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20 **UNITED STATES DISTRICT COURT**
 21 **SOUTHERN DISTRICT OF CALIFORNIA**

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

23 Plaintiffs,

24 v.

25 ALEJANDRO MAYORKAS, *et al.*,

26 Defendants.

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

Hon. Andrew G. Schopler

**PLAINTIFFS' OPPOSITION TO
 DEFENDANTS' MOTION TO
 DISMISS**

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1 **I. INTRODUCTION**

2 Defendants pulled the rug out from under hundreds of asylum seekers.
3 Ignoring the fact that many refugees waiting to be inspected at Class A Ports of Entry
4 on the U.S.-Mexico border (“POEs”) have little money, unreliable access to the
5 internet, and limited knowledge of English, they adopted a policy that requires
6 arriving noncitizens at POEs to make an appointment on a smartphone app that many
7 noncitizens do not understand, cannot easily access, or cannot afford to use. Under
8 this policy, nearly every arriving noncitizen at a POE must use the “CBP One” app
9 to make an appointment before they can access the asylum process. If a noncitizen
10 does not do so, CBP officers standing at the physical demarcation point between U.S.
11 and Mexican territory (the “limit line”) turn them back to Mexico or direct Mexican
12 officials to do so.

13 But the Immigration and Nationality Act (“INA”) makes the asylum process
14 available to *all* arriving noncitizens, regardless of whether they have the right phone,
15 speak the right language, or can afford a data plan. And, indeed, Defendants’ own
16 binding guidance states that those without appointments should not be turned away.
17 But for those refugees with the wrong phone, wrong language, or without enough
18 money, the hope of seeking asylum in the United States and escaping persecution is
19 a dead letter. Many others are forced to wait for weeks or months in dangerous
20 conditions in Mexican border towns, hoping to obtain an appointment to come to a
21 POE and be inspected. This policy is patently illegal. The INA, Due Process Clause
22 of the Fifth Amendment, and international legal principles all guarantee arriving
23 noncitizens a right to access the U.S. asylum process without being turned away
24 simply because they did not successfully use Defendants’ preferred app.

25 **II. FACTUAL BACKGROUND**

26 **A. All Plaintiffs Were Harmed By The Policy**

27 Plaintiffs are nine individuals (the “Individual Plaintiffs”) who attempted to seek
28 asylum at POEs and two nonprofit immigrant rights organizations that support

1 migrants at the U.S.-Mexico border (the “Organizational Plaintiffs”). Compl. ¶¶ 10-
2 21. All of them were harmed when Defendants, who collectively set and enforce
3 policies for inspecting and processing asylum seekers at those POEs, began turning
4 away arriving noncitizens who did not have CBP One appointments. *Id.* ¶¶ 23-25, 61,
5 86-87, 91-151. Defendants’ conduct denied the Individual Plaintiffs and the putative
6 class (the “Class”) rights provided to them by Defendants’ own stated policy, the
7 INA, the Due Process Clause of the Fifth Amendment, and international legal
8 principles, and put their lives at grave risk. *Id.* ¶¶ 29-37, 116-140.

9 **B. Defendants Promised Not To Turn Back Arriving Noncitizens**

10 The worst part of Defendants’ conduct is that they know it is wrong. After
11 years of using different tactics to turn back arriving noncitizens at POEs, Compl. ¶¶
12 46-50, on November 1, 2021, Defendants issued a memorandum prohibiting U.S.
13 Customs and Border Protection (“CBP”) officers at POEs from turning back
14 noncitizens without proper travel documents who are in the process of arriving in the
15 United States. *Id.* ¶ 51. That memorandum is clear: “asylum seekers or others seeking
16 humanitarian protection cannot be required to submit advance information in order
17 to be processed at a [POE].” *Id.*

18 On May 11, 2023, Defendants promulgated a new rule that, while erecting
19 barriers to asylum eligibility, contemplates that all noncitizens in the process of
20 arriving at a POE will be able to access the U.S. asylum process regardless of whether
21 they have a CBP One appointment. Compl. ¶ 52; *see also* Circumvention of Lawful
22 Pathways, 88 Fed. Reg. 31,314, 31,358 (May 16, 2023) (“CLP Rule”). The preamble
23 to the CLP Rule explains that CBP’s policy “is to inspect and process all arriving
24 noncitizens at POEs, regardless of whether they have used the CBP One app,” and
25 that any arriving noncitizens without CBP One appointments “will not be turned
26 away.” Compl. ¶ 59; 88 Fed. Reg. at 31,358.

1 **C. Despite Their Promises, Defendants Turned Back Arriving**
2 **Noncitizens**

3 Despite these public pronouncements, starting on May 12, 2023, Defendants
4 began turning back arriving noncitizens without CBP One appointments from POEs.
5 Compl. ¶¶ 61, 86-87, 91-115. This conduct followed a similar pattern at POEs along
6 the U.S.-Mexico border. At the San Ysidro, California POE, CBP officials standing
7 at the limit line told noncitizens without proper travel documents that they could not
8 be inspected and processed unless they had a CBP One appointment before turning
9 them back to Mexico. *See* Compl. ¶ 91. Similarly, at the Paso Del Norte POE in El
10 Paso, Texas, CBP officers standing at the limit line told arriving noncitizens that they
11 could not be inspected or processed unless they had a CBP One appointment and then
12 turned them back to Mexico. *Id.* ¶ 101. Indeed, CBP officers even turned back
13 noncitizens arriving at the Paso Del Norte POE who explained that they had suffered
14 severe hardships making it impossible for them to wait for a CBP One appointment.
15 *Id.* ¶¶ 103-04 (CBP officer told asylum seeker who feared returning to Mexico, where
16 he had been previously kidnapped and beaten, to make a CBP One appointment
17 because “everyone is saying they’re kidnapped these days”). At the Matamoros POE
18 in Brownsville, Texas, CBP officers turned away a Mexican Indigenous woman who
19 had been previously raped in Mexico, telling her that she needed to return to Mexico
20 and make a CBP One appointment. *Id.* ¶ 110. At the Reynosa POE in McAllen, Texas,
21 CBP officers turned back an Armenian man to Mexico on three different occasions
22 despite his pleas that he had been trying unsuccessfully to get a CBP One
23 appointment for over two months. *Id.* ¶ 111. And at the DeConcini POE in Nogales,
24 Arizona, CBP refused to process virtually all those waiting in line without CBP One
25 appointments on most days in July 2023. *Id.* ¶ 113. When a young Mexican woman
26 with her infant son approached the POE to ask how to seek asylum, a CBP officer
27 told her there was nothing she could do. *Id.*

28 The Individual Plaintiffs suffered a similar fate. After fleeing domestic

1 violence in Mexico, Plaintiff Elena Doe attempted to use the CBP One app to get an
2 appointment to seek asylum at a POE. Compl. ¶¶ 17, 131. Feeling desperate after she
3 had trouble downloading the app, she went to the San Ysidro POE to seek asylum.
4 *Id.* ¶ 17. However, the CBP officer standing at the limit line laughed at her for not
5 having a CBP One appointment and refused to inspect and process her. *Id.*

6 Pablo Doe fled gang violence and extortion attempts in Honduras to seek
7 asylum in the United States. Compl. ¶ 15. During his journey to the border, he was
8 assaulted and lost his cell phone and life savings. *Id.* When he arrived in Ciudad
9 Juarez, Mexico, Pablo Doe obtained another cell phone and attempted to use the CBP
10 One app to make an appointment at the nearby Paso Del Norte POE. *Id.* However,
11 the CBP One app froze frequently and displayed error messages in English that Pablo
12 did not understand. *Id.* After many unsuccessful attempts to get a CBP One
13 appointment, Pablo decided to seek asylum directly at the Paso Del Norte POE. *Id.*
14 However, when he approached the POE, a CBP officer standing at the limit line told
15 Pablo that he could not apply for asylum without a CBP One appointment. *Id.* When
16 Pablo told the officer about his struggles to use the CBP One app, the CBP officer
17 responded that those were not the officer's problem. *Id.*

18 Those stories are just the tip of the iceberg. CBP officers standing at the limit
19 line have repeatedly told arriving noncitizens that they must have CBP One
20 appointments to seek asylum in the United States before turning them back to Mexico.
21 *See* Compl. ¶¶ 12-21, 91-107. CBP officers did so regardless of humanitarian
22 exigencies; regardless of whether they were sending asylum seekers, including
23 Mexican nationals, back to persecution; and regardless of whether the noncitizens
24 could actually access and use the CBP One app. *See id.* ¶ 12 (asylum seeker who told
25 CBP she did not have a working phone was turned back and instructed to use the
26 CBP One app); ¶ 19 (CBP officers turned back Mexican citizen who was fleeing
27 organized crime in Mexico); ¶ 103 (CBP officers discounted asylum seeker's
28 statement that he had been kidnapped and beaten in Mexico and turned him back to

1 Mexico). At times, CBP officers turn back arriving noncitizens directly. At other
2 times, CBP coordinates with Mexican officials to do CBP’s bidding. *See* Compl. ¶¶
3 97, 106.

4 The only logical explanation for the sudden, simultaneous, and border-wide
5 nature of these turnbacks is that Defendants have adopted a policy of turning back
6 noncitizens without CBP One appointments. *See* Compl. ¶¶ 1-6. Plaintiffs refer to
7 this policy as the “CBP One Turnback Policy.” Whether Defendants have committed
8 this policy to writing is unknown to Plaintiffs. However, Defendants have a history
9 of adopting similar policies but refusing to put them in writing for months or even
10 years. *Id.* ¶ 49. Indeed, CBP officers frequently receive verbal “muster” orders that
11 are never committed to writing. *Id.* ¶ 50.

12 **D. Defendants’ Turnbacks Have Caused Serious And Ongoing Harm**

13 Defendants’ CBP One Turnback Policy forces arriving noncitizens to wait
14 indefinitely in dangerous conditions with a flawed app as their only lifeline. Migrants
15 in Mexico often have little money, no job prospects, precarious accommodations, and
16 inconsistent access to food, water, and medicine. Compl. ¶ 119. According to the U.S.
17 State Department, “[v]iolent crime—such as homicide, kidnapping, carjacking, and
18 robbery—is widespread and common in Mexico.” *Id.* ¶ 120. Migrants are easy targets
19 for criminals because many are destitute and often do not blend into the local
20 population in border towns. *Id.* They must also routinely contend with corrupt local
21 officials whose tactics include extortion and arbitrary detention. *Id.* The CBP One
22 Turnback Policy facilitates the efforts of cartels and gangs to victimize migrants. *Id.*
23 ¶¶ 121-22. For example, on the Mexican side of the Laredo, Texas POE, the
24 Northeast Cartel routinely kidnaps noncitizens who have been turned back by CBP
25 and holds them for ransom. *Id.* ¶ 122.

26 Migrants who are unable to access POEs and are forced to wait in Mexico for
27 a CBP One appointment have suffered horrific harm. One such migrant in Matamoros
28 was raped in late May 2023. Compl. ¶ 123. In June 2023, while she was still trying

1 to obtain a CBP One appointment, her assailant returned and attempted to rape her
2 again. *Id.*

3 Migrant camps in Mexican border towns are overcrowded due to CBP's refusal
4 to regularly process arriving noncitizens without CBP One appointments. In
5 Matamoros (across the border from Brownsville, Texas), some migrants have been
6 forced to seek shelter at an abandoned gas station that has no water, air conditioning,
7 or electricity. Compl. ¶ 127.

8 **E. Defendants Have Forced Arriving Noncitizens To Use A Flawed**
9 **App To Access The U.S. Asylum Process**

10 All these problems are exacerbated by Defendants' reliance on the CBP One
11 app. To use the app, migrants must download it from the Apple or Google app stores,
12 accept terms and conditions that may not be available in their native language, and
13 then create an account at Login.gov, a separate website that Defendants use for
14 authentication purposes. Compl. ¶ 64. Users must provide extensive personally
15 identifying information, create a password, and provide some form of two-factor
16 authentication (which requires, for example, a working phone number). *Id.* Only then
17 can a noncitizen begin the process of logging into the CBP One app. *Id.*

18 After accessing the app, a noncitizen must provide extensive information to
19 the U.S. government, including their name, date of birth, place of birth, country of
20 citizenship, country of residence, height, weight, hair and eye color, marital status,
21 parentage, travel document number (including its issuance and expiration dates),
22 employment history, and a destination address and emergency contact number in the
23 United States. Compl. ¶ 65. The noncitizen may then attempt to get an appointment
24 at a POE, but only after they turn on the geolocation feature on their phone and take
25 a live video selfie showing that a real person matching their biometric information is
26 seeking the appointment. *Id.* If during any step in this process, the noncitizen makes
27 a mistake, there is no way to correct that error. *Id.* ¶ 66. CBP One is only available
28 in English, Spanish, and Haitian Creole. *Id.* ¶ 76. If a noncitizen does not understand

1 how to navigate the app, there is no helpline—just a 47-page user guide that is written
2 only in English and Spanish and an email address that no one answers. *Id.* ¶ 67.

3 The CBP One app creates an insurmountable barrier for many noncitizens
4 seeking to access the U.S. asylum process. Many cannot afford smartphones with the
5 type of operating systems that support and have sufficient space for the gargantuan
6 220 MB CBP One app. Compl. ¶¶ 71, 75. Others do not speak any of the three
7 languages currently supported by the app. *Id.* ¶¶ 76-77. In addition, the Haitian Creole
8 version of the app is riddled with translation problems that make certain language
9 nonsensical or confusing. *Id.* ¶ 79. Many migrants do not have access to electrical
10 outlets to charge their phones or reliable Wi-Fi. *Id.* ¶¶ 71-73. People with disabilities
11 may be entirely unable to use the app or have extreme difficulty getting the app to
12 recognize their faces. *Id.* ¶ 80. Finally, people with darker complexions have reported
13 that the app routinely fails to recognize them. *Id.* ¶¶ 81-82.

14 **F. Plaintiffs’ Complaint And Procedural History**

15 Access to the U.S. asylum process is not supposed to depend on an individual’s
16 ability to navigate a smartphone app in order to obtain an appointment. The INA,
17 Due Process Clause, and international law clearly require Defendants to inspect and
18 process all noncitizens who are in the process of arriving in the United States at a
19 POE. Compl. ¶¶ 29-32. Moreover, Defendants cannot publicly adopt a binding policy
20 requiring them to inspect and process all arriving noncitizens and then do the opposite.
21 On July 27, 2023, Plaintiffs filed their Complaint, seeking declaratory and injunctive
22 relief as well as vacatur of the CBP One Turnback Policy for Defendants’ violations
23 of the *Accardi* doctrine, *see United States ex rel. Accardi v. Shaughnessy*, 347 U.S.
24 260, 268 (1954); Sections 706(1) and 706(2) of the Administrative Procedure Act
25 (“APA”); the Due Process Clause of the Fifth Amendment; and the non-refoulement
26 doctrine (via the Alien Tort Statute (“ATS”). Pursuant to Federal Rule of Civil
27 Procedure 23(b)(2), Plaintiffs seek to certify a class consisting of all noncitizens who
28 seek or will seek to present themselves at a Class A POE on the U.S.-Mexico border

1 to seek asylum, and who were or will be prevented from accessing the U.S. asylum
2 process by or at the direction of Defendants based on the CBP One Turnback Policy.

3 LEGAL STANDARD

4 In considering a motion to dismiss under Federal Rule of Civil Procedure
5 12(b)(6), the Court must “accept the complaint’s well-pleaded factual allegations as
6 true, and construe all inferences in the [Plaintiffs’] favor.” *Ariz. Students’ Ass’n v.*
7 *Ariz. Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016); *Hebbe v. Pliler*, 627 F.3d
8 338, 341-42 (9th Cir. 2010). Courts must deny a motion to dismiss if the plaintiff has
9 alleged “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*
10 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “If there are two alternative
11 explanations, one advanced by defendant and the other advanced by plaintiff, both of
12 which are plausible, plaintiffs’ complaint survives a motion to dismiss under Rule
13 12(b)(6).” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). This plausibility
14 standard is not a “probability requirement.” *Id.* at 1217 (emphasis omitted). Rather,
15 it simply “asks for more than a sheer possibility that a defendant has acted unlawfully.”
16 *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

17 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) tests
18 whether the Court has subject matter jurisdiction. *See Meland v. Wever*, 2 F.4th 838,
19 843-44 (9th Cir. 2021). Jurisdictional dismissals for suits premised on federal
20 question jurisdiction “are exceptional.” *Safe Air for Everyone v. Meyer*, 373 F.3d
21 1035, 1039 (9th Cir. 2004). A Rule 12(b)(1) motion may be facial or factual. *White*
22 *v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). Under a factual attack, like the one here,
23 a defendant challenges the truth of the alleged facts that would otherwise be sufficient
24 for jurisdiction. *Id.* In a factual attack, the Court may rely on allegations outside the
25 pleadings without converting the motion to dismiss into a motion for summary
26 judgment. *Meyer*, 373 F.3d at 1039. However, it may not do so when “the
27 jurisdictional issue and substantive issues are so intertwined that the question of
28 jurisdiction is dependent on the resolution of factual issues going to the merits.”

1 *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). “The question of
 2 jurisdiction and the merits of an action are intertwined where ‘a statute provides the
 3 basis for both subject matter jurisdiction and the plaintiff’s substantive claim for
 4 relief.” *Meyer*, 373 F.3d at 1039 (quoting *Sun Valley Gasoline, Inc. v. Ernst Enters.,*
 5 *Inc.*, 711 F.2d 138, 139 (9th Cir. 1983)).

6 ARGUMENT

7 **III. THE INDIVIDUAL PLAINTIFFS’ CLAIMS ARE NOT MOOT, AND 8 THEY HAVE STANDING.**

9 **A. Mootness**

10 Defendants claim that the Individual Plaintiffs’ claims are moot because “there
 11 is no indication that they will be subject to the same alleged conduct again.” ECF No.
 12 68-1 at 12. Defendants are wrong for several reasons. First, a party claiming mootness
 13 bears a “heavy burden” of proof. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d
 14 1006, 1017 (9th Cir. 2012) (quotation marks omitted). Here, Defendants have the
 15 burden of proof backwards. As the party claiming mootness, they must prove that it
 16 is “absolutely clear that the allegedly wrongful behavior could not reasonably be
 17 expected to recur.” *Friends of the Earth, Inc. v. Laidlaw Env’t Servs.*, 528 U.S. 167,
 18 170 (2000). But Defendants have not established that the Individual Plaintiffs will
 19 not be subject to the CBP One Turnback Policy in the future or demonstrated the kind
 20 of formal and final reversal of that policy that would be required to render an
 21 otherwise live claim moot.¹

22 Second, the Plaintiffs’ claims are not moot because they seek to represent a
 23 class of individuals whose claims are “inherently transitory.” *County of Riverside v.*
 24 *McLaughlin*, 500 U.S. 44, 52, quoting *U.S. Parole Comm’n v. Geraghty*, 445 U.S.

25
 26 ¹ Given the cursory nature of the expedited removal process, it is not uncommon for
 27 noncitizens such as the Individual Plaintiffs to be removed and later seek to return to
 28 the United States. Defendants have not offered any assurance at all that in such a
 situation the Individual Plaintiffs will not be subjected to the challenged CBP One
 Turnback Policy.

1 388, 399 (1980). Where an individual plaintiff seeks to represent a class, the class
2 claims remain live as long as there is a “controversy . . . between a named defendant
3 and a member of the class represented by the named plaintiff.” *Sosna v. Iowa*, 419
4 U.S. 393, 402 (1975). In such cases, as long as the individual plaintiffs’ claims were
5 not moot when the lawsuit was filed, the class certification decision “relates back” to
6 the time the complaint was filed. *County of Riverside*, 500 U.S. at 51–52.

7 The government claims that the “relation-back” rule does not apply in this case
8 because “it is not ‘certain that other persons similarly situated will continue to be
9 subject to the challenged conduct.’” ECF No. 68-1 at 12.² At best, that presents a
10 factual issue that is not ripe for decision at the motion to dismiss stage. Countless
11 other similarly situated individuals have been turned back since May 11, 2023, and
12 are currently trying to obtain CBP One appointments, along with many others who
13 will try to present at POEs without CBP One appointments. The Complaint plausibly
14 alleges a policy and widespread practice of turnbacks that will continue to affect
15 hundreds, if not thousands, of individuals. *See* Compl. ¶¶ 91-115. In similar situations,
16 the Ninth Circuit has applied the “inherently transitory” rule to preserve the plaintiffs’
17 class claims. *See, e.g., Pitts v. Terrible Herbst*, 653 F.3d 1081, 1086-91 (9th Cir.
18 2011); *Belgau v. Inslee*, 975 F.3d 940, 949 (9th Cir. 2020).

19 Finally, Defendants argue further that Plaintiffs’ claims are moot because they
20 have “obtained the relief they sought.” ECF No. 68-1 at 12. That is not true, and at
21 the very least it is a disputed fact that cannot be decided at the motion to dismiss
22 stage.³ All the Individual Plaintiffs allege that they were turned back when they

24 ² Defendants do not dispute that the duration of the challenged action—i.e. a
turnback—is too short to allow full litigation before the challenged action ceases.

25 ³ Mootness is a jurisdictional issue that is intertwined with the merits when a
26 defendant argues that a claim is moot because the plaintiff has already received the
27 relief requested. *See, e.g., Lopez v. Scully*, 2019 WL 2902696, at *2-3 (C.D. Cal.
28 2019) (declining to decide mootness on motion to dismiss); *Johnson v. Hernandez*,
69 F. Supp. 3d 1030, 1034-35 (E.D. Cal. 2014) (same). In such cases, “[a] court may

1 should have been given access to the U.S. asylum process. Compl. ¶¶ 12-21, 131-40;
 2 *see also* ECF No. 46-1, ¶¶ 3-13, 15-18. They further allege that each of those
 3 turnbacks was agency action that was unlawfully withheld or unreasonably delayed
 4 under 5 U.S.C. § 706(1). *Id.* ¶¶ 189-98. The mere fact that the Individual Plaintiffs
 5 were inspected and processed *after* they were denied access to the U.S. asylum
 6 process does not mean that they were not harmed or that their claims are somehow
 7 moot. They were still harmed by being turned back, and they still seek to represent a
 8 class of arriving noncitizens seeking to invalidate the very policy that caused them to
 9 be turned back. Accordingly, their dispute remains “live.” *McBride Cotton & Cattle*
 10 *Corp. v. Veneman*, 290 F.3d 973, 982 (9th Cir. 2002). The Individual Plaintiffs seek
 11 an order on behalf of putative class members declaring unlawful and vacating the
 12 CBP One Turnback Policy, ECF No. 1 at 65, and this Court can grant that relief.

13 The contrast between this case and *Jiali T. v. Mayorkas*, 2023 WL 5985509
 14 (S.D. Cal. 2023) demonstrates why this is the case. In *Jiali T.*, two individuals sought
 15 to compel the government to process their applications to register as legal permanent
 16 residents. *Id.* at *1. When the plaintiffs filed suit, those applications had not been
 17 processed, but they were subsequently processed. *Id.* The district court found that the
 18 plaintiffs’ claims were moot because all that they wanted was to have their own
 19 applications processed. *Id.* at *2. Unlike the plaintiffs in *Jiali T.*, who sought relief
 20 only for themselves, *id.* at *1, the Individual Plaintiffs here seek to represent a class
 21 consisting of arriving noncitizens who seek or will seek to present themselves at
 22 Class A POEs to seek asylum and were or will be turned back pursuant to Defendants’
 23 illegal policy. Compl. ¶ 152. Thus, *Jiali T.* does not control here.

24 **B. Standing**

25 To establish standing, a plaintiff must establish (1) an “injury in fact” that (2)

26 _____
 27 not resolve genuinely disputed facts” in response to a 12(b)(1) motion. *Roberts v.*
 28 *Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). Instead, “[w]here intertwined
 factual issues are disputed, discovery should be allowed.” *City of Lincoln v. United*
States, 283 F. Supp. 3d 891, 897 (E.D. Cal. 2017).

1 was caused by the defendant’s challenged action and that (3) is redressable. *Lujan v.*
2 *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Defendants challenge only
3 redressability. Their arguments are without factual or legal merit.

4 Defendants claim that Plaintiffs’ injuries are not redressable because Plaintiffs
5 “have not alleged the existence of an actual policy that could be ‘set[] aside’ under
6 the APA.” See ECF No. 68-1 at 12, 13, 22. That, however, is a disputed factual claim.
7 See, e.g., Compl. ¶ 61 (there is a “practice of turning back arriving noncitizens at
8 POEs” under the guise that an appointment must be made using the CBP One app);
9 ¶ 69 (Defendants have made “successful navigation of CBP One a prerequisite to
10 inspection at POEs”); ¶ 92 (“Border-wide data shows that, as of May 2023, the eight
11 Class A POEs that are processing asylum seekers are turning back almost all those
12 who do not have a CBP One appointment.”); ¶ 100 (regular monitoring shows that
13 “CBP officers routinely turn back asylum seekers who cannot access CBP One”).
14 Disputed factual claims are not an appropriate basis for a motion to dismiss. The
15 court must “accept all factual allegations in the complaint as true and draw all
16 reasonable inferences in favor of the non-moving party.”⁴ *TwoRivers v. Lewis*, 174
17 F.3d 987, 991 (9th Cir. 1999).

18 Defendants also argue that redressability is lacking because class wide
19 injunctive relief is prohibited by 8 U.S.C. §1252(f)(1) and *Garland v. Aleman*
20 *Gonzalez*, 596 U.S. 543 (2022). ECF No. 68-1 at 12.⁵ That argument is meritless.

21 _____
22 ⁴ Whether there is an agency-adopted turnback policy or simply a widespread
23 practice of turnbacks is of no moment. A pattern of unlawful agency action is
24 sufficient for class wide relief as long as the class of people affected is sufficiently
25 numerous. See Pls.’ Motion for Class Cert., Dkt. 37-1, pp. 13-16.

26 ⁵ Plaintiffs maintain that injunctive relief is permissible, at least with respect to their
27 *Accardi* claim. That issue is currently pending before the Ninth Circuit. Docketing
28 Notice, *Al Otro Lado, Inc. v. Mayorkas*, No. 23-3396 (9th Cir. filed Nov. 9, 2023).
Moreover, the Supreme Court has authority to grant injunctive relief. 8 U.S.C.
§1252(f)(1); *Aleman Gonzalez*, 596 U.S. at 572, n.9 (Sotomayor, J, concurring in part
and dissenting in part) (noting that §1252(f)(1) strips authority to issue injunctive

1 Plaintiffs seek declaratory relief under the Declaratory Judgment Act, which allows
2 a federal court to declare the rights of any interested party “whether or not further
3 relief is or could be sought.” 28 U.S.C §2201(a). Declaratory relief provides a remedy
4 because “it must be presumed that federal officers will adhere to the law as declared
5 by the court.” *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985)
6 (Scalia, J.). Further, where injunctive relief is not available, individual class members
7 can use a declaratory judgment “as a predicate to further relief, including an
8 injunction.” *Powell v. McCormack*, 395 U.S. 486, 499 (1969). And, by its terms,
9 §1252(f)(1) does not preclude individual injunctive relief.

10 The Government argues further that because §1252(f)(1) precludes injunctive
11 relief, no “corresponding” declaratory relief is permissible. ECF No. 68-1 at 13,
12 citing *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018). The citation to *Jennings* is
13 inapt. *Jennings* did not decide whether §1252(f)(1) bars declaratory relief, and the
14 Supreme Court subsequently refused to endorse that argument. *See Aleman Gonzalez*,
15 596 U.S. at 571-72 (Sotomayor, J., concurring in part and dissenting in part) (noting
16 that the majority does not embrace the Government’s argument that §1252(f)(1) bars
17 class wide declaratory relief). Further, the Ninth Circuit has considered and rejected
18 the Government’s argument that §1252(f)(1) bars class wide declaratory relief. *See*
19 *Rodriguez v. Hayes*, 591 F. 3d 1105, 1119 (9th Cir. 2010) (“Section 1252(f) was not
20 meant to bar class wide declaratory relief. Congress knew how to say ‘declaratory
21 relief’ in enacting the [Illegal Immigration Reform and Immigrant Responsibility
22 Act], but it chose not to use it in Section 1252(f).”). *See also Immigrant Defenders*
23 *Law Ctr. v. Mayorkas*, 2023 WL 3149243, *13 (C.D. Cal. 2023) (“The best reading
24 relief “from all courts ‘other than the Supreme Court’” and that Defendants’ standing
25 argument “would prevent any such case from reaching this Court, rendering
26 Congress’ reservation of this Court’s authority a nullity”). *See also Biden v. Texas*,
27 597 U.S. 785, 799 (2022) (“If section 1252(f)(1) deprived lower courts of subject
28 matter jurisdiction to adjudicate any non-individual claims under sections 1221
through 1232, no such claims could ever arrive at this Court, rendering the
provision’s specific carveout for Supreme Court injunctive relief nugatory.”).

1 of *Biden v. Texas* and *Aleman Gonzalez* is that district courts like this one retain
2 jurisdiction to award declaratory relief in immigration class actions.”). Because
3 *Rodriguez v. Hayes* has not been overturned by and is not clearly irreconcilable with
4 any Supreme Court decision, it remains binding law. *See Miller v. Gammie*, 335 F.3d
5 889, 900 (9th Cir. 2003) (en banc).

6 In addition, Defendants argue that “setting aside,” or vacating, the CBP One
7 Turnback Policy “would seemingly ... operate” as an injunction prohibited by
8 §1252(f)(1). ECF No. 68-1 at 13. However, vacatur is distinct from injunctive relief,
9 as evidenced by the fact that these remedies are addressed in different provisions of
10 the APA. *See* 5 U.S.C. §706(1) (injunction); § 706(2) (vacatur). An injunction
11 “directs the conduct of a party, and does so with the backing of [the court’s] full
12 coercive powers.” *Nken v. Holder*, 556 U.S. 418, 428 (2009). The vacatur or setting
13 aside of an agency action is a “less drastic remedy.” *Monsanto Co. v. Geertson Seed*
14 *Farms*, 561 U.S. 139, 165 (2010). The Supreme Court has indicated that “[b]y its
15 plain terms, and even by its title, [§1252(f)(1)] is nothing more or less than a limit on
16 injunctive relief.” *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481
17 (1999). It is not a limit on the “setting aside” of agency action. If Congress had
18 intended §1252(f)(1) to preclude courts from setting aside agency action, it would
19 have used different language. *See* 8 U.S.C. §1226(e). *See Texas v. United States*, 50
20 F.4th 498, 528-29 (5th Cir. 2022) (“§1252(f)(1) does not apply to vacatur ... ‘vacatur
21 neither compels nor restrains further agency decision-making’” (quoting *Texas v.*
22 *United States*, 40 F.4th 205, 220 (5th Cir. 2022)).

23 Finally, Defendants argue that even if the CBP One Turnback Policy is
24 enjoined, vacated, or declared unlawful, CBP Officers can still exercise discretion in
25 managing the border. ECF No. 68-1 at 13, citing *United States v. Texas*, 599 U.S.
26 670, 691 (2023) (Gorsuch, J., concurring) (noting that vacatur of challenged
27 prosecutorial guidelines would have no effect on underlying exercise of prosecutorial
28 discretion). But here, Defendants’ argument is a non sequitur. When an agency is

1 required by law to perform an act, a court can enjoin, vacate, or declare unlawful its
2 refusal to act even if the court has no power to determine how the agency is to carry
3 out the action. *See, e.g., Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55,
4 65 (2004) (“[W]hen an agency is compelled by law to act . . . but the manner of its
5 action is left to the agency’s discretion, a court can compel the agency to act, but has
6 no power to specify what the action must be.”); *Firebaugh Canal Co. v. United States*,
7 203 F.3d 568, 578 (9th Cir. 2000) (“Although the district court can compel the
8 Department of Interior to provide drainage service as mandated by the San Luis Act,
9 the district court cannot eliminate agency discretion as to how it satisfies the drainage
10 requirement.”); *see also Reno v. Catholic Social Services*, 509 U.S. 43, 66-67 (1993)
11 (where the Immigration and Naturalization Service (“INS”) was alleged to have
12 unlawfully rejected applications submitted by legalization applicants, the district
13 court had jurisdiction to order INS to accept the applications even though the agency
14 had discretion as to how to manage and adjudicate the applications). Here,
15 Defendants are under a legal obligation to inspect and process asylum seekers
16 arriving at ports of entry. Their discretion to determine how inspection and
17 processing is done does not change the fact that they are legally obligated to act or
18 impact the Court’s authority to compel them to comply with their obligations. *See*
19 Section IV.D, *infra*.

20 **IV. THE ORGANIZATIONAL PLAINTIFFS HAVE STANDING**

21 To establish standing, organizations must show that the defendant’s conduct
22 has frustrated the organization’s mission and caused a diversion of resources. *Fair*
23 *Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002). Here, the Complaint
24 plausibly alleges that the CBP One Turnback Policy has frustrated Al Otro Lado’s
25 (AOL) and Haitian Bridge Alliance’s (HBA) respective missions, Compl. ¶¶ 10–11,
26 and forced both organizations to divert resources away from their core programs.
27 Compl. ¶ 85 (diverting resources to provide technical assistance to asylum seekers
28 trying to navigate the CBP One app); ¶¶ 141–47 (AOL) (diverting resources to

1 monitor POEs and document turnbacks, accompany and advocate for people seeking
2 to present at a POE without CBP One appointments, update materials in various
3 languages, and visit shelters to inform asylum seekers about current border policies);
4 ¶¶ 148–51 (HBA) (shifting programmatic focus areas to prioritize humanitarian
5 services at the border, devising new “know your rights” programs for people stranded
6 in Mexico, and providing assistance to Haitians struggling to use CBP One; diverting
7 funds to secure office space in Reynosa and to provide longer-term accommodations
8 due to longer waiting times resulting from CBP One Turnback Policy). The Ninth
9 Circuit has repeatedly held that organizational plaintiffs experiencing similar
10 consequences have standing. *See East Bay Sanctuary Covenant v. Biden* (“*EBSCI*”),
11 993 F.3d 640, 663–64 (9th Cir. 2021); *East Bay Sanctuary Covenant v. Garland*,
12 994 F.3d 962, 974–75 (9th Cir. 2020); *see also Al Otro Lado v. Nielsen*, 327 F. Supp.
13 3d 1284, 1296–97 (S.D. Cal. 2018).

14 Relying on *United States v. Texas*, 599 U.S. 670 (2023), Defendants argue that
15 the harms suffered by AOL and HBA do not constitute legally cognizable injuries
16 because the Organizational Plaintiffs “are not the subject of the alleged policy or
17 practice.” ECF No. 68-1 at 14. *Texas* has no bearing here because this is not an
18 “extraordinarily unusual” case where a state is asking a federal court to order the
19 federal government to arrest and prosecute a third party. *See Texas*, 599 U.S. at 677,
20 683 n.5, 686 (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973), and *Sure-*
21 *Tan, Inc. v. NLRB*, 467 U.S. 883, 887 (1984), as examples of such “extraordinarily
22 unusual” cases); *see also* ECF No. 68-1 at 14. The organizational plaintiffs in this
23 case challenge CBP’s turnbacks of asylum seekers without CBP One appointments,
24 not their failure to arrest or prosecute noncitizens. Defendants’ attempts to analogize
25 to *Texas* must fail because cases involving executive discretion to arrest and
26 prosecute are “categorically different” from garden-variety cases involving
27 “statutory requirements or prohibitions on the Executive” like this one. *Texas*, 599
28 U.S. at 684; *see also* discussion of *Texas* at 34, *infra*. Thus, this case involves

1 traditional organizational standing in which Defendants’ conduct has frustrated
2 Plaintiffs’ missions and forced them to divert resources from their core programs.
3 *See EBSC I*, 993 F.3d at 663; *see also Combs*, 285 F.3d at 905. *Texas* simply does
4 not apply here.⁶

5 Defendants argue further that some of the harms to the Organizational
6 Plaintiffs are not fairly traceable to the CBP One Turnback Policy. ECF No. 68-1 at
7 15-16. But that misreads the Complaint. Contrary to what Defendants say, the cost
8 of hiring three additional staff for AOL’s Tijuana office in 2023 was incurred to assist
9 migrants turned back under the CBP One Turnback Policy, Compl. ¶¶ 87, 141.
10 Plaintiffs have not “voluntarily incurred” costs to counteract government action that
11 will only speculatively occur. The Complaint makes clear that the costs of providing
12 assistance with the CBP One app are incurred because people are turned back and
13 told to use CBP One in order to access the asylum process, Compl. ¶¶ 142, 149-50;
14 the emotional toll on staff is a direct result of having to assist people who have been
15 turned back and who then suffer harm while waiting at the border. *Id.* ¶¶ 147, 151.⁷

16 Defendants also argue that the Organizational Plaintiffs’ harms are not
17

18 ⁶ Defendants’ claim that there are foreign-policy interests underlying their actions is
19 not relevant to the standing analysis. ECF 68-1, p. 15. *See Ctr. for Bio. Diversity v.*
20 *Mattis*, 868 F.3d 803, 823 (9th Cir. 2017) (if “Congress has expressed its intent
21 regarding an aspect of foreign affairs” through a legislative command and a court is
22 asked to “evaluat[e] the Government’s compliance” with that command, the court “is
23 ‘not being asked to supplant a foreign policy decision of the political branches,’”
24 (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012))). Moreover, the CLP Rule
25 itself (which Defendants cite in support of their foreign-policy argument) recognizes
26 that asylum seekers without CBP One appointments should be processed; as
27 Defendants state, it provides “incentives for use of appointments,” ECF 168-1 at 15,
28 but does not require appointments.

⁷ The Defendants rely on *Clapper v. Amnesty Int’l USA*, 568 U.S. 398 (2019), ECF
No. 68-1 at 16, a case in which the Court found that the plaintiffs lacked standing
because it was “highly speculative” that they would be targeted by the challenged
policy. *Id.* at 410. *Clapper* is not relevant here, where the plaintiffs “are not making
assumptions about their claimed injuries” which are “currently happening.” *See City
& Cty of San Francisco v. USCIS*, 944 F.3d 773, 788 (9th Cir. 2019).

1 redressable in light of § 1252(f)(1). However, this argument fails for the same reasons
2 that the same argument regarding the Individual Plaintiffs fails. *See* Part I.B, *supra*.

3 Finally, Defendants argue that even if the Organizational Plaintiffs can
4 establish Article III standing, their resource-diversion injuries are not within the zone
5 of interests of the relevant INA provisions. But the zone-of-interests test precludes
6 standing only when a plaintiff’s “interests are so marginally related to or inconsistent
7 with the purposes implicit in the statute that it cannot reasonably be assumed that
8 Congress intended to permit the suit.” *Match-E-Be-Nash-She-Wish Band of*
9 *Pottawatomie Indians v. Patchak*, 567 U.S. 209, 225 (2012). Indeed, the INA
10 expressly contemplates a role for nonprofit organizations to provide immigration
11 legal services to noncitizens. *See Al Otro Lado*, 327 F. Supp. 3d at 1297, 1301-02; 8
12 U.S.C. § 1443(h); 8 U.S.C. § 1158(d)(4)(A)-(B). Thus, “[t]he Organizations’ claims
13 fall within the zone of interests of the INA.” *EBSC I*, 993 F.3d at 668.⁸

14 **V. PLAINTIFFS STATE A VALID CLAIM FOR RELIEF UNDER THE**
15 ***ACCARDI* DOCTRINE**

16 Plaintiffs allege that Defendants’ failure to comply with their own guidance
17 prohibiting turnbacks of noncitizens without CBP One appointments violates the
18 *Accardi* doctrine. This well-established doctrine reaches internal agency guidance
19 that affects the rights of individuals. *See Accardi*, 347 U.S. at 265-67; *Alcaraz v. INS*,
20 384 F.3d 1150, 1162 (9th Cir. 2004) (collecting cases). Plaintiffs’ claim relies on
21 CBP’s November 1, 2021 Memo (“Nov. 2021 Memo”), which creates mandatory,
22 public-facing procedures that benefit proposed class members (referred to here as the
23 “Binding Guidance”). That the Memo is intended to be binding on agency officers
24 has been articulated by Defendants in numerous places over two years; it affects
25 asylum seekers’ procedural rights; Defendants themselves have described it as

26 _____
27 ⁸ Defendants’ reliance on *INS v. Legalization Assistance Project*, 510 U.S. 1301,
28 1302 (1993) (O’Connor, J.), is meritless because that case concerned the zone of
interests of the Immigration Reform and Control Act, not the INA, which has been
interpreted more expansively. *Id.* at 1305-06.

1 binding. *See* Compl. ¶¶ 51, 54-60; ECF No. 68-3 (“Watson Decl.”) ¶¶ 3-7.

2 Defendants assert that the Complaint “does not expressly identify any cause of
3 action” for the *Accardi* claim and suggest that it should thus be dismissed for not
4 specifically citing 5 U.S.C. § 706(2). ECF No. 68-1 at 18. But, as Defendants
5 themselves acknowledge, *id.*, Plaintiffs have a cause of action under the APA. As
6 such, Defendants’ highly formalistic argument, which has no support in precedent,
7 fails. Defendants’ own authority supports finding Plaintiffs’ claim sufficient: in
8 *Brown v. Haaland*, the court held that although the plaintiffs pled their *Accardi* claim
9 as based in due process, they could nevertheless proceed with the claim under the
10 APA, which was cited elsewhere in the complaint. 2023 WL 5004358, at *4-5 (D.
11 Nev. 2023); *see* ECF No. 68-1 at 18. Other courts have reached similar conclusions.
12 *See Jefferson v. Harris*, 285 F. Supp. 3d 173, 185-86 (D.D.C. 2018) (“Regardless of
13 whether Jefferson’s *Accardi* claim fits squarely under his due-process heading, the
14 Court concludes that it is adequately pled at this stage in the proceedings.”). Here,
15 too, Plaintiffs included APA allegations elsewhere in the complaint, such that
16 Defendants and the Court can infer that Plaintiffs’ *Accardi* claim falls under the APA.
17 *See* Compl. ¶¶ 168, 181, 190.⁹

18 Contrary to Defendants’ argument, the Binding Guidance prohibiting
19 turnbacks is binding and thus judicially enforceable. The Ninth Circuit has held that
20 courts may look to “various” sources to determine whether an agency policy is
21 binding under *Accardi*. *Alcaraz*, 384 F.3d at 1162. First, Defendants have bound

22 ⁹ Defendants’ reliance on *Salsman v. Access Sys. Americans, Inc.*, 2011 WL 1344246
23 (N.D. Cal. 2011) is misplaced. *Compare Salsman*, 2011 WL 1344246, at *3 (plaintiff
24 failed to provide adequate notice of his claim because he did not identify which
25 provision of the UCC, “a code containing hundreds of provisions,” was allegedly
26 violated), *with Humboldt Baykeeper v. Simpson Timber Co.*, 2006 WL 3545014, at
27 *5 (N.D. Cal. 2006) (refusing to dismiss for failure to identify element of cause of
28 action where plaintiff alleged specific facts that put defendant on notice of the claim).
Here, the Complaint adequately puts the Defendants on notice of the *Accardi* claim.
See Compl. ¶¶ 159-66. Rule 8 requires no more. Defendants’ argument to the contrary
is baseless.

1 themselves with the “operating procedures” laid out in the Nov. 2021 Memo. *Church*
 2 *of Scientology of Cal. v. United States*, 920 F.2d 1481, 1487 (9th Cir. 1990). And in
 3 this litigation, Defendants have affirmed that the Nov. 2021 Memo is binding on CBP
 4 officers. Watson Decl. ¶¶ 3-7 (describing the memo as “formal guidance” that sets
 5 “expectations for the field to follow,” and explaining CBP’s creation of detailed
 6 guidance operationalizing the memo and expectations that officers comply with it).
 7 That the prohibition against turnbacks is binding is further confirmed by the preamble
 8 to the CLP Rule, which repeatedly states that those without appointments will not be
 9 turned back, and in the exceptions to the Rule’s rebuttable presumption, which
 10 recognize that certain individuals without appointments will have their asylum claims
 11 considered. *See* Compl. ¶¶ 51, 54-60.¹⁰

12 Second, the Binding Guidance prescribes procedures “intended to protect the
 13 interests of a party before the agency.” *Backcountry Against Dumps v. FAA*, 77 F.4th
 14 1260, 1267 (9th Cir. 2023); *accord Morton v. Ruiz*, 415 U.S. 199, 235 (1974);¹¹
 15 *Alcaraz*, 384 F.3d at 1162. Specifically, the texts that memorialize CBP’s policy
 16 create procedural rules that benefit proposed class members, e.g., by specifying that
 17 asylum seekers “cannot be required to submit advance information in order to be

18
 19 ¹⁰ The preamble to the CLP Rule is relevant insofar as it establishes the ongoing
 20 validity of the Nov. 2021 Memo. While the Ninth Circuit has held that a preamble
 21 can be legally binding where “there is every reason to believe that the Agency
 22 intended to bind itself,” *Safer Chems., Healthy Families v. U.S. EPA*, 943 F.3d 397,
 422 (9th Cir. 2019), it is not the preamble that itself binds the agency; the preamble
confirms that the agency continues to be bound by the Nov. 2021 Memo.

23 ¹¹ Defendants err in attempting to distinguish *Morton* by pointing to language in the
 24 agency manual regarding the “purpose of” the program at issue there. ECF 68-1 at
 25 19. Defendants’ cited language comes from a section of the manual not under
 26 consideration in *Morton* – it addressed the purpose of the assistance program
 27 generally, 415 U.S. at 204 n.6, whereas the relevant language analyzed by the
 28 Supreme Court was a procedural requirement that the agency publish directives that
 relate to the public, *id.* at 233-235.

1 processed” at a POE, that those at the “border line should be permitted to wait in line,”
2 and that “officers may not instruct travelers that they must return to the POE at a later
3 time or travel to a different POE for processing.” ECF No. 68-2 (Nov. 2021 Memo)
4 at 3. And the memo establishes that the policy aims to incentivize presenting at POEs;
5 in other words, it provides undocumented noncitizens the benefit of access to POEs
6 in order to dissuade them from crossing between ports. *See id.*

7 While the procedures required by the Binding Guidance do not provide for
8 notice to noncitizens, as was required by the procedures at issue in *Damus v. Nielsen*,
9 313 F. Supp. 3d 317 (D.D.C. 2018) and *Emami v. Nielsen*, 365 F. Supp. 3d 1009
10 (N.D. Cal 2019), *see* ECF No. 68-1 at 20, that is not determinative. The Nov. 2021
11 Memo lays out clear and specific processes that CBP officers must follow; all these
12 processes benefit asylum seekers by giving them certainty that they will not be turned
13 back and thus will eventually be able to access POEs and the asylum process. *See*
14 ECF No. 68-2 at 3; *see also Torres v. U.S. DHS*, 2017 WL 4340385, at *5 (S.D. Cal.
15 2017) (granting preliminary injunction on *Accardi* claim based on DACA standard
16 operating procedures).¹²

17 Defendants’ argument that the Binding Guidance constitutes a “non-
18 substantive rule of agency procedure” fails because it confuses two distinct strands
19 of administrative law. Defendants mistakenly conflate an *Accardi* claim with a claim
20 that the Binding Guidance is a binding “legislative rule.” ECF No. 68-1 at 19-20.
21 Defendants’ error is illustrated by their reliance on *United States v. Fifty-Three*
22 *Eclectus Parrots*, 685 F.2d 1131 (9th Cir. 1982), which is not about an *Accardi* claim
23 at all. The Ninth Circuit in *Eclectus Parrots* analyzed whether a statement in an

24 ¹² *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532 (1970), does not
25 help the Defendants. There, the Supreme Court found that the agency procedure at
26 issue did not provide a benefit for the plaintiffs but was created only for the purpose
27 of providing information to the Interstate Commerce Commission that it needed to
28 decide applications submitted to it. *Id.* at 538-39. In contrast, Defendants here have
not specified any purpose of the Binding Guidance that benefits the agency as
opposed to undocumented noncitizens. *See* ECF 68-1 at 20.

1 agency manual had the “force and effect of law”—an inquiry that pertains to whether
2 Congress has granted an agency quasi-legislative authority to promulgate a rule and
3 whether the agency has complied with APA rulemaking provisions. *Id.* at 1135-36
4 (quoting *Rank v. Nimmo*, 677 F.2d 692, 698 (9th Cir. 1982)); accord *Chrysler Corp.*
5 *v. Brown*, 441 U.S. 281, 301-03 & n.30 (1979) (discussing substantive and procedural
6 requirements for a regulation to have the “force and effect of law” under 5 U.S.C. §
7 553). Notably, *Eclectus Parrots* has never been cited by the Ninth Circuit in
8 discussing the requirements for an *Accardi* claim.¹³ As such, the case is inapposite,
9 and Defendants’ argument is unfounded.

10 Finally, the Ninth Circuit has rejected Defendants’ assertion, ECF No. 68-1 at
11 21, that individuals must show “substantial prejudice” as to the “ultimate outcome”
12 of the agency’s action before challenging a policy. *Montes-Lopez v. Holder*, 694 F.3d
13 1085, 1091, 1093–94 (9th Cir. 2012) (“No showing of prejudice is required, however,
14 when a rule is ‘intended primarily to confer important procedural benefits upon
15 [individuals].’”). As discussed above, the Binding Guidance confers important
16 procedural benefits on asylum seekers—namely the right not to be turned back at
17 POEs. *Cf. Am. Farm Lines*, 397 U.S. at 538-39. Regardless, the prejudice to Plaintiffs
18 from CBP’s violation of the Binding Guidance is indisputable: the “ultimate outcome”
19 of the administrative process that they challenge was being unlawfully turned back
20 at POEs and forced to endure additional dangers and harm in Mexico, when they
21 should have been inspected and processed, or permitted to wait in line and then
22 inspected and processed. For these reasons, Plaintiffs state a valid *Accardi* claim.

23
24
25 ¹³ *Doucette v. U.S. Dep’t of Interior*, 849 F. App’x 653 (9th Cir. 2021), is instructive:
26 the Circuit analyzes two distinct claims regarding whether an agency’s decisions
27 constitute a binding policy, and cites *Eclectus Parrots* only in support of its first
28 finding that the decisions are not a “substantive rule” and are merely procedures “not
promulgated in accordance with the APA.” *Id.* at 655. The court’s entirely separate
discussion of the *Accardi* claim makes no mention of *Eclectus Parrots* at all. *Id.*

1 **VI. PLAINTIFFS HAVE PLAUSIBLY ALLEGED CLAIMS UNDER**
 2 **BOTH APA § 706(1) AND § 706(2).**

3 Plaintiffs' claims under APA § 706(1) and § 706(2) are separate and distinct.
 4 Plaintiffs' § 706(1) claim targets Defendants' refusal to comply with their mandatory
 5 statutory duties to inspect and process asylum seekers arriving at POEs. Plaintiffs'
 6 § 706(2) claim alleges that Defendants' CBP One Turnback Policy exceeds their
 7 statutory authority. Despite Defendants' attempts to conflate these claims, ECF No.
 8 68-1 at 32–36, the Ninth Circuit has repeatedly indicated that final agency action is
 9 not required for § 706(1) claims. *See, e.g., Hells Canyon Pres. Council v. U.S. Forest*
 10 *Serv.*, 593 F.3d 923, 930 (9th Cir. 2010); *Northwest Env't Def. Ctr. v. Bonneville*
 11 *Power Admin.*, 477 F.3d 668, 681 n.10 (9th Cir. 2007); *Indep. Mining Co. v. Babbitt*,
 12 105 F.3d 502, 511 (9th Cir. 1997). For the reasons discussed below, Plaintiffs have
 13 properly pled their claims under both § 706(1) and § 706(2). Defendants' arguments
 14 regarding non-reviewability and lack of jurisdiction are unfounded.

15 Plaintiffs note that many of these issues have already been litigated to
 16 preclusive effect before another court in this district in *Al Otro Lado v. Mayorkas*,
 17 No. 17-cv-02355. As Defendants acknowledge, Judge Bashant's prior *Al Otro Lado*
 18 decisions carry preclusive effect while on appeal. *Collins v. D.R. Horton, Inc.*, 505
 19 F.3d 874, 882 (9th Cir. 2007); ECF No. 68-1 at 34 n.12. Collateral estoppel applies
 20 when

21 (1) there was a full and fair opportunity to litigate the issue in the
 22 previous action; (2) the issue was actually litigated in that action; (3) the
 23 issue was lost as a result of a final judgment in that action; and (4) the
 person against whom collateral estoppel is asserted in the present action
 was a party or in privity with a party in the previous action.

24 *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1050 (9th Cir. 2008) (quoting *U.S.*
 25 *Internal Revenue Serv. v. Palmer*, 207 F.3d 566, 568 (9th Cir. 2000)). Here, mutual
 26 issue preclusion applies to claims between Defendants and plaintiff Al Otro Lado,
 27 as well as claims between Defendants and any putative class members in this case
 28 who are also part of the certified class of asylum seekers in the prior *Al Otro Lado*

1 case—namely, those asylum-seeking noncitizens who were turned back at POEs on
2 the U.S.-Mexico border by or at the instruction of CBP officials on or after January
3 1, 2016. For example, Judge Bashant already determined that each turnback is “a
4 discrete agency action” for purposes of a §706(1) claim. *See Al Otro Lado, Inc. v.*
5 *McAleenan*, 394 F. Supp. 3d 1168, 1195-96 (S.D. Cal. 2019); *Al Otro Lado, Inc. v.*
6 *Mayorkas*, 2021 WL 3931890, at *9-10 (S.D. Cal. 2021). Thus, many of
7 Defendants’ arguments are precluded, but Plaintiffs address those issues for
8 completeness.

9 **A. Defendants’ Refusal to Inspect And Process Asylum Seekers**
10 **Constitutes Discrete Agency Action For Purposes Of Plaintiffs’**
11 **§ 706(1) Claim.**

12 A § 706(1) claim “can proceed only where a plaintiff asserts that an agency
13 failed to take a *discrete* agency action that it is *required to take*.” *Norton*, 542 U.S. at
14 64, 65 (2004) (distinguishing challenge to agency’s failure to take a “discrete agency
15 action” from a challenge to an impermissible “broad programmatic attack”). Here,
16 Plaintiffs allege that Defendants have failed to inspect and process noncitizens
17 without CBP One appointments arriving at the border. Compl. ¶ 193. Each act of
18 inspecting an arriving noncitizen is a “discrete agency action,” as is the act of
19 processing the noncitizen to determine if they intend to apply for asylum. *See Al Otro*
20 *Lado*, 2021 WL 3931890, *9 (finding that plaintiffs had established discrete agency
21 action under § 706(1) where they alleged that defendants had unlawfully withheld or
22 unreasonably delayed inspection and processing of asylum seekers at POEs). Thus,
23 each individual whom CBP refuses to inspect and process and then turns back has a
24 claim that the agency failed to take a required “discrete agency action.” As long as
25 the requirements for maintaining a class action are met (as they are), Plaintiffs are
26 entitled to class wide relief on their § 706(1) claim. *See, e.g., Ramirez v. U.S. ICE*,
27 310 F. Supp. 3d 7, 21 n.4 (D.D.C. 2018) (where plaintiff complains that there are
28 multiple “specific, discrete instances” in which defendants violated the statute, the
fact that they “seek to join multiple instances of such alleged agency failure into one

1 class action does not render their complaint an attack on an ongoing program or
2 policy of the sort that is not actionable under the APA”).

3 Defendants improperly analogize the relevant agency action to activities that
4 other courts have found insufficiently discrete to constitute the basis for an APA
5 challenge. ECF No. 68-1 at 34. *See Wild Fish Conservancy v. Jewell*, 730 F.3d 791,
6 800-802 (9th Cir. 2013) (vague allegation that federal defendants “operate dams 2
7 and 5 in a manner that obstructs fish passage through Icicle Creek during some or all
8 of the year” was not final agency action under APA § 706(2) because challenged
9 Forest Service interpretation did not constitute a formal statement of agency policy,
10 and Forest Service’s periodic closure of dam gates constituted part of its day-to-day
11 operations, not “consummation of the agency’s decisionmaking process”); *Bark v.*
12 *United States Forest Serv.*, 37 F. Supp. 3d 41, 50-51, 53 n.4 (D.D.C. 2014) (finding
13 that plaintiffs’ “amorphous description of Forest Service’s practices” was not a policy,
14 but instead a “generalized complaint about agency behavior” that did not constitute
15 final agency action under APA § 706(2); however, defendants’ issuance of permits
16 pursuant to the purported policy did provide a basis for APA § 706(2) claim.

17 Defendants’ argument that the practices alleged in the Complaint are too varied
18 to amount to discrete agency action also misses the mark. Each individual turnback
19 involves the withholding of a discrete agency action, which is sufficient for a § 706(1)
20 claim. *Ramirez*, 310 F. Supp. 3d at 21 & n.4 (ICE’s placement of unaccompanied
21 child plaintiffs in adult detention facilities without mandated consideration of less
22 restrictive placements were discrete agency actions). Moreover, the Complaint
23 provides a solid factual basis to support allegations that Defendants have a
24 widespread pattern or practice of refusing to inspect and process individuals arriving
25 at the border who do not have CBP One appointments. *See, e.g., Part II.C, supra.*

26 Defendants also suggest that the meaning of “turnbacks” is unclear. ECF No.
27 68-1 at 33. But the Complaint indicates that Plaintiffs challenge Defendants’ refusal
28 to do what they are required to do: inspect and process noncitizens who approach the

1 limit line, including those without CBP One appointments. The Complaint explicitly
2 states that if asylum seekers approach the limit line without “a CBP One appointment
3 confirmation or present at a date or time different from the designated appointment
4 slot, they are turned back to Mexico” without being inspected. Compl. ¶¶ 5, 162.
5 When an individual who approaches the border is told that they must have a CBP
6 One appointment in order to be inspected and processed and otherwise returned to
7 Mexico, that action constitutes a turnback—a failure to take a discrete agency action.
8 And Plaintiffs allege such failure withholds a statutorily mandated duty and violates
9 Defendants’ own binding policy. *See* ECF No. 68-2 (Nov. 2021 Memo); ECF No.
10 68-3, Ex. B at 18; ECF No. 68-3 ¶ 3 (describing Defendants’ own policies instructing
11 CBP line officers not to “turn back” noncitizens without appropriate documents at
12 POEs). Accordingly, Plaintiffs’ have stated a claim under APA § 706(1). *See Vietnam*
13 *Veterans of Am. v. Cent. Intel. Agency*, 811 F.3d 1068, 1081 (9th Cir. 2016) (where
14 there is a “specific, unequivocal command” that the agency must act, “Section 706(1)
15 of the APA provides that a reviewing court ‘shall . . . compel agency action
16 unlawfully withheld”).

17 **B. Plaintiffs Plausibly Allege A CBP One Turnback Policy**

18 Plaintiffs’ § 706(2) claim alleges an unlawful “border-wide policy and
19 widespread practice of turning back arriving noncitizens without CBP One
20 appointments at or near Class A POEs and thereby denying [Plaintiffs] access to the
21 asylum process.” Compl. ¶ 1. Plaintiffs allege that when asylum seekers without a
22 CBP One appointment approach the limit line, they are typically turned back to
23 Mexico by or at the direction of CBP officers. Compl. ¶ 5; *see also id.* ¶¶ 46-50
24 (discussing Defendants’ longstanding policy of turning back asylum seekers); ¶ 56
25 (“the CBP Turnback Policy precludes most individuals without CBP One
26 appointments . . . from presenting at POEs or even asserting that they fall into any of
27 the [Rule’s] exception categories”); ¶ 61 (describing Defendants’ continued practice
28 of turning back asylum seekers under the guise of CBP One); ¶¶ 91-115 (describing

1 Defendants’ policy and widespread practice of turning back asylum seekers without
2 CBP One appointments). Taken as true and construed in the light most favorable to
3 Plaintiffs, as required at this early stage, these allegations, combined with the
4 Complaint’s numerous accounts of turnbacks of asylum seekers without CBP One
5 appointments, plausibly establish the existence of the CBP One Turnback Policy.

6 Even if the CBP One Turnback Policy constitutes an unwritten policy, it would
7 still be an agency action reviewable under § 706(2). *See Al Otro Lado*, 327 F. Supp.
8 3d at 1319 (agency action “‘need not be in writing to be final and judicially
9 reviewable’ pursuant to the APA.” (quoting *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164,
10 184 (D.D.C. 2015)); *see also Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 138–39
11 (D.D.C. 2018) (finding, based on evidence of an unwritten policy, that plaintiffs were
12 likely to succeed on the merits at the preliminary injunction stage). A contrary rule
13 “would allow an agency to shield its decisions from judicial review simply by
14 refusing to put those decisions in writing.” *R.I.L-R*, 80 F. Supp. 3d at 184 (quoting
15 *Grand Canyon Trust v. Pub. Serv. Co. of N.M.*, 283 F. Supp. 2d 1249, 1252 (D.N.M.
16 2003)).¹⁴

17 First, both the Individual and Organizational Plaintiffs’ first-hand accounts
18 demonstrate effects consistent with the alleged policy. *See, e.g.*, Compl. at ¶ 12 (CBP
19 supervisory officer at San Ysidro POE told Michelle Doe that people could not cross
20 without using the CBP One application); ¶ 13 (Diego Doe turned back from San
21 Ysidro POE due to lack of a CBP One appointment); ¶ 15 (CBP officers at Paso Del
22 Norte Bridge told Pablo Doe he could not apply for asylum without a CBP One
23 appointment); ¶ 16 (CBP officer turned Laura Doe back at Otay Mesa POE because
24 she did not have a CBP One appointment); ¶ 17 (CBP officers refused to allow Elena
25 Doe to approach the San Ysidro POE without a CBP One appointment and, following

26 ¹⁴ Indeed, Plaintiffs allege that Defendants purposefully abstained from
27 memorializing their prior turnback policy and that the CBP One Turnback Policy is
28 merely an extension of that policy. Compl. ¶¶ 49–50.

1 a separate attempt, laughed at her and refused to let her proceed); ¶ 19 (CBP officers
2 blocked Luisa Doe from the POE on two occasions and told her she needed a CBP
3 One appointment); ¶¶ 20-21 (Guadalupe and Somar Doe turned back from San
4 Ysidro POE due to lack of CBP One appointments). Organizational Plaintiff Al Otro
5 Lado’s staff and volunteers’ firsthand observations during regular port monitoring
6 likewise support the existence of a turnback policy. Compl. ¶ 96 (observed regular
7 turnbacks by CBP of individuals and families without CBP One appointments,
8 including CBP officers telling asylum seekers they could not be processed without
9 an appointment).

10 Second, Plaintiffs’ allegations are supported by data demonstrating effects
11 consistent with the alleged policy, Compl. ¶ 92 (border-wide data showing the eight
12 Class A POEs processing asylum seekers are turning back almost all those without
13 CBP One appointments), and first-hand accounts from a range of observers. *Id.* ¶¶
14 100-05 (reporter, nonprofit staff, and attorney observed CBP officers denying asylum
15 seekers without CBP One appointments access to the Paso del Norte POE); ¶ 110
16 (nonprofit staff observed several CBP turnbacks of asylum seekers without CBP One
17 appointments at Matamoros POE); ¶ 111 (nonprofit staff interviewed asylum seeker
18 whom CBP had turned back three times from McAllen-Hidalgo International Bridge
19 POE due to lack of CBP One appointment).

20 Defendants wrongly assert that Plaintiffs are “amalgamat[ing] a variety of
21 individual decisions into one class action.” ECF 68-1 at 35. In fact, Plaintiffs “attack
22 *particularized* agency action,” *R.I.L.-R*, 80 F. Supp. 3d at 184; specifically,
23 Defendants’ purposeful restrictions of access to the asylum process in violation of
24 their statutory obligations. *See Ramirez*, 310 F. Supp. 3d at 20–21 (finding that
25 “aggregation of similar, discrete purported injuries—claims that many people were
26 injured in similar ways by the same type of agency action” constituted “agency action”
27 under the APA); *R.I.L.-R*, 80 F. Supp. 3d at 174-75 (plaintiffs established existence
28 of a challengeable policy based on declarations from immigration experts, attorneys,

1 and data); *see also Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 388 (D.C. Cir.
 2 2018) (allowing a challenge to an alleged widespread “pattern and practice” of
 3 routinely extending temporary H-2A visas beyond the statutorily required temporary
 4 period). Accordingly, Plaintiffs’ factual allegations “allow[] the court to draw the
 5 reasonable inference” of the existence of the CBP One Turnback Policy. *Iqbal*, 556
 6 U.S. at 678.

7 **C. Both the CBP One Turnback Policy and Each Individual**
 8 **Turnback Constitute Final Agency Action for Purposes of**
 9 **Plaintiffs’ 706(2) Claims**

10 Agency action is “final” when (1) it “mark[s] the ‘consummation’ of the
 11 agency’s decisionmaking process” and (2) as a result of the action, “‘rights or
 12 obligations have been determined,’ or . . . ‘legal consequences will flow.’” *Bennett v.*
 13 *Spear*, 520 U.S. 154, 177–78 (1997) (cleaned up). Courts interpret finality in “a
 14 pragmatic and flexible manner,” “focus[ing] on the practical and legal effects of the
 15 agency action.” *Or. Nat. Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th
 16 Cir. 2006).

17 Here, Plaintiffs have adequately identified two distinct final agency actions:
 18 the CBP One Turnback Policy and each individual turnback, both of which satisfy
 19 706(2)’s requirements. The CBP One Turnback Policy marks the consummation of
 20 the agency’s decisionmaking process because it reflects a “conscious” and
 21 “deliberate” decision by Defendants to deny noncitizens without CBP One
 22 appointments access to the asylum process at POEs. *ONRC Action v. Bureau of Land*
 23 *Mgmt.*, 150 F.3d 1132, 1137 (9th Cir. 1998); *see, e.g., Compl.* ¶¶ 6, 47. Far from
 24 being tentative or interlocutory, the CBP One Turnback Policy is “an active program
 25 implemented by the agency.” *Wagafe v. Trump*, 2017 WL 2671254, at *10 (W.D.
 26 Wash. 2017); *see R.I.L.-R*, 80 F. Supp. 3d at 184 (an implemented policy directing an
 27 ongoing practice affecting individual cases is final agency action).

28 Moreover, legal consequences flow from the CBP One Turnback Policy
 because its active implementation has “actual or immediately threatened effects” on

1 certain asylum seekers. *Aracely, R.*, 319 F. Supp. 3d at 139; *Wagafe*, 2017 WL
2 2671254, at *10 (finding final agency action when a policy “affect[ed] the thousands
3 of applicants whose qualified applications [we]re allegedly indefinitely delayed or
4 denied” as a result). Through the CBP One Turnback Policy, Defendants have
5 deprived Individual Plaintiffs and thousands of other asylum seekers of the
6 opportunity to seek asylum, violating their rights under the INA and putting their
7 lives at risk. *See* Compl. ¶¶ 169-74. Without the policy, Plaintiffs and putative class
8 members would be permitted to seek asylum. As a result of the policy, Defendants
9 have forced asylum seekers to wait indefinitely in dangerous Mexican border towns,
10 facing threats of refoulement, pursuit by persecutors, physical and sexual violence,
11 kidnapping, and death. *Id.* ¶¶ 131, 133-40 (describing harm to Individual Plaintiffs);
12 116-30 (describing harm asylum seekers face in Mexico). Contrary to Defendants’
13 assertions, there is no guarantee that these individuals will ever obtain a CBP One
14 appointment or be inspected and processed at a later time. *See, e.g., id.* ¶ 69-85
15 (insurmountable obstacles faced by asylum seekers trying to obtain CBP One
16 appointments). Out of desperation, some turned-back asylum seekers have attempted
17 to enter the United States without inspection despite significant safety risks. *Id.* ¶ 129.
18 These “actual or immediately threatened effect[s]” satisfy the finality test’s second
19 prong. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 894 (1990).

20 Similarly, each individual turnback identified in the Complaint represents a
21 final agency action. As with the CBP One Turnback Policy, each turnback marks the
22 consummation of the agency’s decision-making process because it reflects a
23 “conscious” and “deliberate” decision to limit access to the asylum process at POEs.
24 *ONRC Action*, 150 F.3d at 1137; *see, e.g.,* Compl. ¶¶ 6, 47. Moreover, each turnback
25 functionally denies the affected individual access to the U.S. asylum process. *See*
26 *Aguayo v. Jewell*, 827 F.3d 1213, 1223 (9th Cir. 2016) (noting “denial” of relief and
27 “failure to act” are “agency action” that can be “final” under 5 U.S.C. § 551(13));
28 *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1094–95 (9th Cir. 2014)

1 (considering the practical effect of agency action).

2 Defendants argue that an asylum seeker who has been turned back may later
3 obtain a CBP One appointment. ECF No. 68-1 at 36. However, the mere possibility
4 of later accessing the U.S. asylum process through some “future yet distinct
5 administrative process” does not negate the finality of a completed turnback.
6 *Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586, 593 (9th
7 Cir. 2008); *see also U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 598
8 (2016) (possibility that agency could revise action within five years upon receipt of
9 new information did not make otherwise definitive decision nonfinal). Defendants do
10 not “hold” applications for admission after an asylum seeker is turned back; indeed,
11 Defendants keep no records of those they turn back. Therefore, once an asylum
12 seeker is turned back, there are no “further steps to be taken” by the agency. *Indus.*
13 *Customers of Nw. Utils. v. Bonneville Power Admin.*, 408 F.3d 638, 646 (9th Cir.
14 2005) (quoting *Dalton Equip. Co. v. Brown*, 594 F.2d 195, 197 (9th Cir. 1979)); *see*
15 *Al Otro Lado v. Wolf*, 952 F.3d 999, 1014 (9th Cir. 2020) (with respect to an earlier
16 turnback policy, observing that “each arrival triggers a right to apply for asylum and
17 be interviewed”).

18 Moreover, legal consequences flow from each individual turnback, which
19 unlawfully denies an arriving noncitizen’s statutory right to seek asylum and subjects
20 them to immense danger in Mexico, along with the risk of refoulement by Mexican
21 authorities, kidnapping, physical and sexual assault, and death—which would lead to
22 a permanent loss of access to the U.S. asylum process. *See* Compl. ¶¶ 131, 133-40
23 (describing harm to Individual Plaintiffs); ¶¶ 116-30 (describing harm asylum
24 seekers face in Mexico). Given the gravity of these consequences, Defendants’
25 argument that turned-back asylum seekers are somehow “in the same legal position
26 that they would be otherwise,” ECF No. 68-1 at 36, is unavailing.¹⁵

1 **D. Defendants Do Not Have Discretion To Flout Their Statutory**
2 **Obligations to Inspect and Process Asylum Seekers at POEs.**

3 Congress created a statutory scheme that specifically addresses how
4 Defendants must treat noncitizens arriving at POEs, including an “exhaustive
5 inspection regime for all noncitizens who seek admission to the United States,”
6 *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 507 (9th Cir. 2019), and specific
7 requirements for processing asylum seekers. Congress did not give Defendants any
8 authority to refuse to inspect and process asylum seekers without CBP One
9 appointments or otherwise limit the number of arriving asylum seekers who may
10 access the asylum process. *See* 6 U.S.C. §§ 111, 202, 211; 8 U.S.C. § 1103; *see also*
11 8 U.S.C. § 1158(a) (right to apply for asylum), § 1225(a)(3) (requiring inspection of
12 all arriving noncitizens), § 1225(b)(1)(A)(ii) (providing for referral of arriving
13 asylum seekers for interviews).

14 Defendants argue that general authorizing statutes permit CBP to block asylum
15 seekers from entering POEs, thereby preventing their inspection and processing. ECF
16 No. 68-1 at 25-26. But this interpretation would thwart Congress’s goal of protecting
17 asylum seekers and allow Defendants to shirk their mandatory statutory duties. As
18 Judge Bashant previously held, “Defendants’ citations to broad delegations of
19 statutory authority... are insufficient, as a matter of law, to establish that their ability
20 to meter asylum seekers is ‘committed to agency discretion by law.’” *See Al Otro*
21 *Lado*, 2021 WL 3931890, at *11.

22 The statutes upon which Defendants rely do not indicate that Congress
23 intended to supersede Defendants’ mandatory inspection and processing duties.
24 Section 111(b)(1) outlines the agency’s “primary mission”—which includes
25 “carry[ing] out all functions of entities transferred to [DHS].” That section further
26 indicates that DHS’s “primary mission” is to “ensure that the functions of the
27 agencies and subdivisions within the Department that are not related directly to
28 securing the homeland,” such as inspection and processing of asylum seekers, “*are*

1 *not diminished or neglected except by a specific explicit Act of Congress.*” 6 U.S.C.
2 § 111(b)(1)(E) (emphasis added). Defendants point to no such Act of Congress that
3 would permit them to deprioritize inspection and processing of asylum seekers at
4 POEs for any reason. *See also id.* § 202 (similarly broad grant of general authority
5 that does not authorize turnbacks); 8 U.S.C. § 1103(a) (containing no authorization
6 to limit the number of asylum seekers at POEs). Section 211 lists CBP’s duties—
7 including inspection and processing of noncitizens arriving at POEs, *see* 6 U.S.C. §
8 211(c)(8)(A), (g)(3)(B)—supporting *Plaintiffs’* position that Defendants have no
9 power to block such individuals’ access to ports. *Bostock v. Clayton Cnty.*, 140 S. Ct.
10 1731, 1747 (2020) (when Congress passes a statute and includes no exceptions, no
11 “tacit exception” may be inferred). In short, these general authorizing statutes provide
12 no basis “to infer an implicit delegation” of agency authority to override explicit
13 statutory requirements. *Gorbach v. Reno*, 219 F.3d 1087, 1093 (9th Cir. 2000) (en
14 banc). *See also Al Otro Lado*, 2021 WL 3931890, at *11-12.

15 In a last-ditch effort to evade their statutory obligations, Defendants cite
16 several inapposite cases regarding the use of prosecutorial discretion in the context
17 of law enforcement. In *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005),
18 for example, the Supreme Court held that a municipality was not required to enforce
19 a domestic abuse restraining order against the respondent’s husband, where the
20 respondent had no entitlement under state law, and thus no protected property interest
21 under the Due Process Clause, to police enforcement. *Id.* at 766-68. By contrast, the
22 putative class members in this case have a clear statutory right to apply for asylum,
23 and Defendants have mandatory statutory duties to inspect and process them. *See*
24 Part V, *infra*. This case is not about prosecutorial discretion. As Judge Bashant has
25 repeatedly found, “[8 U.S.C.] § 1225 codifies Congress’s specific and detailed
26 instructions regarding ‘how immigration officers are to “manage the flow” of arriving
27 aliens who express to an immigration officer an intention to apply for asylum or a
28 fear of persecution.’” *Al Otro Lado*, 2021 WL 3931890, at *11; *Al Otro Lado*, 394 F.

1 Supp. 3d at 1210. Unlike the municipality in *Castle Rock*, Defendants have no
2 discretion to deviate from these instructions.

3 Defendants' attempt to categorize CBP's inspection and processing duties as
4 immigration law enforcement efforts has no support in their cited, or indeed any, case
5 law. See ECF 68-1 at 26 (citing *City of Chicago v. Morales*, 527 U.S. 41 (1999), and
6 *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999)). At issue in *City*
7 *of Chicago* was a criminal statute and its failure to provide sufficient guidelines to
8 limit police officers' discretion to arrest, 527 U.S. at 41-42; *Reno* dealt squarely with
9 the Executive's discretion to place people in removal proceedings, an action that the
10 Supreme Court has recognized is tied to law enforcement, 525 U.S. at 488-91. In
11 contrast, inspection and processing duties at POEs are not a traditional law
12 enforcement or prosecutorial function. See, e.g., *Texas*, 599 U.S. at 678-80
13 (discussing immigration enforcement discretion only in the context of arresting and
14 removing noncitizens).

15 While Defendants have some latitude regarding how inspection at POEs is
16 carried out, as both a Ninth Circuit motions panel and Judge Bashant have found, "a
17 class member's first arrival [at a POE] trigger[s] a statutory right to apply for asylum
18 and have that application considered." *Al Otro Lado*, 952 F.3d at 1013-14, (citing 8
19 U.S.C. §§ 1158, 1225(a)(3), 1225(b)(1)(A)(ii)); *Al Otro Lado*, 394 F. Supp. 3d at
20 1203-05. If CBP is allowed to refuse inspection, the individual's first arrival would
21 lose its legal significance. See *id.* Plaintiffs' APA claims are thus judicially
22 reviewable. See *Heckler v. Chaney*, 470 U.S. 821, 834-35 (1985) ("If [Congress] has
23 indicated an intent to circumscribe agency enforcement discretion, and has provided
24 meaningful standards for defining the limits of that discretion, ... courts may require
25 that the agency follow that law ...").¹⁶

26 _____
27 ¹⁶ In a footnote, Defendants briefly suggest that the act of state doctrine or the
28 political question doctrine deprives this Court of jurisdiction. ECF 68-1 at 35 n.8.
Their suggestion is meritless. Plaintiffs claim that by refusing to inspect and process

1 **VII. SECTIONS 1225 AND 1158 OF THE INA REACH NONCITIZENS IN**
2 **THE PROCESS OF ARRIVING AT POES.**

3 Defendants next reprise their argument that Plaintiffs' claims should be
4 dismissed because noncitizens who approach a POE are not entitled to inspection and
5 processing under 8 U.S.C. §§ 1158 or 1225. ECF No. 68-1 at 27-30. Defendants
6 readily acknowledge that they are making this argument largely to "preserve" it, as
7 the issue was extensively briefed and resolved in Plaintiffs' favor in the dismissal
8 and summary judgment opinions in Judge Bashant's prior *Al Otro Lado* decisions.
9 *See Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d at 1198-1202; *Al Otro Lado,*
10 *Inc. v. Mayorkas*, 2021 WL 3931890, at *11-12; *Al Otro Lado, Inc. v. Mayorkas*, 619
11 F. Supp. 3d 1029, 1049-50 (S.D. Cal. 2022). A Ninth Circuit motions panel
12 subsequently held that the district court's statutory interpretation is "likely correct"
13 and has "considerable force." *Al Otro Lado*, 952 F.3d at 1013. In short, both a
14 motions panel of the Ninth Circuit and another court in this district have now rejected
15 Defendants' arguments several times, because the plain language and legislative

16
17 noncitizens standing at the limit line, Defendants violate a clear statutory duty to
18 inspect and process individuals who are at the limit line seeking entry. That claim is
19 not barred by either the act of state doctrine or the political question doctrine. *See,*
20 *e.g., Sea Breeze Salt, Inc. v. Mitsubishi Corp.*, 899 F.3d 1064, 1069 (9th Cir. 2018)
21 (act of state doctrine bars suit where (1) there is an official act of a foreign sovereign
22 performed within its own territory; and (2) the relief sought or the defense interposed
23 would require a court in the United States to declare invalid the foreign sovereign's
24 official act); *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986)
25 (refusing to find a political question in a case "which calls for applying no more than
26 the traditional rules of statutory construction, and then applying this analysis to the
27 particular set of facts presented"); *El-Shifa Pharm. Indus. Co. v. United States*, 607
28 F.3d 836, 842 (D.C. Cir. 2010) (distinguishing claims that question whether military
action was "wise" as nonjusticiable "policy choice" committed to executive
discretion from claims "presenting purely legal issues such as whether the
government had legal authority to act") (cleaned up). *See also Al Otro Lado*, 394 F.
Supp. 3d at 1192 n.6 (rejecting Defendants' argument that the act of state doctrine
barred injunctive or declaratory relief relating to allegations that Mexican officials
acted unlawfully).

1 history of these statutes support the conclusion that they apply to asylum seekers in
 2 the process of arriving in the United States. *See Al Otro Lado*, 952 F.3d at 1010-13;
 3 *Al Otro Lado*, 394 F. Supp. 3d at 1199-1205.¹⁷

4 First, as the Ninth Circuit and this Court have both recognized, these statutes
 5 use terms that necessarily refer to noncitizens who are not yet present in the United
 6 States. *Al Otro Lado*, 952 F.3d at 1011; *Al Otro Lado*, 394 F. Supp. 3d at 1199.
 7 Sections 1225(a)(1) and 1158(a)(1) discuss two categories of noncitizens: (1) those
 8 “physically present in the United States” and (2) those “who arrive[] in the United
 9 States.” *Al Otro Lado*, 952 F.3d at 1011; *Al Otro Lado*, 394 F. Supp. 3d at 1199. If
 10 people “arrive[] in” the United States only when they are physically “present,” then
 11 including both terms in each section of the statute would be redundant. Following the
 12 “cardinal principle of statutory construction that a statute ought, upon the whole, to
 13 be so construed that, if it can be prevented, no clause, sentence, or word shall be
 14 superfluous, void, or insignificant,” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)
 15 (internal quotation marks and citation omitted), the term “arrives in” must cover those
 16 noncitizens who are not geographically “present in” the United States. *Al Otro Lado*,
 17 394 F. Supp. 3d at 1199 (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)); *see*
 18 *Al Otro Lado*, 952 F.3d at 1011.

19 Defendants’ interpretation that “arrives in” is limited to persons “physically
 20 present in” the United States runs afoul of the rule that “[w]hen a term goes undefined

21 _____
 22 ¹⁷ Notably, Judge Bashant’s interpretation of the relevant statutory language carries
 23 preclusive effect; her determination of the meaning of “arrive” and “arriving” in 8
 24 U.S.C. § 1158 and § 1225 should control this Court’s analysis of the statutory
 25 question here. *See Al Otro Lado*, 394 F. Supp. 3d at 1198-1202; *Al Otro Lado*, 2021
 26 WL 3931890, at *11-12; *see also* Part IV, *supra*, at ___. Although Defendants are
 27 correct that neither this Court nor the Ninth Circuit are “bound by” the Ninth
 28 Circuit motions panel’s analysis, it nonetheless has “considerable force,” *Al Otro*
Lado, 952 F.3d at 1013, and is a persuasive authority that addresses the exact
 arguments Defendants now seek to rehash. Moreover, Defendants themselves rely
 heavily on Judge Bress’s dissent from the Ninth Circuit motions panel’s opinion in
 support of their position on the merits. They cannot have it both ways.

1 in a statute, [the Court] give[s] the term its ordinary meaning.” *Taniguchi v. Kan. Pac.*
 2 *Saipan, Ltd.*, 566 U.S. 560, 566 (2012). “Physically present in the United States”
 3 means just what it says—physically on U.S. soil. *Barrios v. Holder*, 581 F.3d 849,
 4 863 (9th Cir. 2009) (noting that “physical presence” as used in the INA is not a term
 5 of art), *abrogated on other grounds, Hernandez-Rodriguez v. Barr*, 776 F. App’x 477,
 6 478 (9th Cir. 2019). And so, the inclusion of a reference to noncitizens who “arrive[]
 7 in the United States” must refer to something different: people who have not yet
 8 crossed the border.

9 Second, as Judge Bashant determined, Congress’s choice of verb tense in
 10 sections 1158(a)(1) and 1225(a)(1) demonstrates that “arrive[] in” refers to
 11 noncitizens who have not crossed the border. *Al Otro Lado*, 394 F. Supp. 3d at 1200
 12 (concluding that § 1158(a)(1)’s “use of the present tense of ‘arrives’ plainly covers
 13 an alien who may not yet be in the United States, but who is in the process of arriving
 14 in the United States through a POE”); *see also Al Otro Lado*, 952 F.3d at 1011.

15 Third, § 1225(b)(1)(A)(ii) uses the term “arriving” in the present progressive
 16 tense. Again, the verb tense is significant—here, to indicate that arrival is an ongoing
 17 process.¹⁸ *See Al Otro Lado*, 394 F. Supp. 3d at 1199; *Al Otro Lado*, 952 F.3d at 1011;
 18 *see also Shell v. Burlington N. Santa Fe Ry.*, 941 F.3d 331, 336 (7th Cir. 2019) (“a
 19 present participle [is] used to form a progressive tense . . . [to signal] continuous and
 20 concurrent processes”); *United States v. Balint*, 201 F.3d 928, 933 (7th Cir. 2000)
 21 (“[U]se of the present progressive tense . . . generally indicates continuing action.”).

22 _____
 23 ¹⁸ *See Al Otro Lado*, 394 F. Supp. 3d at 1201 (quoting Representative Lamar Smith,
 24 Chairman of the House Judiciary Committee’s Subcommittee on Immigration and
 25 Claims, who noted that the term “arriving alien” ““was selected specifically by
 26 Congress in order to provide a flexible concept that would include all aliens *who are*
 27 *in the process of physical entry* past our borders[.]. . . . ‘Arrival’ in this context should
 28 not be considered ephemeral or instantaneous but, consistent with common usage, as
 a process . . . [including a]n alien apprehended at any stage of this process, *whether*
attempting to enter, at the point of entry, or just having made entry[.]” (emphasis
 added)).

1 Noncitizens are necessarily in the process of “arriving in” the United States before
2 they physically enter it.

3 Defendants concede that the present progressive tense in Section 1225 “could
4 denote a process of arrival.” ECF No. 68-1 at 29. But Defendants attempt to explain
5 that away by arguing that the “overall statutory scheme” of Section 1225 concerns
6 removal, which Defendants argue cannot happen unless one is first “present in that
7 location.” *Id.* at 30. But the government’s own regulations counter its proposed
8 statutory interpretation by defining the term “arriving alien” as “an applicant for
9 admission coming or *attempting to come into the United States* at a port-of-entry.” 8
10 C.F.R. § 1.2 (emphasis added). This definition again uses the present progressive,
11 emphasizing the ongoing nature of the action. Moreover, “attempting to come into
12 the United States” clearly encompasses individuals who have not yet crossed the
13 border. Accordingly, these provisions of the INA cover, at a minimum, Plaintiffs who
14 were attempting to enter the United States and would have crossed the border but for
15 Defendants’ unlawful conduct.

16 While the government has not raised the presumption against extraterritoriality,
17 *see Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1936-37 (2021), that two-step doctrinal
18 framework further supports application of Sections 1158 and 1225 to arriving class
19 members. For the foregoing reasons and those set forth in Judge Bashant’s prior *Al*
20 *Otro Lado* opinions, *see Al Otro Lado*, 394 F. Supp. 3d at 1201-02; *Al Otro Lado*,
21 2021 WL 3931890, at *13, both statutes give a “clear affirmative indication” of their
22 extraterritorial reach to individuals such as class members, and thus survive the
23 presumption at Step One. *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325,
24 337 (2016). Even if this Court were to disagree that the statutory text applies to
25 arriving aliens, these statutes should still have extraterritorial application under Step
26 Two of the framework.

27 At Step Two, a court must ask “whether the case involves a domestic
28 application of the statute” by “identifying the statute’s focus and asking whether the

1 conduct relevant to that focus” occurred in the United States. *WesternGeco LLC v.*
2 *ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018) (cleaned up). The focus of
3 these statutes is regulation of asylum processing for those arriving in the United
4 States and the “conduct relevant” to this “focus” plainly concerns a United States
5 agency (CBP) and the mandatory statutory duties of its officers standing on U.S. soil
6 to “inspect” and “refer” noncitizens—duties that involve the application of U.S. law
7 on U.S. soil. *See, e.g.*, 8 U.S.C. § 1225(a)(3) (“shall be inspected by immigration
8 officers”); 8 U.S.C. § 1225(b)(1)(A)(ii) (“officer shall refer the alien for an
9 interview”). Although the individuals seeking inspection and processing were one
10 whit’s distance outside of U.S. territory, application of the statute is permissible given
11 the substantial U.S.-based conduct. *WesternGeco*, 138 S. Ct. at 2137. In nearly all
12 border legislation, conduct relevant to the statute’s regulatory focus occurs inside the
13 United States even if it frequently reaches some activity that occurs across the border.
14 *See, e.g., Biden v. Texas*, 597 U.S. at 792; *United States v. Ubaldo*, 859 F.3d 690,
15 700 (9th Cir. 2017).

16 **VIII. PLAINTIFFS STATE A VALID DUE PROCESS CLAIM BASED ON** 17 **THEIR STATUTORY ENTITLEMENTS**

18 The government has again asked the Court to adopt a bright-line rule that
19 would deny all noncitizens any constitutional rights whatsoever outside the United
20 States. This Court should follow Judge Bashant’s prior *Al Otro Lado* decisions and
21 reject the government’s argument. *See, e.g., Al Otro Lado*, 394 F. Supp. 3d at 1218-
22 1221 (concluding that “there is nothing ‘impracticable [or] anomalous’ in applying
23 elementary due process protection at the U.S. border”). There are two parts to
24 understanding the availability of due process to class members in this case: (1)
25 whether the Constitution reaches extraterritorially, just across the U.S. border and (2)
26 assuming it does, the scope of due process protections available to Plaintiffs.

27 Regarding the first question, the government claims the Constitution
28 categorically does not apply abroad, regardless of the circumstances, by relying on

1 plainly outdated cases such as *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950), and
2 *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). However, the
3 watershed case of *Boumediene v. Bush*, 553 U.S. 723 (2008), rejected the brightline
4 formulations of the *Eisentrager* and *Verdugo-Urquidez* cases and held that
5 “questions of extraterritoriality turn on objective factors and practical concerns, not
6 formalism.” *Id.* at 764 (“[n]othing in *Eisentrager* says that de jure sovereignty is or
7 has ever been the only relevant consideration in determining the geographic reach of
8 the Constitution or of habeas corpus.”). When “determining the geographic scope of
9 the Constitution,” *Boumediene*, 553 U.S. at 759, courts must take into account the
10 “specific circumstances of each particular case” and ask whether application of the
11 constitutional right in those particular circumstances would be “impracticable and
12 anomalous.” *Id.*; see also *Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983, 995–97
13 (9th Cir. 2012) (because the “border of the United States is not a clear line”
14 determining whether the Constitution will apply, courts should use a “functional
15 approach).

16 Under the governing *Boumediene* framework, there is nothing impracticable
17 or anomalous about protecting asylum seekers against unlawful conduct, especially
18 where their rights are coextensive with the statutory rights Congress afforded.
19 Defendants have not proffered any added hardship that they might face by conferring
20 due process rights on asylum seekers at the U.S.-Mexico border, and it is hard to
21 fathom how this situation would change if the putative class members were one foot
22 inside U.S. territory. Nor could it be anomalous to accord such due process rights to
23 protect the underlying statutory rights under Sections 1158 and 1225, given
24 Congress’s intention to have those statutes reach noncitizens on the Mexican side of
25 the border who are arriving in the United States. See *United States v. Villanueva*, 408
26 F.3d 193, 199 (5th Cir. 2005) (“It is natural to expect that Congress intends for laws
27 that regulate conduct that occurs near international borders to apply to some activity
28 that takes place on the foreign side of those borders.”).

1 Regarding the second inquiry, the scope of the due process rights Plaintiffs
 2 seek to protect are those that “are coextensive with the statutory rights Congress
 3 provides.”¹⁹ *Guerrier*, 18 F.4th at 313; *see also Thuraissigiam*, 140 S. Ct. at 1983
 4 (non-resident noncitizens entitled to “rights regarding admission that Congress has
 5 provided by statute”). Judge Bashant’s reasoning affirming that individual plaintiffs’
 6 due process rights “extend as far as their rights under [the inspection and referral
 7 statutes]” should apply here, too. *Al Otro Lado, Inc. v. Mayorkas*, 2021 WL 3931890,
 8 at *20.

9 **IX. PLAINTIFFS’ NON-REFOULEMENT CLAIM IS ACTIONABLE**
 10 **UNDER THE ALIEN TORT STATUTE**

11 The norm of non-refoulement has reached *jus cogens* status, “an elite subset
 12 of . . . customary international law” from which no derogation is ever permitted,
 13 *Siderman de Blake v. Rep. of Argentina*, 965 F.2d 699, 714-15 (9th Cir. 1992).
 14 Although the 1951 Refugee Convention is silent on the issue, the norm is currently
 15 understood to prohibit “rejection at the frontier.”²⁰ It is this norm that is sufficiently
 16 specific to qualify for jurisprudential recognition. *See Jesner v. Arab Bank, PLC*, 138
 17 S. Ct. 1386, 1409 (2018) (violation of norm must be “specific, universal and
 18

19 ¹⁹ Nothing in *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020),
 20 changed the availability of such rights outside the expedited removal context.
 21 *Thuraissigiam*—like *Mendoza-Linares v. Garland*, 51 F.4th 1146 (9th Cir. 2022)—
 22 involved challenges to the expedited removal statutes, *Thuraissigiam*, 140 S. Ct. at
 23 1966. Because Congress specifically limited judicial review of expedited removal
 24 processes, *Thuraissigiam* merely holds that there is no independent due process
 25 entitlement to challenge such processes. *See Guerrier v. Garland*, 18 F.4th 304, 308-
 26 09 (9th Cir. 2021). Here, Plaintiffs do not raise a due process challenge to the
 27 inspection and referral statutes; they seek to protect the arbitrary deprivation of these
 28 statutory entitlements via due process. *See Guerrier*, 18 F.4th at 312-13.

²⁰ UNHCR, Non-Refoulement No. 6 (XXVIII) - 1977, ¶¶ (a), (c), U.N. DOC.
 A/32/12/Add.1 (Oct. 12, 1977) (“the principle of non-refoulement . . . [applies] both
 at the border and within the territory of a State,” a principle that “was generally
 accepted by states.”); *see also* UNHCR Exec. Comm., Conclusion No. 22 (XXXII)
 – 1981, Protection of Asylum-Seekers in Situations of Large-Scale Influx, ¶ II.A.

1 obligatory,” quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)) (Alito, J.
2 concurring). The universality and robustness of the norm confirm that it would not
3 be an “extraordinary exercise of judicial power” to recognize an Alien Tort Statute
4 (ATS) non-refoulement norm. ECF No. 68-1 at 32.

5 Disregarding an overwhelming international consensus that non-refoulement
6 is a *jus cogens* norm prohibiting rejection at the border, Defendants’ singular
7 authority in support of their argument that the norm is not universal is Judge
8 Bashant’s holding that, because Australia and “some European countries” are not
9 respecting this norm, the United States should not have to do so. *See Al Otro Lado*,
10 2021 WL 3931890, at *22. However, as the plaintiffs in the prior *Al Otro Lado* case
11 have stressed in their cross-appeal of this ruling, *see Appellees/Cross-Appellants’*
12 *Redacted Principal and Response Brief* 53, Nos. 22-55988, 22-56036 (9th Cir. Feb.
13 21, 2023), ECF No. 23, violations of a norm do not diminish or undermine its
14 “binding effect as a norm of international law.” *Filartiga v. Pena-Irala*, 630 F.2d 876,
15 884 n.15; *Siderman*, 965 F.2d at 715 (*jus cogens* ““is derived from values taken to be
16 fundamental by the international community, rather than from the fortuitous or self-
17 interested choices of nations”” (quoting David F. Klein, *A Theory for the Application*
18 *of the Customary International Law of Human Rights by Domestic Courts*, 13 Yale
19 J. Int’l L. 332, 351 (1988))).

20 Defendants also rely on an overbroad and plainly incorrect reading of *Sale v.*
21 *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), to foreclose any extraterritorial
22 application of this fundamental norm. First, *Sale* was not an ATS case; it only
23 considered the extraterritorial reach of Article 33 of the 1951 Refugee Convention,
24 not the multiplicity of sources courts must consider—including treaties, state
25 practices and scholarship, *Siderman*, 965 F.2d at 714–15—to assess the binding
26 nature of the norm. Second, despite dicta regarding Article 33’s extraterritorial reach,
27 *Sale*’s actual holding was narrow: Article 33 does not “appl[y] to action taken by the
28 Coast Guard on the high seas,” *Sale*, 509 U.S. at 159, and its text does not apply “to

1 aliens interdicted on the high seas.” *Id.* at 187; *see also id.* at 160, 166–67, 173, 179–
 2 80 (all emphasizing noncitizens’ presence on the high seas); *Blazevska v. Raytheon*
 3 *Aircraft Co.*, 522 F.3d 948, 954 (9th Cir. 2008) (*Sale* involved the “deportation of
 4 aliens from international waters”).²¹

5 Even if there may be ambiguity about the application of the norm to the *high*
 6 *seas*, there is universal consensus that the norm applies *at the border*. That is
 7 manifested in multiple treaties (including the Refugee Convention, the 1967 Protocol,
 8 and the Convention Against Torture), UNHCR principles,²² state practices,²³ and

9 _____
 10 ²¹ Indeed, *Sale* recognized that the INA provision at issue there *would* have
 11 applied had the Haitian petitioners “arrived at the border of the United States,” 509
 12 U.S. at 160, as the putative class members have here. The Court determined that the
 13 English translation of “refouler” from Article 33 is not synonymous with “return,”
 14 but rather is akin to “repulse,” “repel,” “drive back,” and “expel.” *Id.* at 181.
 15 Accordingly, “these translations imply that ‘return’ [in Article 33] means a defensive
 16 act of resistance or exclusion at a border rather than an act of transporting someone
 17 to a particular destination.” *Id.* at 181–82. Defendants’ “exclusion at [the] border”
 18 would thus violate Article 33 under *Sale*’s terms.

19 ²² In 1981, UNHCR’s Executive Committee reaffirmed that “in all cases the
 20 fundamental principle of non-refoulement *including non-rejection at the frontier*
 21 *must be scrupulously observed.*” UNHCR Executive Comm., *Conclusion No. 22*
 22 *(XXXII)-1981-Protection of Asylum-Seekers in Situations of Large-Scale Influx*,
 23 para. II.A. Most emphatically, in 2007, the UNHCR Executive Committee opined
 24 specifically that “Article 33 [of the Refugee Convention] encompasses ‘non-
 25 admission[s] at the border.’” *Advisory Opinion on the Extraterritorial Application of*
 26 *Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of*
 27 *Refugees and its 1967 Protocol*, ¶ 8 (Jan. 26, 2007). The UNHCR Executive
 28 Committee has also stated that the “duty not to *refoule*” is a prohibition against “any
 measure attributable to a State which could have the effect of returning an asylum-
 seeker or refugee to the frontiers of territories where his or her life or freedom would
 be threatened, or where he or she would risk persecution ... [including] *rejection at*
the frontier ...” UNHCR Exec. Comm., *Note on International Protection*, ¶ 16, U.N.
 Doc. A/AC.96/951 (Sept. 13, 2001) (emphasis added).

²³ *See, e.g., Dee M.A. and Others v. Lithuania* (no. 59793/17), Eur. Ct. H.R. (Dec. 11,
 2018) (“States have a fundamental obligation to ‘ensure that no one shall be subjected
 to refusal of admission at the frontier’”); *Hirsi Jamaa v. Italy*, App. No. 27765/09
 Eur. Ct. H.R. (Feb. 23, 2012); Austria - Administrative Court of the Province of

1 scholarship.²⁴

2 Defendants’ remaining prudential arguments are meritless. First, as Judge
 3 Bashant correctly held, the APA’s unqualified waiver of sovereign immunity applies
 4 to the ATS claims asserted in this case. *Al Otro Lado*, 327 F. Supp. 3d at 1308. The
 5 government, without citing any authority, speculates that Congress did not intend for
 6 Section 702’s waiver to reach ATS claims. *But see Navajo Nation v. Dep’t of the*
 7 *Interior*, 876 F.3d 1144, 1171 (9th Cir. 2017) (“§ 702 waives whatever sovereign
 8 immunity the United States enjoyed from prospective relief with respect to *any action*
 9 *for injunctive relief*”) (internal quotations omitted) (emphasis added); *Clinton v.*
 10 *Babbitt*, 180 F.3d 1081, 1087 (9th Cir. 1999) (§ 702 “expressly waived” immunity
 11 for non-statutory claims for “nonmonetary relief against the United States.”); *Iran*
 12 *Thalassemia Soc’y v. Off. of Foreign Assets Control*, 2022 WL 9888593, at *7 (D.
 13 Or. 2022) (holding that APA § 702 is sufficient waiver for an ATS claim to proceed).
 14 Moreover, any nominal interest in sovereign immunity—a creature of common
 15 law—would be outweighed in the face of a violation of *jus cogens* norms. *Yousuf v.*
 16 *Samantar*, 699 F.3d 763,776 (4th Cir. 2012); *Siderman*, 965 F.2d at 718.

17 Defendants also reprise a preemption argument, suggesting that Congress
 18 foreclosed an ATS remedy through its broad statutory enactments regarding asylum
 19 and withholding. But while congressional enactments may preempt direct application
 20

21 _____
 22 Styria, LVwG 20.3-912/2016 (Sep. 9, 2016) (asylum seekers cannot be rejected at
 23 the border crossing without having the possibility to state reasons for obtaining
 24 international protection); *D.D. v. Spain*, U.N. Doc. CRC/C/80/D/4/2016 (same);
 25 *Judgment of the Court in Case C-143/22 | ADDE and Others*, Eur. Ct. J. (2023)
 26 (condemning pushbacks as violating non-refoulement).

27 ²⁴ See, e.g., Cathryn Costello, *The Human Rights of Migrants and Refugees in*
 28 *European Law* 236 (2015) (“The weight of authority is now that [non-refoulement]
 also applies to rejection at the frontier.”); Guy S. Goodwin-Gill & Jane McAdam,
The Refugee in International Law 208 (3d ed. 2007) (“States in their practice and in
 their recorded views . . . have recognized that non-refoulement applies . . . [when]
 asylum seekers present themselves for entry, either within a State or at its border”).

1 of customary international law,²⁵ which is not sought here, one statute, such as the
 2 INA, cannot preempt another statutory enactment, the ATS. *See Al Otro Lado*, 327
 3 F. Supp. 3d at 1307 n.10 (“Contrary to defendants’ argument, there is no absolute
 4 preclusion of international law claims by the availability of domestic remedies for
 5 the same alleged harm.”); *see also Jama v. U.S. INS*, 22 F. Supp. 2d 353, 364 (D.N.J.
 6 1998).

7 Finally, Defendants correctly identify the purpose of the ATS—“to promote
 8 harmony in international relations by ensuring foreign plaintiffs a remedy for
 9 international-law violations in circumstances where the absence of such a remedy
 10 might provoke foreign nations to hold the United States accountable,” *Jesner*, 138 S.
 11 Ct. at 1406—but fail to perceive how this *compels* ATS relief in this case. It is the
 12 “absence” of a judicial remedy for foreign nationals that would produce
 13 “international discord,” *id.*; providing a remedy would fulfill the congressional
 14 purpose behind the ATS and this court’s role in protecting separation of powers.²⁶

15 CONCLUSION

16 For the foregoing reasons, Defendants’ Motion to Dismiss should be denied.
 17
 18
 19

20 ²⁵ Wherever possible, courts are urged to harmonize congressional mandates with
 21 well-established international legal norms. *See Murray v. The Schooner Charming*
 22 *Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“act of Congress ought never to be construed
 23 to violate the law of nations if any other possible construction remains.”). This Court
 24 can harmonize the law of nations—which has decisively prohibited rejection at the
 25 frontier—and 8 U.S.C. §§ 1158 and 1225 by holding that Defendants’ duties to
 26 inspect and process asylum seekers apply at the limit line.

27 ²⁶ Defendants assert that they are entitled to a judgment on the ATS claim through
 28 collateral estoppel. ECF No. 68-1 at 34 & n.12. But most Individual Plaintiffs in this
 action are not in privity with the individual plaintiffs in the prior *Al Otro Lado* case
 and could not reasonably expect to be bound by that decision. *Mogan v. Sacks,*
Ricketts & Case, LLP, 2023 WL 2983577, at *2 (9th Cir. 2023).

1 Dated: January 12, 2024

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CERTIFICATE OF SERVICE

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6
7 DATED: January 12, 2024

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