure:

- CBP officers will not turn back, redirect, or prevent the entry of a noncitizen without documents sufficient for admission at any POE.
- All travelers, including noncitizens without documents sufficient for admission, will be processed in a safe, orderly manner under Title 8.
- OFO will balance the need to process noncitizens without documents sufficient for admission at land POEs with the duty to execute the critical priority missions to protect the American people, safeguard our borders, and enhance the Nation's economic prosperity through the facilitation of lawful trade and travel.

Pre-Processing:

- Through DHS announcements and initiatives, noncitizens without documents sufficient for admission will be encouraged, but not required, to schedule an appointment to present at a POE through the CBP One™ mobile application.
 - POEs may prioritize the inspection and processing of noncitizens without documents sufficient for admission with CBP One™ appointments over those without CBP One™ appointments.

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- The lifting of Title 42 and its related measures, including anticipated operational effects, does not change OFO's commitment to the facilitation of lawful trade and travel; where operationally feasible, travelers will be processed in the following priority order upon arrival:
 1. U.S. Citizens (USCs), Lawful Permanent Residents (LPRs), and Trusted Travelers
 2. Travelers in possession of valid entry documents
 3. Noncitizens with CBP One™ scheduled arrivals
 4. Noncitizens without CBP One™ scheduled arrivals
- If HQ-issued signage is available at a POE, it should be posted in a manner that maximizes public awareness of available processing lines for each of the above 4 categories, in languages most useful to demographics encountered at the POE.
- Where physical queuing space is limited due to infrastructure or security measures, and staging multiple pedestrian lines for each of the above 4 categories is not possible, the following structures should be utilized:
 - Where only 3 lines are possible:
 - Line 1: USCs, LPRs, Trusted Travelers, and travelers with valid entry documents
 - Line 2: Noncitizens without documents sufficient for admission with CBP One™ scheduled arrivals
 - Line 3: Noncitizens without documents sufficient for admission without CBP One™ scheduled arrivals
 - Where only 2 lines are possible:
 - Line 1: USCs, LPRs, Trusted Travelers, and travelers with valid entry documents
 - Line 2: Noncitizens without documents sufficient for admission
- Noncitizens without documents sufficient for admission arriving by vehicle should not be prioritized for secondary processing over pedestrian arrivals.
- When noncitizens are required to wait outdoors on U.S. soil for extended periods of time, OFO will ensure the following resources are all regularly made available:
 - Cover from sun and/or weather conditions
 - Water and food (which may include snacks)
 - Toilet facilities
- OFO will assist in providing urgent medical care when required, to include health screenings when necessary.
 - POEs should leverage contract medical support, where available, and certified medical professionals, such as emergency medical technicians and paramedics.

Port Security:

- POEs will take active, preventative measures when necessary, including the suspension of operations when required due to security concerns.
 - The use of barricades, fencing, and alike infrastructure should be leveraged where available and appropriate.

- Available law enforcement assets such as Special Response Team operators and/or Mobile Field Force personnel should be deployed where available and appropriate.

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- When n circumstances reasonably preclude the exercise of such authority by the Acting Commissioner, the authority to close temporarily any OFO office or POE along the southwest border between the United States and Mexico, or to temporarily take any other lesser action that may be necessary to respond to the specific threat to human life, is delegated (See *Delegation Order 22-027* dated December 05, 2022) to Senior Executive Leadership.

Processing:

- Noncitizens without documents sufficient for admission who arrive with confirmed CBP One™ scheduled arrivals will be processed in **Law Enforcement Sensitive** **Law Enforcement Sensitive** as it confirms facial submission, displays user provided information, and allows for more efficient secondary processing.
- While noncitizens without documents sufficient for admission with CBP One™ scheduled arrivals will be prioritized for processing over those without scheduled arrivals, a scheduled arrival will not determine the processing disposition applied under Title 8; each processing disposition will be determined on a case-by-case basis, considering the totality of circumstances.
 - All available processing dispositions under Title 8 should be considered.
 - Custody determinations with U.S. Immigration and Customs Enforcement (ICE), Enforcement Removal Operations (ERO) will continue.
- DHS previously established a process that provides certain nationals of Cuba, Haiti, Nicaragua, and Venezuela (CHNV), along with their qualifying immediate family members, the opportunity to request advance authorization to travel to the United States to seek a discretionary grant of parole at an air POE.
 - CHNV noncitizens without sufficient documents for admission encountered by OFO at a land border POE, may in the exercise of discretion, based on the facts and circumstances known to the officer, be offered the opportunity to withdraw their application for admission and return to Mexico in lieu of removal proceedings, and remain eligible for the aforementioned parole process provided that such Withdrawal (WD) would be their first with CBP, whether Border Patrol or OFO after either January 9, 2023 (for Cubans, Haitians and Nicaraguans), or December 20, 2022 (for Venezuelans); ports are reminded that when processing a

CHNV national for a WD of their application for admission, the provisions of the Discretionary Authority Directive remain in effect.

- The following statement must be read in its entirety in a language understood by the CHNV noncitizen prior to permitting any WD:

“You may withdraw your application for admission to the United States and return to Mexico instead of being placed in removal proceedings. Withdrawal of your application is a voluntary decision. You are not required to withdraw your application for admission and depart, and you may instead decide to remain in the United States to be placed in removal proceedings and seek relief or protection from removal, including asylum, if appropriate.

The United States currently offers a parole process that allows Cuban, Haitian, Nicaraguan or Venezuelan nationals and their immediate family members to come to the United States. That parole process provides a safe and orderly way for Cuban, Haitian, Nicaraguan or Venezuela nationals who lack sufficient U.S. entry documents to be considered, on a case-by-case basis, for advance authorization to travel and a temporary period of parole into the United States for up to 2 years.

Participants in that process must have a supporter in the United States, pass certain security checks, and fly to an interior location in the United States. To seek participation in that process, however, you must be outside the United States.

You may choose to depart the United States voluntarily a single time and still be eligible for the parole process. You are being given an opportunity now to withdraw your application for admission and return to Mexico so that you remain eligible for that parole process.”

- CBP officers will determine the appropriate processing disposition under Title 8, including Expedited Removal (ER), Notice to Appear (NTA), and where appropriate, WD, for each noncitizen on a case-by-case-basis at the time the noncitizen presents themselves at the POE.

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- Noncitizens seeking to withdraw their application for admission on the southwest border will continue to be provided with information via Form I-275.

- Regardless of the nationality of a noncitizen without documents sufficient for admission, including the CHNV population, POEs will continue to process individuals who present national security or public safety concerns for ER, including referral to U.S. Citizenship and Immigration Services (USCIS) for credible fear determination when applicable, and detention coordination with ERO.

- If OFO cannot complete a removal when appropriate, ERO will be contacted; if ERO declines custody, it should be annotated **Law Enforcement Sensitive**

- If an NTA disposition is determined to be appropriate given the totality of circumstances, noncitizens without documents sufficient for admission that presented at a POE with a CBP One™ scheduled arrival may be considered for parole, on a case-by-case basis, for a period up to 24 months to attend removal proceedings.

- If an NTA disposition is determined to be appropriate given the totality of circumstances, noncitizens that presented at a POE without a CBP One™ scheduled arrival may be considered for parole, on a case-by-case basis, for a period up to 12 months to attend removal proceedings.

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- If that determination occurs, a Form I-213 is still required to record the arrival and inadmissibility of the noncitizen.
- Processing of unaccompanied children (UC) remains unchanged.

Release:

- OFO only provides short-term holding of individuals for processing, repatriation, release, or transfer to other federal agencies.
- OFO turns all individuals over to law enforcement partners or releases directly from POEs; however, OFO will continue to coordinate with non-governmental organizations and state and local partners to enable support for noncitizens who may seek assistance upon release from POEs.
- If OFO's detention and/or transportation resources are unable to match noncitizen apprehension volumes, the processing of some or all individuals (see aforementioned priority order) may need to be halted, suspended, or limited due to the suspension of POE operations.