No. 23-3396

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AL OTRO LADO, INC., *et al.*,
Plaintiffs-Appellants,

v.

ALEJANDRO MAYORKAS, Secretary of Homeland Security, *et al.*,
Defendants-Appellees.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
No. 3:23-cv-01367

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

8 U.S.C. § 1252(f)(1) does not apply to Plaintiffs' proposed preliminary injunction, which does not require Defendants to take or refrain from taking actions to enforce, implement, or otherwise carry out 8 U.S.C. § 1225 or any other provision in 8 U.S.C. §§ 1221–1232. Contrary to Defendants' assertions, nothing in the November 2021 binding guidance at issue in this case requires Defendants to inspect and process arriving noncitizens under 8 U.S.C. § 1225. At most, requiring Defendants to adhere to the November 2021 binding guidance will have "some collateral effect" on certain provisions of 8 U.S.C. §§ 1221–1232, and thus 8 U.S.C. § 1252(f)(1) does not apply. *See Garland v. Aleman Gonzalez*, 596 U.S. 543, 553 n.4 (2022).

The relevant facts are not in dispute, and they are dispositive. On November 1, 2021, Defendants adopted binding guidance concerning how U.S. Customs and Border Protection ("CBP") "manage[s] the intake of undocumented noncitizens at [ports of entry]" on the U.S.-Mexico border. 2-ER-115–17. That guidance governs how CBP officers interact with undocumented noncitizens on Mexican territory who are in the process of arriving in the United States, before those noncitizens are inspected and processed pursuant to 8 U.S.C. § 1225. *Id*. The binding guidance prohibits CBP officers from turning back those noncitizens. *Id*. That is, it prohibits CBP officers or persons acting at their direction from telling a noncitizen who is in the

process of arriving in the United States that they must leave the port of entry ("POE"), travel to another POE, or return to the POE at a later date in order to be inspected and processed. *Id.*

The binding guidance *does not* require that CBP officers inspect and process every arriving noncitizen. *Id.* The guidance specifically allows CBP officers to ask a noncitizen to wait in line outside the POE, 2-ER-116, and it indicates that the wait times in those lines can vary significantly based on "a wide range of factors, including staffing constraints" and "outdated infrastructure." 2-ER-115. Moreover, under the November 2021 guidance, the time that noncitizens must wait in line outside a POE may vary based on "CBP's other vital priorities, including . . . protect[ing] public safety and national security, interdict[ing] the flow of narcotics and contraband, and facilitat[ing] lawful trade and travel." 2-ER-116. In extreme cases, the November 2021 guidance permits CBP to entirely cut off the inspection and processing of noncitizens waiting in line by closing the POE. *Id.*; *see also* 2-ER-120. When a CBP officer directs a noncitizen to stand in line outside the POE, there is no guarantee that the noncitizen will actually be inspected and processed under 8 U.S.C. § 1225. The noncitizen may decide that the wait is too long and elect to return to the POE at another time. Mexican authorities may unilaterally decide to clear the line

from their territory for various administrative reasons. *See, e.g.*, 2-ER-267. The bottom line is that a policy prohibiting turnbacks is not a policy mandating inspection and processing under 8 U.S.C. § 1225.

Nor does the binding guidance say anything about 8 U.S.C. §§ 1221–1232. It simply references an executive order. 2-ER-117. The guidance does not even mention the inspection or processing of arriving noncitizens in a way that would implicate 8 U.S.C. § 1225. Instead, the guidance governs the way that CBP officers manage pre-inspection interactions with noncitizens. 2-ER-116.

Plaintiffs did not seek an injunction requiring Defendants to inspect and process arriving noncitizens. Rather, they sought an injunction under *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), requiring *only* that Defendants adhere to the November 2021 binding guidance. *See* 2-ER-101. Plaintiffs sought a narrow injunction prohibiting Defendants from turning back noncitizens at POEs in accordance with the November 2021 binding guidance. *Id.*

Because Plaintiffs sought an injunction that has no direct effect on a statutory provision covered by § 1252(f)(1), Defendants' arguments that an injunction is barred by § 1252(f)(1) are misguided for several reasons. *First*, an injunction requiring Defendants to comply with their own binding guidance does not enjoin or restrain the operation of any covered provision because the guidance itself does not

implement 8 U.S.C. § 1225 and does not require inspection or processing. *Infra* Section I.A. *Second*, the "nature of the claim" does not matter here because the injunction is not aimed at a covered provision. *Infra* Section I.B. *Third*, Defendants scarcely address Plaintiffs' arguments that the text and history of 8 U.S.C. § 1252(f)(1) demonstrate that it does not apply here. *Infra* Section I.C. *Finally*, Defendants' reading of "enjoin or restrain" contradicts the Supreme Court's reading of that phrase in *Aleman Gonzalez*, and ultimately does not bar relief because the injunction does not directly impact a covered provision. *Infra* Section I.D.

Once this Court corrects the District Court's legal error, there is no reason to delay granting injunctive relief. Defendants object to this Court's jurisdiction over issues of provisional class certification, but those issues are inextricably bound up with the order denying a class-wide preliminary injunction. *Infra* Section II.A. And Defendants do not contest the core facts that noncitizens are being forced to wait in dangerous and squalid conditions in Mexico because they do not have—and are not able to obtain—CBP One appointments. *Infra* Section II.B. Nonetheless, to the extent the Court finds factual disputes or believes it appropriate to allow the District Court to adjudicate provisional class certification in the first instance, the proper course of action is to resolve the disputed legal issue and remand to the District Court.

ARGUMENT

I. 8 U.S.C. § 1252(f)(1) does not bar Plaintiffs' requested injunction.

In an effort to force a square peg into a round hole, Defendants assert that the Court can dispose of this case by applying *Garland v. Aleman Gonzalez*, 596 U.S. 543 (2022). But *Aleman Gonzalez* does not bar Plaintiffs' requested injunction, which would not enjoin or restrain the operation of any of the statutory provisions covered by 8 U.S.C. § 1252(f)(1). Because none of Defendants' other arguments support the District Court's ruling, this Court should reverse.

A. *Aleman Gonzalez* confirms that § 1252(f)(1) does not bar injunctive relief that does not have a direct effect on a covered provision.

Section 1252(f)(1) strips district courts and courts of appeal of their "authority to enjoin or restrain the operation of the provisions of [8 U.S.C. §§ 1221–1232]." In *Aleman Gonzalez*, the Supreme Court held that the phrase "operation of" refers to "the Government's efforts to enforce or implement" 8 U.S.C. §§ 1221–1232. 596 U.S. at 550. Therefore, 8 U.S.C. § 1252(f)(1) "generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified provisions." *Id.*

But Defendants should not "read[] too much into the *Aleman Gonzalez* opinion." *Texas v. United States*, 40 F.4th 205, 219 (5th Cir. 2022) (per curiam). *Aleman Gonzalez* itself notes that district courts may still enjoin "the unlawful operation of

a provision *that is not specified in § 1252(f)(1)* even if that injunction has some collateral effect on the operation of a covered provision." 596 U.S. at 553 n.4. To determine whether this exception applies, a court focuses on two questions:

> (1) does the injunction "order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out" one of the statutory provisions covered by § 1252(f)(1)?, *id.* at 550; and
>
> (2) does that injunction have more than a "collateral effect" on the operation of the covered provision?, *id.* at 550, 553 n.4.

Here, the answer to both of those questions is "no" and supports Plaintiffs' proposed injunction.

1. The injunction does not enjoin or restrain any covered provision because it applies exclusively to conduct *before* inspection and processing.

Plaintiffs' proposed injunction does not enjoin or restrain the operation of a covered provision. The proposed injunction prohibits Defendants from disregarding binding guidance and turning back arriving noncitizens who lack appointments made through the CBP One app. Opening Br. 16, 32.

Importantly, all of the conduct addressed by the proposed injunction occurs *prior* to the inspection and processing of a noncitizen, and it is by no means certain that a noncitizen who is not turned back will be inspected and processed under

8 U.S.C. § 1225. In particular, the November 2021 guidance requires that noncitizens "be permitted to wait in line, if they choose, and proceed into the POE for processing as operational capacity permits." 2-ER-116. It also generally prohibits CBP officers from "instruct[ing] travelers that they must return to the POE at a later time or travel to a different POE for processing." *Id.*

But the November 2021 guidance does not compel inspection and processing for class members who are in Mexico, and only requires inspection for individuals "[o]nce in the United States." *Id.* The November 2021 guidance does not mention any statutory provision covered by 8 U.S.C. §1252(f)(1), and Defendants expressly maintain that the guidance does not implement 8 U.S.C. § 1225. Resp. Br. 52–53 (relying on 6 U.S.C. §211(g)).[1] Thus, an injunction that requires CBP to follow its binding guidance and allow noncitizens in Mexico to wait in line would not "enjoin or restrain" a covered provision under § 1252(f)(1) because it does not "order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise

[1] Defendants also rely on inapposite cases regarding the use of prosecutorial discretion in the context of law enforcement. Resp. Br. 52–53 (citing *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005); *City of Chicago v. Morales*, 527 U.S. 41, 62 n.32 (1999)). Those criminal-law cases do not inform whether the proposed injunction would enjoin or restrain the operation of a covered provision, particularly because inspection and processing duties at POEs are not traditional law enforcement or prosecutorial functions. *See, e.g.*, *United States v. Texas*, 599 U.S. 670, 678–80 (2023) (discussing immigration enforcement discretion only in the context of arresting and removing noncitizens). But the citations reinforce Defendants' belief that the November 2021 binding guidance is distinct from CBP's mandatory obligations under 8 U.S.C. § 1225.

carry out" their inspection and processing duties in the United States under 8 U.S.C. § 1225 (or any other covered provision). *See Aleman Gonzalez*, 596 U.S. at 550.

The narrow scope of Plaintiffs' *Accardi* claim reinforces that the injunction would not enjoin or restrain any covered provision. Plaintiffs moved for a preliminary class-wide injunction based solely on *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260—a claim that seeks agency compliance with an agency's own rules and guidance. *See Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required."). *Accardi* claims require an agency "to adhere to its own internal operating procedures." *Church of Scientology of Cal. v. United States*, 920 F.2d 1481, 1487 (9th Cir. 1990) (citing *Accardi*, 347 U.S. at 268). Specifically, Plaintiffs sought to require Defendants to comply with their November 2021 binding guidance that prohibits CBP from turning back noncitizens "regardless of whether they have used the CBP One app." 2-ER-225 (quoting 88 Fed. Reg. 31,314, 31,358 (May 16, 2023)).

2. The proposed injunction would have at most a "collateral effect" on a covered provision.

Defendants' argument betrays the same confusion that underlies the District Court's opinion—they both assume that an injunction prohibiting turnbacks is the

same as an injunction requiring Defendants to inspect and process arriving noncitizens. That is not the case. The November 2021 binding guidance gives Defendants leeway to ask arriving noncitizens to wait in line outside the POE. *See* 2-ER-116. It also provides Defendants with the flexibility to inspect and process noncitizens in that line if and when it is operationally feasible to do so. *See id.* The fact that a noncitizen is standing in line outside a POE does not mean that they will be inspected. Noncitizens may decide to leave the line and return at a later time. Mexican officials may also exercise their authority to disperse the line for a host of reasons. 2-ER-267. Moreover, Defendants also retain the authority to shut down POEs for operational reasons and not inspect or process any of the noncitizens waiting in line. *See* 2-ER-116. It is simply not the case that strict compliance with the November 2021 binding guidance will force Defendants to inspect every noncitizen who is not turned back.

The mere fact that some noncitizens may eventually be inspected and processed if they are not turned back does not mean that the proposed injunction interferes with Defendants' "efforts to enforce or implement" 8 U.S.C. § 1225. *Aleman Gonzalez*, 596 U.S. at 550. As this Court noted in *Catholic Social Services*, plaintiffs may receive benefits under a covered provision (there, preventing removal; here, inspection and processing) as a collateral consequence of a permissible injunction

where the injunction was issued under and directly impacted a non-covered provision (there, the adjustment of status statute; here, agency policy that dictates how Defendants are to treat undocumented noncitizens *prior* to inspection). *See Catholic Social Servs. v. INS ("CSS")*, 232 F.3d 1139, 1145–50 (9th Cir. 2000) (en banc); *Gonzales v. DHS*, 508 F.3d 1227, 1232–33 (9th Cir. 2007).[2]

Defendants argue that a handful of references to inspecting and processing arriving noncitizens in Plaintiffs' preliminary injunction motion must mean that "the object and effect" of the preliminary injunction was to require actions under 8 U.S.C. § 1225. Resp. Br. 29, 32. But the fact that Plaintiffs and proposed class members hope to eventually obtain access to inspection and processing does not mean that the proposed injunction interferes with Defendants' "efforts to enforce or implement" § 1225. *Aleman Gonzalez*, 596 U.S. at 550. Rather, § 1252(f)(1) allows such "collateral effect[s]" on a covered provision. *Id.* at 553 n.4.

[2] In a footnote, Defendants suggest that *CSS* is inconsistent with *Aleman Gonzalez*. *See* Resp. Br. 45 n.12. That is not the case. *CSS* is a part of a long line of cases holding that 8 U.S.C. § 1252(f)(1) does not apply when an injunction seeks to bar activity outside of 8 U.S.C. §§ 1221–1232. *See* 232 F.3d at 1149–50 (upholding preliminary injunction because it was issued under part V of the subchapter and thus "by its terms, the limitation on injunctive relief [in § 1252(f)(1)] does not apply"). Nor do Defendants directly challenge that holding in this appeal. Resp. Br. 45 n.12. ("[T]he Court need not decide that issue in this appeal . . . ."). *CSS* remains binding on this panel. *See Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc).

As this Court noted in *Gonzales v. DHS*, plaintiffs may avoid enforcement action under a covered provision as an indirect consequence of a permissible injunction issued to implement a legal requirement not covered by § 1252(f)(1). 508 F.3d at 1232–33. In *Gonzales*, the district court enjoined DHS from denying certain I-212 inadmissibility waivers to plaintiffs under § 1255(i)—a provision not covered by § 1252(f)(1). 508 F.3d at 1231–32. On appeal, the Ninth Circuit explained that § 1231(a)(5), a covered provision, provides for "*automatic* reinstatement" of a prior removal order when an undocumented immigrant reenters the United States without permission. *Id.* at 1230 (emphasis added). DHS argued that the "legal effect" of denying an I-212 waiver was the "commencement of reinstatement proceedings" under § 1231(a)(5), with the result that § 1252(f)(1) precluded the district court from granting an injunction prohibiting such denials. *Id.* at 1232–33. This Court rejected that argument and instead held that the injunction was authorized, "notwithstanding that a reinstatement proceeding," covered by § 1252(f)(1), "may be a collateral consequence of an unsuccessful adjustment application." *Id.* at 1233.

Likewise, in *CSS*, the Ninth Circuit upheld a district court order enjoining an adjustment of status policy under 8 U.S.C. § 1255(a), a provision not covered by § 1252(f)(1), even though the injunction also prohibited the government from executing final orders of removal in class members' cases under a covered provision.

232 F.3d at 1149–50. Lower courts have continued to follow this precedent, concluding that § 1252(f)(1)'s "limited jurisdictional bar" does not necessarily apply even if the challenged non-covered statute is "cross-reference[d]" in the text of a covered provision—which is not the case here. *See, e.g.*, *E. Bay Sanctuary Covenant v. Biden*, 2023 WL 4729278, at *8 (N.D. Cal. 2023) (issuing preliminary injunction where the challenged statute was cross-referenced in a provision covered by § 1252(f)(1)), No. 23-16032 (9th Cir. argued Nov. 7, 2023).

Plaintiffs in *Gonzales* and *CSS* almost certainly intended their injunctions to be one step towards receiving other immigration benefits, such as avoiding removal. But this Court did not inquire into the Plaintiffs' motives, and instead analyzed the effect of the requested injunction by looking to what source of law the injunction "directly implicates." *Gonzales*, 508 F.3d at 1233. Here too, Plaintiffs' intent to eventually obtain inspection and processing is irrelevant to the § 1252(f)(1) analysis.

Defendants cannot meaningfully distinguish *Gonzales* and *CSS*, Resp. Br. 44–49, which remain binding precedent in this Circuit and require reversal of the District Court's order. Defendants suggest that the legal effect or "direct consequence" of enjoining CBP from turning back arriving asylum seekers without CBP One appointments is the inspection and processing of asylum seekers under 8 U.S.C. § 1225—a covered provision. Resp. Br. 46. But *Gonzales* holds that even "automatic" conse-

quences are permissible. 508 F.3d at 1230, 1233. Defendants similarly try to distinguish *CSS* by arguing that the "aim" or "target" of Plaintiffs' requested relief is the execution of a covered provision requiring inspection and processing. Resp. Br. 45 n.12, 47–48. But the simple and straightforward goal of Plaintiffs' *Accardi* claim—the only claim for which they sought injunctive relief and the only claim on appeal—is to enforce Defendants' own policies prohibiting them from turning away noncitizens in Mexico before they enter the United States. Opening Br. 32; 1-ER-25.

3. Enforcing Defendants' November 2021 binding guidance will not guarantee inspection and processing.

But even if Defendants were correct about the legal test for collateral consequences, the record below shows that inspection and processing is far from an "automatic" or "direct[]" consequence of requiring Defendants to comply with their binding guidance. *See Gonzales*, 508 F.3d at 1230, 1233. While not being turned back may *enable* the possibility of inspection and processing, actual inspection and processing remains at least "one step removed." *Id.* at 1233 (citation omitted).

When Defendants encounter arriving noncitizens without CBP One appointments, they have "several available recourses," *id.*, under their own binding guidance. Defendants can immediately inspect and process those noncitizens. *See* 8 U.S.C. § 1225(a)(1), (3). But, under the November 2021 guidance, Defendants need not do so; they can ask those noncitizens to wait in line outside the POE without inspecting or processing them. 2-ER-116. In fact, as Defendants have argued several

times to this Court in related litigation, the INA contains no statutory requirement that Defendants immediately process arriving noncitizens. Opening Br. for the Government at 24–25, *Al Otro Lado, Inc. v. Mayorkas ("AOL 1")*, Nos. 22-55988, 22-56036 (9th Cir. Dec. 20, 2022) (arguing that the government "had no mandatory and ministerial obligation to inspect class members who are in Mexico" and that it was "entirely within the Executive's statutory and constitutional authority to control the pace of travel across the border—including by controlling the pace of intake").

The magnitude of that "one step" between waiting in line and inspection becomes obvious when considering the reality on the ground. For example, if CBP complied with its November 2021 guidance and stopped turning back arriving noncitizens, those noncitizens may still be forced to wait days or weeks in line, hoping to eventually be inspected and processed, but with no guarantee. *See*, *e.g.*, 3-ER-359 ("People inside the turnstile at the POE, *next in line to be processed*, reported they had been waiting and sleeping there for 22 nights and still had not been processed.") (emphasis added). In addition, Mexican officials may intervene and disperse the line, as frequently occurs. *See*, *e.g.*, 2-ER-267 (describing INM officials who "patrol" a line and "pull asylum seekers who do not have a CBP One appointment off the line"). And asylum seekers may decide for their own reasons to abandon the line. *See*, *e.g.*, 3-ER-564 (describing asylum seekers "being forced to wait by

CBP for over 72 hours in extreme heat"). But under Defendants' own binding guidance, Defendants cannot short-circuit those consequences by turning back noncitizens who lack CBP One appointments and refusing to allow noncitizens to wait for the possibility of inspection and processing.

Defendants even acknowledge that inspection and processing is not an automatic consequence of the November 2021 guidance. In their opposition to Plaintiffs' preliminary injunction motion, Defendants confirmed that "CBP's policy does not require *immediate* inspection and processing of those who present at POEs without appointments; it contemplates that individuals may, and likely will, have to wait in line, sometimes in Mexico, to await processing." 2-ER-94. Eventual inspection and processing under § 1225 would be an indirect, downstream consequence of an injunction requiring Defendants to comply with their binding guidance.

Therefore, an injunction that requires Defendants to adhere to the November 2021 binding guidance does not directly affect the inspection and processing of arriving noncitizens under 8 U.S.C. § 1225. Any collateral effect is permissible under § 1252(f)(1) and *Aleman Gonzalez*. Thus, the District Court's ruling should be reversed.

B. The "nature of the claim" does not matter because the injunction is not aimed at a covered provision.

Defendants place significant weight on the language in § 1252(f)(1) that the prohibition on class-wide injunctive relief applies "regardless of the nature of the

action or claim" in order to argue that injunctive relief is inapplicable even when "the underlying claim seeks to enforce something other than the statute." *See* Resp. Br. 35–37. Defendants rely on cases where courts of appeal have applied § 1252(f)(1) to reject class-wide injunctions directed squarely at covered provisions where the underlying cause of action was based on constitutional arguments. *Id.* But these arguments falsely conflate Plaintiffs' requested injunction—which has at most a collateral effect on covered provisions—with decisions in which the direct object of the injunction was a covered provision.

Defendants cite *Miranda v. Garland*, 34 F.4th 338 (4th Cir. 2022), and *Brito v. Garland*, 22 F.4th 240 (1st Cir. 2021), but those decisions are inapposite because, unlike here, the proposed injunctions in those cases directly impacted covered provisions. Resp. Br. 35–36. In *Miranda*, the plaintiffs sought class-wide injunctive relief that would have altered detention procedures adopted in regulations implementing 8 U.S.C. § 1226(a) on the basis that the existing procedures violated their due process rights under the Constitution. 34 F.4th at 346–47. The Fourth Circuit held that imposing the requested judicially created detention procedures to override the Attorney General's regulations implementing § 1226, a covered provision, would run afoul of § 1252(f)(1) and impermissibly enjoin or restrain the operation of the statute. *Id.* at 356. Likewise in *Brito*, the injunction sought similar changes to the government's detention regulations and procedures implementing § 1226 based on

a due process challenge. 22 F.4th at 250. The First Circuit held that § 1252(f)(1) barred such injunctive relief because § 1226 grants the government "discretion to 'continue to detain [an] arrested alien,'" and an injunction that altered the procedures for how the government could make that decision would enjoin or restrain the operation of § 1226. *Id.* at 249.

However, neither the Fourth Circuit nor the First Circuit relied on the "nature of the claim" language Defendants emphasize in their briefing in this case. Resp. Br. 35–37. Rather, the courts in those cases found that the requested injunctions would have interfered with the manner in which the government decided to implement "discretionary detention permitted under §1226(a)" and therefore enjoined or restrained the operation of a statute covered by § 1252(f)(1). *Miranda*, 34 F.4th at 356; *Brito*, 22 F.4th at 250 ("[W]e regard the district court's injunction to be what it appears to be: a classwide injunction that restrains the operation of section 1226(a) . . . ."). In both cases, the injunctions would have required new procedures not required by a covered statute and inconsistent with the government's own interpretation of that statute.

Here, in contrast, the defining characteristic of Plaintiffs' requested injunction is that it is not directed at the implementation of a covered provision under § 1252(f)(1). Instead, the injunction seeks to enforce compliance with Defendants' own binding guidance, which according to Defendants themselves, implements their

broad authorizing statutes and not a covered provision. Resp. Br. 52–53. Defendants would retain discretion under that guidance over whether, how, and when to process arriving noncitizens under § 1225. And because the proposed injunction is not aimed at the covered provision, it is not barred by § 1252(f)(1).

C. Defendants barely engage with Plaintiffs' statutory construction and legislative history arguments.

Defendants argue that the plain language of the statutory phrase "operation of the provisions" means that Plaintiffs' requested injunction is prohibited because of the "effect of the injunction on the operation of the covered provisions." Resp. Br. 50 (emphasis omitted). But Defendants' plain-language argument does nothing to shed light on whether the proposed injunction, which is aimed at a pre-inspection policy, actually has an effect on a covered provision. An injunction requiring compliance with the November 2021 guidance that prohibits turnbacks would not mandate how Defendants go about "the functioning or working" of their inspection and processing duties. *Aleman Gonzalez*, 596 U.S. at 559. Defendants also do not grapple with the fact that the Supreme Court in *Aleman Gonzalez* reviewed the plain language of § 1252(f)(1) and agreed that not every "effect" on a covered provision precludes an injunction. 596 U.S. at 549. Rather, by its terms, § 1252(f)(1) is nothing more or less than a limit on remedies, prohibiting courts from granting class-wide injunctive relief that would directly affect the functioning of the provisions in

§§ 1221–1232, and does not reach all activities that precede or are related to those covered statutory activities.

Moreover, Defendants do not explain how the structure and legislative history of § 1252(f)(1) are "consistent" with "the application of § 1252(f)(1) to bar the requested injunction." Resp. Br. 50. The structure of § 1252 as a whole makes clear that each of the prohibitions was carefully targeted by Congress to apply to specific statutes and proceedings—sometimes down to the subsection or number. *See, e.g.*, 8 U.S.C. § 1252(a)(2)(A)(i) (limiting review of "an order of removal pursuant to section 1225(b)(1)"), § 1252(a)(2)(B) (limiting review of discretionary relief "under section 1182(h), 1182(i), 1229b, 1229c, or 1255"). The precision with which Congress limited judicial review of other actions confirms that § 1252(f)(1) only prohibits lower courts from entering class-wide injunctions that enjoin or restrain the operation of 8 U.S.C. §§ 1221–1232. 8 U.S.C. § 1252(f)(1).

If Congress intended to speak more broadly when adopting § 1252(f)(1), it would have done just that. For example, the Tax Injunction Act prohibits interference with "the assessment, levy or collection of any tax under State law." 28 U.S.C. § 1341. Had Congress wished to cover all discretionary immigration decisions, it could have written § 1252 to similarly limit injunctions concerning "any Federal immigration law." Congress did not do so. Indeed, in *Gonzalez v. ICE* this Court explained that injunctions against regulations promulgated under a "grant of authority

[that] is *not* located in [§§ 1221–1232]" are permissible because the Court "presume[s] that Congress acted intentionally." 975 F.3d 788, 813–15 & n.16 (9th Cir. 2020). Here, Defendants claim that the binding guidance is grounded in 6 U.S.C. § 211. Resp. Br. 52–53. Therefore, Defendants are wrong to claim that the plain text or structure of § 1252(f)(1) supports the District Court's interpretation of the statute.

Although Defendants assert that "Plaintiffs point to nothing" in the legislative history of 8 U.S.C. § 1252(f)(1) to support "the conclusion that Congress merely sought to limit injunctive relief restraining government efforts to enforce or implement 8 U.S.C. §§ 1221–1232," Defendants at no point engage with Plaintiffs' legislative history arguments. *Compare* Resp. Br. 51, *with* Opening Br. 35. As Plaintiffs have pointed out, the legislative history of § 1252(f)(1) makes it abundantly clear that this provision *only* "limits the authority of Federal courts other than the Supreme Court to enjoin the operation of the new removal procedures established in *this* legislation." H.R. Rep. No. 104-469, pt. 1, at 161 (1996) (emphasis added); *see also id.* ("[S]ingle district courts or courts of appeal do not have authority to enjoin *procedures established by Congress* to reform the process of removing illegal aliens from the U.S.") (emphasis added). Defendants point to nothing that suggests Congress was concerned with injunctions, like the one sought here, that involve agency policies that are not tied to those specific covered statutes written by Congress. Thus, the legislative history indicates Congress' intent that § 1252(f)(1) prohibit lower

courts only from entering class-wide injunctions that enjoin the specific statutes it was simultaneously enacting.

D. The "Government's view" of the binding guidance confirms the injunction would not enjoin or restrain a covered provision.

The injunction here would not "enjoin or restrain" the operation of the covered provisions because it merely seeks to enforce Defendants' own voluntarily-adopted policies, separate and apart from their efforts to implement a covered provision. In *Aleman Gonzalez*, the Supreme Court was deliberate when it interpreted the phrase "enjoin or restrain the operation" to preclude requiring or prohibiting actions that "in the Government's view" are not required or permitted by the statute. 596 U.S. at 551. That limitation on the scope of § 1252(f)(1) is an important safety valve that allows courts to enforce compliance with the government's own policies, and Defendants' attempts to avoid that language miss the mark.

First and foremost, Defendants argue that, as a factual matter, the November 2021 guidance does not represent the "Government's view" of its obligations under § 1225. Resp. Br. 53. That argument merely confirms that the proposed injunction would not have an impermissible effect on a covered provision. Instead, the Government seems to agree that the November 2021 guidance does not implement § 1225. For that reason, an injunction requiring compliance with that binding guidance is not prohibited by § 1252(f)(1).

Defendants' remaining arguments about whether an injunction can compel compliance with the "Government's view" of its requirements are also unavailing. Defendants primarily argue that their view of their obligations expressed in the brief should control. Resp. Br. 52–53. However, courts generally do not accept convenient litigating positions taken by the government, and instead look to pre-litigation policy statements to determine the validity of government action. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."). The Supreme Court's skepticism towards the government's self-serving statements during litigation is equally appropriate here, and courts should look to the policy itself—like the November 2021 guidance—to determine the government's view.

Further, the statutory language in § 1252(f)(1) prohibiting injunctions "regardless of the nature of the action or claim" does not preclude enforcing the government's own view of its obligations. *Cf.* Resp. Br. 54. Instead, an injunction enforcing those obligations is permissible because it does not "require officials to take actions that (in the Government's view) are not required . . . [or] refrain from actions that (again in the Government's view) are allowed" by a covered statute. *Aleman*

Gonzalez, 596 U.S. at 552. To the extent the binding guidance implements the government's interpretation of what is permitted or required by § 1225, courts can enforce that policy under *Aleman Gonzalez*.

Ultimately, Defendants seem to agree that the November 2021 guidance does not implement a covered provision, so this Court need not determine whether the injunction would be consistent with the "Government's view" of its obligations. But to the extent this Court holds that the binding guidance implements § 1225, the November 2021 guidance is an enforceable statement of the "Government's view" of its obligations that *Aleman Gonzalez* declares is not prohibited by § 1252(f)(1).

II. The Court should reverse and direct the District Court to provisionally certify the class and enter a preliminary injunction.

This Court can order preliminary injunctive relief to preserve the rights of noncitizens who are fleeing persecution. Defendants argue that this Court lacks jurisdiction to certify a class and grant injunctive relief in the first instance. Resp. Br. 55–61. But because class certification is inextricably bound with the preliminary injunction, this Court has jurisdiction to review that issue. *Paige v. California*, 102 F.3d 1035, 1039 (9th Cir. 1996). Moreover, the preliminary injunction record is clear, and Defendants' attempts to create factual issues do not undermine the need for an injunction to prevent harm. Resp. Br. 58–61. But to the extent this Court concludes there are factual or discretionary issues to be resolved, Plaintiffs agree that the appropriate course of action would be remand to the District Court.

A. This Court has jurisdiction to enter a preliminary injunction.

As Defendants readily concede, jurisdiction over an interlocutory appeal extends to "matters inextricably bound up with the injunctive order from which the appeal is taken." *Paige*, 102 F.3d at 1039 (citation omitted). Indeed, in *Paige*, this Court found that an order granting class certification was "inextricably bound up with the grant of the interim injunction." *Id.* That is because this Court could not uphold the injunction without also upholding class certification. *Id.*

Here, the issue is whether the District Court lacked authority to enter classwide injunctive relief under 8 U.S.C. § 1252(f)(1). Opening Br. 5. Without a class, § 1252(f)(1) would not be relevant to the injunction, so the District Court's legal error is inextricably bound up with a decision on class certification. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481–82 (1999) (§ 1252(f)(1) "prohibits federal courts from granting classwide injunctive relief"). In fact, Defendants seem to agree that the decision on class certification is bound up, as they note that the purpose of Plaintiffs' injunction is "to obtain such relief on behalf of a class." Resp. Br. 58.[3] Thus, this Court's review of the order denying an injunction can encompass the denial of provisional class certification.

[3] Defendants also claim that the injunction is not warranted for the Individual Plaintiffs alone because they have received CBP One appointments and their claims are therefore moot. Resp. Br. 58. But it is not uncommon for noncitizens such as the Individual Plaintiffs to be removed and later seek to return to the United States, and

B. Injunctive relief is warranted as a matter of law to prevent harm.

Once this Court resolves the legal question regarding the effect of 8 U.S.C. § 1252(f)(1), injunctive relief should follow. Defendants argue that this Court should not grant injunctive relief because of factual disputes not resolved by the District Court. Resp. Br. 58–61. But Defendants do not dispute most of the facts in this case—including the harms caused by their actions, which deprived Individual Plaintiffs of access to the U.S. asylum process and forced them to endure "squalid and dangerous conditions in Mexican border communities." *Al Otro Lado, Inc. v. Mayorkas*, 619 F. Supp. 3d 1029, 1033–34 (S.D. Cal. 2022). Defendants raise a grab-bag of minor factual challenges, but none justify further delay in granting injunctive relief.

First, Defendants argue that there is insufficient evidence of a "borderwide" turnback policy. Resp. Br. 59–60. But Plaintiffs' *Accardi* claim does not require a border-wide turnback policy; it merely requires evidence that Defendants are not complying with their own policies, i.e. the November 2021 guidance. *See* Opening

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therefore the dispute is "capable of repetition, yet evading review." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). Defendants have not offered any assurance that in such a situation the Individual Plaintiffs will not be subjected to the challenged CBP One Turnback Policy. Thus, Defendants have not proven that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 189. Moreover, Defendants do not dispute that the class claims are "inherently transitory," Opening Br. 46–47, and thus the controversy remains live.

Br. 32–33. And there is clear evidence that Defendants are not complying with that binding guidance. When each of the proposed class representatives approached a POE, CBP officers turned them back because they did not have a CBP One appointment. *See*, *e.g.*, 2-ER-278–79, 2-ER-286–87, 2-ER-297–98, 2-ER-310, 2-ER-319–20, 3-ER-341, 3-ER-350, 3-ER-358–59. And border-wide data shows that, as of May 2023, the eight Class A POEs that are processing asylum seekers are turning back almost all those who do not have CBP One appointments. 2-ER-166–73.

Defendants also argue that evidence regarding conduct by Mexican officials cannot support an injunction. Resp. Br. 59–60. But again, that is irrelevant. The injunction is aimed at requiring Defendants to comply with their own binding guidance. Federal courts have jurisdiction to redress actions by federal officials notwithstanding the involvement of foreign officials. *See Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1192 n.6 (S.D. Cal. 2019).

Nor is the proposed injunction order overbroad. Resp. Br. 32 & n.9; 2-ER-101. Defendants insist that relief under the *Accardi* doctrine is limited to the text of the policy that is being enforced. *Id.* But Plaintiffs *are* seeking to enforce the text of CBP's own binding guidance, which provides that:

- "asylum seekers or others seeking humanitarian protection cannot be required to submit advance information in order to be processed at a Southwest Border land POE," and

- "In all cases, however, undocumented noncitizens who are encountered at the border line should be permitted to wait in line, if they choose, and proceed into the POE for processing as operational capacity permits."

2-ER-116, 258. Plaintiffs could not have simply requested an injunction requiring Defendants to adhere to the November 2021 binding guidance because preliminary injunctions must "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(C). The requested injunction against "turning back . . . non-citizens arriving or attempting to arrive at a [POE] . . . regardless of whether those arriving noncitizens have an appointment made on the CBP One App" describes that policy in reasonable detail and requires compliance with CBP's own binding guidance. 2-ER-101.

Plaintiffs have satisfied the requisites for an injunction, which should be granted. But to the extent this Court finds factual disputes in the record or room for exercise of discretion, remand is the appropriate remedy. *See Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1528 (9th Cir. 1992). Accordingly, to the extent this Court does not direct the District Court to grant the injunction, it should correct the District Court's legal error regarding 8 U.S.C. § 1252(f)(1) and remand to allow the District Court to rule on the motion for preliminary injunction and provisional class certification in the first instance.

CONCLUSION

This Court should reverse the District Court's erroneous interpretation of § 1252(f)(1). After reversing that ruling, this Court should direct the District Court to provisionally certify the class and issue the preliminary injunction sought by Plaintiffs or, alternatively, remand for further proceedings.

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Respectfully submitted,

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