No. 23-3396

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,

On Appeal from an Interlocutory Order Denying Preliminary Injunctive Relief
Civil Action No. 3:23-cv-1367

ANSWERING BRIEF FOR THE GOVERNMENT

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INTRODUCTION

The limit on remedies in 8 U.S.C. § 1252(f)(1) is straightforward and clear. "Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter," that is, 8 U.S.C. §§ 1221-31. As the Supreme Court recently held, § 1252(f)(1) precludes any court, other than the Supreme Court, "from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." *Garland v. Aleman Gonzalez*, 596 U.S. 543, 550 (2022). The statute thus precludes any court from compelling the government to carry out any covered provision in any particular way. The injunction Plaintiffs sought below would have done just that, by compelling the government to implement covered inspection and processing procedures codified at 8 U.S.C. §§ 1225(a)(3) and (b) in a particular way on a classwide basis. Accordingly, that injunction is squarely prohibited by § 1252(f)(1), and the district court correctly declined to grant Plaintiffs' motion for a classwide preliminary injunction.

Plaintiffs claimed below that Defendants, the Department of Homeland Security (DHS) and U.S. Customs and Border Protection (CBP) (collectively, "Defendants" or "the government"), are violating an internal CBP policy concerning the management and processing of noncitizens at ports of entry, and Plaintiffs sought an injunction to enforce their view of the requirements of that policy as to a proposed class. Currently, CBP employs a mobile application known as CBP One™ that allows noncitizens who lack documents sufficient for admission ("undocumented noncitizens") to request and schedule an appointment to present themselves at a port of entry (POE) along the U.S.-Mexico border for inspection and processing. CBP's internal guidance states that appointments are not required for an undocumented noncitizen to present at a POE, but it permits CBP to control intake of undocumented noncitizens to the POE at the border and permits prioritization of noncitizens with CBP One appointments. Plaintiffs claimed that CBP was engaging in a borderwide practice of violating its policy by turning away at the border noncitizens without appointments. Defendants dispute that such a borderwide practice exists. CBP's policy is not to turn away undocumented noncitizens at a POE who have not made an appointment through CBP One, although noncitizens without appointments may need to wait in sometimes long lines to enter the United States for processing at the POE.

Whether the alleged practice in fact exists and whether, if so, it is lawful is not at issue in this appeal. At issue is only whether the injunction requested by Plaintiffs—an order enjoining Defendants from taking actions at the border that, in Plaintiffs' view, are not authorized by CBP's internal policy—would violate § 1252(f)(1). As the district court correctly held, the relief Plaintiffs sought would be precluded by § 1252(f)(1) because it would impose statutory inspection and processing obligations on CBP and would thus restrain CBP's conduct under the inspection and processing provisions of the Immigration and Nationality Act (INA) codified at 8 U.S.C. § 1225. The requested injunction would impose on CBP obligations concerning the inspection and processing of noncitizens who are not yet in the United States. Plaintiffs themselves described the goal of their injunction as enforcing an obligation to "inspect and process" asylum seekers. Because the injunction thus would require federal officers to take actions to implement the inspection and processing obligations codified at § 1225 in a particular way, it is barred by § 1252(f)(1). *See Aleman Gonzalez*, 596 U.S. at 550.

Consequently, this Court should affirm the decision below.

STATEMENT OF JURISDICTION

This Court has jurisdiction over Plaintiffs' appeal from the district court's interlocutory order denying preliminary injunctive relief under 28 U.S.C.

§ 1292(a)(1). The Court does not have jurisdiction to decide the propriety of class certification or direct the district court to grant provisional class certification to support a classwide preliminary injunction. *See* Dkt. No. 6 ("Opening Br.") 50 (requesting such relief). Plaintiffs did not petition under Federal Rule of Civil Procedure 23(f) for review of the denial of class certification, and the Court lacks pendent jurisdiction under 28 U.S.C. § 1292(a)(1) because the requirements for class certification are not "inextricably bound up with the injunctive order from which the appeal is taken." *Paige v. State of Cal.*, 102 F.3d 1035, 1039 (9th Cir. 1996).

ISSUE PRESENTED

Did the district court correctly determine that 8 U.S.C. § 1252(f)(1) barred it from granting Plaintiffs' request for a preliminary injunction on behalf of a proposed class of noncitizens, where the requested injunction imposes requirements on how federal officials engage in inspection and processing procedures authorized by 8 U.S.C. § 1225?

STATEMENT OF THE CASE

A. Immigration Processing at Ports of Entry.

CBP's Office of Field Operations (OFO) is responsible for "coordinat[ing] the enforcement activities of [CBP] at United States air, land, and sea ports of entry." 6 U.S.C. § 211(g). These statutory obligations—including deterring and preventing

entry of terrorists, guarding against illegal entry of individuals, illicit drugs, agricultural pests, and contraband, and facilitating and expediting the flow of legitimate travelers and trade, *id.*—apply at all U.S. POEs, including the 25 Class A land POEs[1] along the U.S.-Mexico border.

By regulation, an "[a]pplication to lawfully enter the United States shall be made in person to a U.S. immigration officer at a U.S. port-of-entry when the port is open for inspection." 8 C.F.R. § 235.1(a). Under the INA, a noncitizen[2] "present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival . . .)" is "deemed an applicant for admission." 8 U.S.C. § 1225(a)(1). Under § 1225(a)(3), "[a]ll aliens . . . who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers." *Id.* § 1225(a)(3).

Generally, when a CBP officer inspects a noncitizen at a POE and determines the noncitizen lacks a valid travel document sufficient for admission, the noncitizen is processed for appropriate removal proceedings under the INA. Such proceedings

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[1] "Class A means that the port is a designated Port–of–Entry for all aliens." 8 C.F.R. § 100.4.
[2] "Noncitizen" as used here refers to an "alien" as defined at 8 U.S.C. § 1101(a)(3).

may include processing under the expedited removal procedures at § 1225(b)(1), which provide generally that the noncitizen may be removed without further review. 8 U.S.C. § 1225(b)(1)(A). But if a noncitizen processed for expedited removal "indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the [noncitizen] for an interview by an asylum officer under subparagraph (B)." *Id.*, § 1225(b)(1)(A)(ii); *see also id.* § 1158(a)(1). An asylum officer then conducts a "credible fear interview" to determine whether the noncitizen will be referred for further consideration of their claim to asylum or other protection. *Id.* § 1225(b)(1)(B); 8 C.F.R. § 208.30.

The inspecting immigration officer also has discretion to process inadmissible arriving noncitizens for placement in § 1229a removal proceedings pursuant to § 1225(b)(2)(A), where the noncitizens may raise claims for asylum or humanitarian protection before an immigration judge. *See Matter of E-R-M-*, 25 I. & N. Dec. 520, 521–24 (BIA 2011). A proceeding under § 1229a is commenced by issuing a notice to appear (NTA). 8 U.S.C. § 1229(a)(1). Thus, a CBP officer may process an undocumented noncitizen for, among other potential pathways, expedited removal under 8 U.S.C. § 1225(b)(1) or removal proceedings under 8 U.S.C. §§ 1225(b)(2)(A) and 1229a. *See id.*; *see also* 2-ER-123–24 (CBP procedures discussing available immi-

gration processing dispositions for noncitizens without documents sufficient for admission as Expedited Removal, Notice to Appear, and Withdrawals of applications for admission).

B. Immigration Processing at Ports of Entry from 2017 to 2021.

In 2017, Al Otro Lado and individual noncitizens brought a lawsuit claiming that CBP had engaged in what Plaintiffs termed "turnbacks" at Class A POEs along the U.S.-Mexico Border. *See* Second Am. Compl., *Al Otro Lado, Inc. v. Mayorkas*, No. 17-cv-2366, ECF No. 189 (Nov. 13, 2018) (*AOL I*). The *AOL I* plaintiffs asserted that "turnbacks" were unlawful on several grounds, including that they infringed upon rights and obligations under the INA, at 8 U.S.C. §§ 1158(a) and 1225(a) and (b), as to noncitizens who approach a port of entry but have not crossed the border into the United States. *See id.* The government, in turn, argued that those statutes did not apply to noncitizens still in Mexico. *See, e.g.*, *Al Otro Lado v. Mayorkas*, 2021 WL 3931890, at *10 (S.D. Cal. Sept. 2, 2021). The *AOL I* court concluded that these statutes applied to "migrants who are 'in the process of arriving,' which includes 'aliens who have not yet come into the United States, but who are "attempting to" do so' and may still be physically outside the international boundary line at a POE." *Id.* (quoting *Al Otro Lado v. Nielsen*, 394 F. Supp. 3d 1168, 1205 (S.D. Cal. 2019)).

In September 2021, after certifying a class, the *AOL I* court determined on

summary judgment that CBP had engaged in "turnbacks" of asylum seekers through its prior practices of metering, prioritization-based queue management, or similar practices. *Al Otro Lado*, 2021 WL 3931890, at *1 nn. 2, 3, *9-10. The court also concluded that such turnbacks that occur without express statutory authority constitute a withholding of CBP's obligation to inspect and refer asylum seekers pursuant to 8 U.S.C. §§ 1225(a)(3) and (b)(1)(A)(ii), and for the same reason constitute a violation of due process. *Id.* at *18, 20. The *AOL I* court described the "turnbacks" at issue as CBP officers "affirmatively turning asylum seekers away from the border" through various practices. *Id.* at *9. The court's opinion did not address the lawfulness of coordination "with Mexican officials to 'control the flow' of migrants seeking asylum before they reached the border." *Id.*; *see also id.* at *22 n.20.

The *AOL I* court subsequently entered a declaratory judgment. *Al Otro Lado v. Mayorkas*, 2022 WL 3970755 (S.D. Cal. Aug. 23, 2022). It rejected Plaintiffs' request for an injunction, concluding that classwide relief enjoining Defendants "from turning back noncitizen asylum seekers" was prohibited under 8 U.S.C. § 1252(f)(1), because any such order would "'interfere' with Defendants' 'operation' of § 1225." *Al Otro Lado, Inc. v. Mayorkas*, 619 F. Supp. 3d 1029, 1045, 1047 (S.D. Cal. 2022). Both Plaintiffs and Defendants appealed certain aspects of the *AOL*

I district court's ruling, but Plaintiffs did not directly challenge the denial of class-wide injunctive relief prohibiting turnbacks. *See Al Otro Lado, Inc. v. Mayorkas*, Nos. 22-55988, 22-56036 (9th Cir.); *id.* at Dkt. No. 23. Those cross-appeals are pending.[3]

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

In November 2021, shortly after the *AOL I* district court issued its summary-judgment order, CBP rescinded its prior guidance and issued a memorandum to OFO providing "updated guidance" regarding the management and processing of undocumented noncitizens at POEs along the U.S.-Mexico border ("November 2021 Guidance"). *See* 2-ER-257–59. Recognizing that the Title 42 orders were still in effect at

[3] Oral argument in the *AOL I* appeal was held on November 28, 2023, and post-argument supplemental briefing is due January 17, 2024. *Al Otro Lado, Inc. v. Mayorkas*, Nos. 22-55988, 22-56036, Dkt. Nos. 93, 94 (9th Cir.).

the time of its issuance, the Guidance contemplates that it would apply once those orders were lifted. 2-ER-257; *see also* 2-ER-105–06. To incentivize the use of POEs as an alternative to unlawful crossings, the Guidance instructs OFO "to consider and take appropriate measures, as operationally feasible, to increase capacity to process undocumented noncitizens at Southwest Border POEs, including those who may be seeking asylum and other forms of protection." 2-ER-257, 2-ER-258. "Possible additional measures include the innovative use of existing tools such as the CBP One mobile application, which enables noncitizens seeking to cross through land POEs to securely submit certain biographic and biometric information prior to arrival and thus streamline their processing upon arrival." 2-ER-258. "Importantly, however, asylum seekers or others seeking humanitarian protection cannot be required to submit advance information in order to be processed at a Southwest Border land POE." *Id.* The Guidance provides that "POEs must strive to process all travelers . . . who are waiting to enter, as expeditiously as possible, based on available resources and capacity," taking into account CBP's other vital priorities. *Id.*

The November 2021 Guidance permits CBP to staff the border line to manage safe and orderly travel into the POE, but "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." *Id.* "Absent a

POE closure, officers also may not instruct travelers that they must return to the POE at a later time or travel to a different POE for processing." *Id.* At the end, the Guidance states that it is issued in furtherance of the Administration's "comprehensive strategy to expand safe, orderly, and humane pathways for migration, including for noncitizens who may be seeking protection to access the United States," as set forth in Executive Order 14010. 2-ER-259; Executive Order 14010, 86 Fed. Reg. 8267 (Feb. 5, 2021).

In early 2023, the President announced the expiration of the public health emergency effective May 11, 2023, which would cause the then-operative Title 42 order to end. *See* Circumvention of Lawful Pathways (NPRM), 88 Fed. Reg. 11,704, 11,708 (Feb. 23, 2023). The end of the Title 42 Order was expected to cause the number of migrants seeking to illegally enter the United States at the southwest border to rise to or remain at all-time highs—an estimated 11,000 migrants daily. *See* Circumvention of Lawful Pathways, 88 Fed. Reg. 31,314, 31,331 (May 16, 2023). To address this expected increase in the number of migrants at the southwest border seeking to enter the United States without authorization, DHS and the Department of Justice promulgated the Circumvention of Lawful Pathways Rule ("CLP Rule"). 88 Fed. Reg. at 31,314, 31,324; *see also* 88 Fed. Reg. at 11,704. The CLP Rule was

effective as of May 11, 2023, and provides that most noncitizens (but excluding unaccompanied minors) who enter the United States during the next two years at the southwest land border or adjacent coastal borders after traveling through a country other than their native country are subject to a rebuttable presumption of ineligibility for asylum unless they take certain steps. 88 Fed. Reg. at 31,321–23. In particular, noncitizens may be excepted from the presumption if they seek and are denied protection in a third country through which they traveled en route to the United States; were "provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process"; "[p]resented at a port of entry, pursuant to a pre-scheduled time and place"; or "presented at a port of entry without a pre-scheduled time and place" but can "demonstrate[] by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle." 8 C.F.R. §§ 208.33(a)(2), 1208.33(a)(2). Noncitizens who are otherwise subject to the presumption of asylum ineligibility may also rebut the presumption by demonstrating that "exceptionally compelling circumstances exist." *Id.* §§ 208.33(a)(3), 1208.33(a)(3). Noncitizens who cannot rebut the presumption are still considered for statutory withholding of removal and protection under the Convention Against Torture (CAT) and may not be removed to a country where it is

likely that they will be persecuted on account of a protected ground or tortured. *See id.* §§ 208.33(b)(2), 1208.33(b)(2)(ii), (4); 88 Fed. Reg. at 11,733.

The CLP Rule aims to reduce irregular migration, decrease crowding in border facilities, avoid projected severe strains on DHS border resources, and facilitate safe and humane processing. *See, e.g.*, 88 Fed. Reg. at 31,324. It does so by encouraging migrants to seek asylum or protection in other countries or take advantage of lawful, safe, and orderly migration pathways to enter the United States by generally conditioning the discretionary grant of asylum on migrants' availing themselves of such pathways (or demonstrating exceptionally compelling circumstances). *Id.* at 31,235. Thus, noncitizens who have already traveled to Mexico with the intent of entering the United States can avoid the presumption of asylum ineligibility by prescheduling an appointment to present at a POE for orderly processing. 8 C.F.R. §§ 208.33(a)(1), 1208.33(a)(1). CBP currently uses CBP One to allow noncitizens to make such appointments. 88 Fed. Reg. at 31,317. For this purpose, CBP One allows "[n]oncitizens located in Central or Northern Mexico who seek to travel to the United States" to "submit information in advance and schedule an appointment to present themselves at" eight southwest-border POEs: Nogales, Brownsville, Eagle Pass, Hidalgo, Laredo, El Paso, Calexico, and San Ysidro. *See* "Advance Submis-

sion and Appointment Scheduling," https://www.cbp.gov/about/mobile-apps-directory/cbpone (last visited Jan. 5, 2024). Use of appointments allows these POEs to manage the flow of undocumented noncitizens into the POE facility, efficiently allocate border enforcement resources, and streamline processing through advanced vetting for public safety and national security concerns, thus reducing overall burdens on immigration enforcement at the border. 88 Fed. Reg. at 31,318; 2-ER-107–110. As the CLP Rule's preamble states, an appointment is "not a prerequisite to approach a POE . . . [or be] inspected or processed," but scheduling a CBP One appointment will allow noncitizens to avoid the presumption of asylum ineligibility and avoid "waiting in long lines of unknown duration at POEs." 88 Fed. Reg. at 31,317-18, 31,332, 31,365.[4]

Although appointments made through CBP One enhance CBP's ability to process undocumented noncitizens by streamlining the resource-intensive process, CBP's policy remains that noncitizens without documents sufficient for admission may not be turned away absent a port closure. *E.g.*, 2-ER-106–07; 2-ER-121. POEs

[4] In July, a district court in California vacated the CLP Rule, *East Bay Sanctuary Covenant v. Biden*, 2023 WL 4729278 (N.D. Cal. July 25, 2023), but that order has been stayed pending appeal. *See East Bay Sanctuary Covenant v. Biden*, No. 23-16032, Dkt. No. 21 (9th Cir. Aug. 3, 2023). Oral argument in that appeal was held on November 7, 2023. *See id.* Dkt. No. 82.

at which CBP One appointments are scheduled prioritize the processing of those with appointments, but these and other Class A POEs continue to process noncitizens without appointments. *E.g.*, 2-ER-108–09 ¶ 10; 1-ER-166–69, 171; 3-ER-406 ¶ 50. Between May 12 and August 23, 2023, noncitizens without appointments made up approximately 29% of the total number of undocumented noncitizens processed by OFO at southwest-border POEs. *See* 2-ER-108–09 ¶ 10. At the 8 POEs that process CBP One appointments, the number is approximately 27%.[5] Not only is CBP continuing to process non-appointment holders, but the use of CBP One appointments allows CBP to process "several times more migrants each day at [southwest border] POEs than the 2010-2016 average." 88 Fed. Reg. at 31,398; 2-ER-108 ¶ 9. Since May 11, CBP has increased—to more than 40,000 per month—the number of appointments available. *See CBP One Appointments Increased to 1,450 Per Day* (June 30, 2023), https://perma.cc/F3L4-48FB (last visited Dec. 21, 2023).

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[5] In the proceedings below, Plaintiffs asserted that data on CBP's website conflicted with these figures. 2-ER-59–64. The district court did not address this issue, and it was not discussed at oral argument on the preliminary-injunction motion. CBP could supplement the record on this issue in the district court if necessary. But even under Plaintiffs' analysis, noncitizens without appointments made up 12-19% of CBP's processing of undocumented noncitizens. *See id.*

C. The Individual Plaintiffs' Motions for a Classwide Preliminary Injunction Based on an Alleged "CBP One Turnback Policy."

On July 28, 2023, several noncitizens (the "Individual Plaintiffs" or "Plaintiffs") and two organizational plaintiffs brought the underlying lawsuit, alleging that CBP and DHS have a "policy and widespread practice" of "turning back arriving noncitizens without CBP One Appointments and thereby denying them access to the U.S. asylum process" at Class A POEs along the U.S.-Mexico border. 4-ER-709 (Compl. ¶ 1). Plaintiffs claim that under this alleged "CBP One Turnback Policy," asylum seekers who approach a POE from Mexico "are typically met at or near the 'limit line' [international boundary] . . . by CBP officers or Mexican authorities who . . . are acting at the behest of CBP. If the asylum seekers do not have a CBP One appointment confirmation or present at a date or time different from the designated appointment slot, they are turned back to Mexico." *Id.* ¶ 5. Plaintiffs define the "asylum process" as the "right to be inspected and processed at a POE." 4-ER-723 (Compl. ¶ 34, citing 8 U.S.C. §§ 1158(a)(l), 1225(a)(3), 1225(b)(l)(A)(ii), 1225(b)(l)(B), 1225(b)(2)); *see also* 4-ER-771. Plaintiffs asserted several different claims, including a claim asserted under the administrative-law principle that courts can require administrative agencies to abide by their own regulations or certain internal policies. 4-ER-763; *United States ex rel. Accardi v. Shaughnessy,* 347 U.S.

260, 268 (1954). That *Accardi*-based claim asserts that CBP and DHS have failed to comply with the November 2021 Guidance, the preamble to the CLP Rule, and the CLP Rule itself by "adopt[ing] and implement[ing] a policy of turning back asylum seekers who do not have CBP One appointments," and have "denied Individual Plaintiffs access to the asylum process at POEs." 4-ER-764.

The Individual Plaintiffs then sought a preliminary injunction and provisional class certification, seeking to enjoin "Defendants' failure to follow their binding guidance to inspect and process asylum seekers" at POEs as to a proposed class. 2-ER-222. Plaintiffs premised their request for an injunction on their *Accardi*-based claim, arguing that CBP has a policy under which it "refuse[s] to process asylum seekers at POEs who present without a CBP One appointment," and that this policy contravened other binding CBP guidance. 2-ER-226. Plaintiffs identified as part of this "Binding Guidance" the part of the November 2021 Guidance that provides that "asylum seekers or others seeking humanitarian protection cannot be required to submit advance information [*e.g.*, use the CBP One app] in order to be processed at a Southwest Border land POE." 2-ER-224 (citing November 2021 Guidance). They also pointed to the preamble to the CLP Rule, which reiterates that "CBP's policy is to inspect and process all arriving noncitizens at POEs, regardless of whether they have used the CBP One app," and that an advance appointment is "not a prerequisite

to approach a POE, nor is it a prerequisite to be inspected and processed." 2-ER-225. Finally, they pointed to the "structure" of the CLP Rule—which allows for exceptions to asylum ineligibility for certain individuals without a CBP One appointment as assessed in credible fear interviews under 8 U.S.C. § 1225(b)(1)(B)—as indicating that "noncitizens arriving at a POE without a CBP One appointment . . . will be inspected and processed and not turned away." 2-ER-225.

Plaintiffs requested that the Court enter the following injunction: "Defendants are ENJOINED from turning back, or directing or encouraging others to turn back, non-citizens arriving or attempting to arrive at a Port of Entry on the U.S.-Mexico border, regardless of whether those arriving non-citizens have an appointment made on the CBP One App." 2-ER-101 (Plaintiffs' Proposed Order); *see also* 2-ER-99.

The evidence submitted to the district court in connection with Plaintiffs' motion demonstrated that, although the eight POEs at which CBP One appointments are scheduled may prioritize the processing of those with appointments, these and other Class A POEs continue to process substantial numbers of noncitizens without appointments, and are generally processing all noncitizens, with and without appointments, at a robust rate. *See supra* § B; *see also* U.S. Customs and Border Protection, Southwest Land Border Encounters, *https://www.cbp.gov/news-*

room/stats/southwest-land-border-encounters (OFO encounters) (last visited January 5, 2024).

The 25 Class A POEs along the U.S.-Mexico border fall under the jurisdictions of four different field offices. The San Diego Field Office covers the San Ysidro (Tijuana),[6] Tecate, Otay Mesa, Calexico (Mexicali), and Andrade border POEs. *See* 2-ER-129 ¶ 5. The Tucson Field Office covers the San Luis, Douglas, Naco, Sasabe, Lukeville, and Nogales border POEs. *See* SER-04 ¶ 2. The El Paso Field Office covers the Santa Teresa, Columbus, Presidio, Ysleta, Marcelino Serna (Tornillo), and El Paso (Ciudad Juarez) border POEs. *See* 2-ER-156–57. The Laredo Field Office covers the Laredo (Nuevo Laredo), Roma, Del Rio (Ciudad Acuna), Brownsville (Matamoros), Eagle Pass (Piedras Negras), Hidalgo (Reynosa), Rio Grande City, and Progreso border POEs. *See* SER-13–21.

The Individual Plaintiffs' accounts of encounters with CBP Officers primarily relate to only three of these 25 POEs: San Ysidro, Otay Mesa, and El Paso. *See* 2-ER-273–333; 3-ER-336–353; 3-ER-416–424. The majority of these encounters occurred at the San Ysidro POE. *See generally id.* No Individual Plaintiff or any other

[6] Because the record sometimes refers to the name of the Mexican town or city across the border from the U.S. POE, Defendants include the Mexican city/town name in parentheses where helpful to the Court's understanding.

noncitizen declarant alleges having been turned back by a CBP Officer at any POEs within the Tucson or Laredo Field Offices. *See id.*; *see also* 3-ER-447–456; 3-ER-508–530. Numerous of these 25 POEs are not mentioned in Plaintiffs' evidence. *See generally* 2-ER-260–3-ER-623.

The evidence presented demonstrated that the particular circumstances at each POE vary. For example, the evidence from both Plaintiffs and Defendants demonstrated that the Nogales POE processed noncitizens without CBP One appointments from a line of noncitizens that begins at the border, which abuts the entrance to the POE *See, e.g.*, SER-07 ¶ 10; 2-ER-309 ¶ 9; 3-ER-358–59 ¶¶ 8, 10. At certain POEs in the Laredo Field Office, Plaintiffs asserted that Mexican immigration officials are controlling physical entry to the four POEs that take CBP One appointments and are making "allowances" for those without appointments to cross the pedestrian bridges to the U.S. POEs to be processed. 3-ER-538–539 ¶ 12(b); 3-ER-487 ¶ 29; 3-ER-490 (describing Mexican immigration officials' access controls at Brownsville (Matamoros) and Hidalgo (Reynosa) and acknowledging that those without appointments who made it past such checks were processed by CBP after a wait); 3-ER-471 ¶ 35; SER-14–22 (acknowledging Mexican protocols).

The evidence about individual encounters likewise varies. Many reports recounted that noncitizens were prevented by Mexican officials from accessing a U.S.

POE. *See, e.g.*, 3-ER-590; 3-ER-470 ¶ 29; 3-ER-490. As to encounters with CBP officers, although some reported that they were told that they must have a CBP One appointment to cross into the United States, other reports indicate that CBP officers merely did not allow noncitizens to immediately proceed past the international boundary or do not specify what the CBP Officer said. *See, e.g.*, 2-ER-310; 3-ER-526.

D. The District Court's Denial of the Requested Injunction Based on Lack of Jurisdiction and Authority Under 8 U.S.C. § 1252(f)(1).

On October 13, 2023, the district court denied Plaintiffs' motion for a preliminary injunction under 8 U.S.C. § 1252(f)(1), which states:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1252(f)(1).

The district court stated that 8 U.S.C. § 1225(b)(1), which is covered by § 1252(f)(1), "was the statutory authority and procedure for inspection of aliens arriving in the United States, including procedures for asylum interviews." 1-ER-10–

11. It thus reasoned that "forc[ing] defendants to follow binding guidance and inspect and process asylum seekers regardless of whether they have a CBP One appointment . . . would be ordering them to take actions to implement the specified statutory provisions of asylum inspections under § 1225(b)(1)." 1-ER-10. Although Plaintiffs sought a preliminary injunction to enforce defendant's compliance with an internal policy that did not expressly rely on an interpretation of a provision of the INA, the district court determined that an order "restricting Customs & Border Protection from turning back asylum applicants for whatever reason . . . would directly implicate how CBP implements its duty to inspect asylum seekers under § 1225 and the procedures set out therein." 1-ER-11–12.

The district court considered Plaintiffs' presentation at oral argument, in which Plaintiffs disavowed seeking to enforce a right to inspection and processing and stated "the goal of Plaintiffs' injunction is not inspection and processing," but to enforce a "procedural benefit" set forth in an internal policy, rather than the statute, which is a "right not to be turned back by CBP Officers." 1-ER-25. The district court determined that, although Plaintiffs were requesting the court to issue an order requiring that noncitizens not be turned back at the border and be permitted to wait in an unspecified "waiting area," those noncitizens are waiting "to get inspections and asylum interviews, which are clearly covered in the statutory framework of part

IV." 1-ER-29; *see also* 1-ER-25–26. Thus, Plaintiffs' requested injunction would impose requirements on the government as to the operation of § 1225. *See id.*; 1-ER-31. Further, the district court determined that § 1252(f)(1)'s focus is on "remedy-stripping" and not on the source of the asserted right, whether that source be a statute, the Constitution, or an internal policy. 1-ER-30.

The district court thus denied Plaintiffs' motion for a preliminary injunction based on § 1252(f)(1) and denied Plaintiffs' motion for provisional class certification in aid of that injunction as moot. 1-ER-30, 4-ER-808 (Dkt. No. 62).

SUMMARY OF THE ARGUMENT

This Court should affirm the decision below.

I. The district court correctly determined that the classwide injunction Plaintiffs sought was barred by 8 U.S.C. § 1252(f)(1). That provision prohibits lower courts from issuing orders that "enjoin or restrain the operation of" covered statutory provisions, including the inspection and expedited removal provisions codified at 8 U.S.C. § 1225. Plaintiffs' requested injunction—which would have prohibited Defendants from "turning back, or encouraging or directing others to turn back, noncitizens arriving or attempting to arrive at a Port of Entry on the U.S.-Mexico border" in order to provide them "access[] [to] the U.S. asylum process"—would prescribe how CBP personnel engage in inspection and processing procedures set forth in

8 U.S.C. §§ 1225(a)(3), (b)(1)(A)(ii), and (b)(2). Indeed, Plaintiffs conceded below that the aim of this injunction is to obtain inspection and processing as to the proposed class. 2-ER-45; *see also* 4-ER-640. Undocumented noncitizens who approach a POE to "access[] the U.S. asylum process" are seeking to enter the United States at that POE, and their entrance triggers those covered inspection and processing obligations. As the district court noted, proposed class members who present at the POE seek and are subject to inspection and processing under §§ 1225(a)(3) and (b)(1), which are clearly covered provisions. 1-ER-29. Thus, the requested injunction, by prohibiting CBP from turning back those individuals from the border, would "order federal officials to take . . . actions to . . . implement, or otherwise carry out the specified statutory provisions," and is barred by § 1252(f). *See Aleman Gonzalez*, 596 U.S. at 550.

II. The fact that Plaintiffs seek to enforce a CBP policy is not material to the application of § 1252(f)(1), because the acts they seek to directly require through enforcement of that policy are governed by covered statutory provisions. Section 1252(f)(1)'s remedial bar applies "regardless of the nature of the action or claim." 8 U.S.C. § 1252(f)(1). It thus applies regardless of the source of the asserted right. For similar reasons, the implementing authority for the CBP policy is likewise not

relevant to the inquiry here, which properly focuses on what the injunction does, rather than what statute CBP has invoked as the legal basis for its policy.

III. The effect of the requested injunction on implementation of the covered inspection and processing provisions is far from "collateral." The primary target and direct effect of the requested injunction would be to require inspection and processing to be implemented in a particular way, which readily distinguishes this case from injunctions that have only a "collateral effect" on the covered provisions. Here, the covered inspection and processing procedures are inextricably intertwined with any command not to turn proposed class members away from the POE. Those proposed class members are seeking to enter the United States for processing when they approach the border, and the command would require CBP to allow those individuals to enter the United States to be inspected and processed. This result is not independent of or ancillary to the injunction's terms, but the direct aim and coercive consequence thereof.

IV. Nothing in the language, text, or history of § 1252(f)(1) undermines the district court's application of the statute to bar injunctive relief here. All of Plaintiffs' arguments to the contrary hinge on their contention that their requested injunction

does not in fact require actions under the covered provisions because they are seeking to enforce a CBP policy. These arguments are misplaced for the same reasons discussed above.

V. Finally, the fact that CBP has voluntarily committed not to turn back noncitizens without appointments does not mean a court may order injunctive relief to require inspection and processing. The text of § 1252(f)(1) is not limited to injunctions that require actions that are inconsistent with the government's policies, and the government must be permitted to retain discretion in the immigration-enforcement arena.

Consequently, this Court should affirm the decision below.

VI. If this Court were to reverse the decision of the district court, however, it should remand to the district court to make the determinations as to whether to grant or deny class certification and preliminary injunctive relief. This Court lacks jurisdiction to consider whether the requirements for class certification are satisfied, because Plaintiffs have not petitioned under Federal Rule of Civil Procedure 23(f) for review of the denial of class certification, and because the prerequisites for class certification are not necessary to determine whether the district court properly denied injunctive relief based on § 1252(f)(1). Nor can this Court direct the district court to grant preliminary-injunctive relief on behalf of a class—even if the requirements for

such relief were met—in the absence of a certified class. Finally, the resolution of such matters involves factual issues and matters of equitable discretion that are best left to the district court to decide in the first instance.

ARGUMENT

I. A Straightforward Application of 8 U.S.C. § 1252(f)(1) Precludes the Injunction Plaintiffs Sought.

The district court correctly determined that 8 U.S.C. § 1252(f)(1) prohibits the classwide injunction Plaintiffs sought below. The requested injunction would compel CBP to implement inspection and processing in a particular manner as to the putative class under the statutory provisions at 8 U.S.C. §§ 1225(a)(3) and 1225(b), both of which are covered by § 1252(f)(1).

Section 1252(f)(1) provides:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1252(f)(1). This statute "strips lower courts of 'jurisdiction or authority' to 'enjoin or restrain the operation of' the relevant statutory provisions" except as to individual noncitizens. *Garland v. Aleman Gonzalez*, 596 U.S. 543, 548 (2022).

Those relevant statutory provisions charge the federal government with the "implementation and enforcement of the immigration laws governing the inspection, apprehension, examination, and removal of aliens." *Id.*; 8 U.S.C. §§ 1221-31.[7]

In *Aleman Gonzalez*, the Supreme Court held that to "enjoin" means to "tell[] someone what to do or what not to do," and "restrain" means to "check, hold back, or prevent (a person or thing) from some course of action." *Aleman Gonzalez*, 596 U.S at 549 (citing, *inter alia*, *Nken v. Holder*, 556 U.S. 418, 428 (2009)). And the "'operation of' (a thing) means the functioning or working of (that thing)." *Aleman Gonzalez*, 596 U.S. at 549. "Accordingly, the 'operation of' the relevant statutes is best understood to refer to the Government's efforts to enforce or implement them." *Id.* at 550. Based on this interpretation of § 1252(f)(1)'s text, the Supreme Court concluded that § 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 statutory provisions." *Id.*; *Biden v.*

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[7] As Amicus notes, the text of the statute as enacted referred to "chapter 4 of title II" of the INA, which is not completely coextensive with "part IV of this subchapter" as set forth in the codified version of the statute. Dkt. No. 16 ("ACLU Br.") 2 n.2 (citing *Moreno Galvez v. Jaddou*, 52 F. 4th 821, 830 (9th Cir. 2022)). But as Amicus also notes, these distinctions are immaterial here, as all agree that the relevant statutes relied upon by Defendants—primarily 8 U.S.C. § 1225, but also 8 U.S.C. §§ 1229 and 1229a—are covered provisions. *See* ACLU Br. 6; Opening Br. 22.

Texas (Texas MPP), 597 U.S. 785, 797 (2022). Section 1252(f)(1) thus precludes not only orders that prohibit actions taken in implementing the covered provisions, but also orders that compel the executive to take actions under a covered provision. *Texas MPP*, 597 U.S. at 797 (holding that a nationwide injunction that required the government to implement contiguous-territory return under § 1225(b)(2)(C) "violated" § 1252(f)(1)); *see also United States v. Texas*, 599 U.S. 670, 690 (2023) (Gorsuch, J., concurring in judgment) (explaining that an injunction that compels the government to detain noncitizens would run afoul of § 1252(f)(1)).

The requested injunction here squarely falls within § 1252(f)(1). Plaintiffs sought an injunction that would "enjoin Defendants from turning back, or directing or encouraging others to turn back, non-citizens arriving or attempting to arrive at a Port of Entry on the U.S.-Mexico border, regardless of whether those arriving non-citizens have an appointment made on the CBP One App." 2-ER-101. Both the object and the effect of this requested injunction are to require federal officials to take actions under 8 U.S.C. § 1225 to inspect and process noncitizens who seek to present at POEs.

A prohibition on undefined "turnbacks" would require CBP to implement § 1225 as to the proposed class in the following manner. Proposed class members are noncitizens seeking to enter the United States at a POE to seek asylum who were

or will be "prevented from accessing the U.S. asylum process by or at the direction of Defendants." 4-ER-640 (defining proposed class). Thus, Plaintiffs' requested injunction seeks to obtain access to the "U.S. asylum process" by enjoining the act of "turning back."

For undocumented noncitizens who lack present at a POE to seek asylum in the United States, that process begins with inspection by CBP Officers. Section 1225(a)(3) generally requires CBP to inspect such noncitizens as applicants for admission to the United States. 8 U.S.C. §§ 1225(a)(1), (3). Upon inspection, CBP then has the discretion either to process undocumented noncitizens for expedited removal under § 1225(b)(1)—which, for those who express an intent to seek asylum or claim a fear of persecution or torture, requires referral to an asylum officer under § 1225(b)(1)(A)(ii)—or to process them for another appropriate immigration action, including placement in § 1229a removal proceedings pursuant to § 1225(b)(2)(A). *See supra* 5–7 (Statement of the Case, § A). Plaintiffs themselves define the "asylum process" in their Complaint as encompassing the referral procedures and processing decisions under 8 U.S.C. §§ 1225(b)(l)(A)(ii), 1225(b)(l)(B), 1225(b)(2). 4-ER-

723.[8] All of these statutes fall within the covered provisions of § 1252(f)(1). *See* Opening Br. 22.

Thus, if a court enjoins CBP from "turning back" proposed class members at the border, the result would be that CBP must permit those noncitizens to enter the United States at the POE to be inspected and processed under these covered statutory provisions, which by Plaintiffs' definition constitutes access to the asylum process. Further, because Plaintiffs did not define "turning back," long wait times at the border could potentially be characterized or construed as a "turnback" or prevention of "access[] [to] the U.S. asylum process." As a result, the requested injunction would effectively set a time frame for CBP to inspect and process noncitizens and would thus potentially enjoin CBP from stopping noncitizens at the border and permitting

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[8] Although Plaintiffs also cite the asylum statute, § 1158, as part of the "asylum process," *see* 4-ER-723; *see also* Opening Br. 31, the asylum statute does not set forth any statutory duties or procedures for the processing of undocumented noncitizens who seek asylum except by referencing § 1225. *Al Otro Lado*, 619 F. Supp. 3d at 1046–47. Instead, it is § 1225(b)(1)(A)(ii) that sets forth referral procedures applicable to CBP's processing of asylum-seekers for expedited removal. *See Al Otro Lado, Inc. v. McAleenan,* 394 F. Supp. 3d 1168, 1181 (S.D. Cal. 2019) ("This case turns on § 1225(b) asylum procedure that [§] 1158 incorporates."); *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1311 (S.D. Cal. 2018) ("8 U.S.C. § 1158(a)(1) does not identify any specific obligations placed on an immigration officer."). Plaintiffs appear to acknowledge that, in the context of CBP's processing of undocumented asylum-seekers, the asylum statute is "inextricably intertwined" with § 1225. Opening Br. 26 (citing *Al Otro Lado v. Mayorkas*, 619 F. Supp. 3d 1029, 1046 (S.D. Cal. 2022)).

them to wait in Mexico (as contemplated by CBP's November 2021 Guidance).[9] A directive not to turn back asylum-seekers in this context is thus the operative equivalent of imposing requirements to inspect and process those noncitizens and is inextricably intertwined with these statutory procedures.

Indeed, Plaintiffs' stated objective was to enjoin Defendants' alleged "failure to follow their binding guidance to *inspect and process* asylum seekers" at POEs. *See* 2-ER-222 (emphasis added). The "binding guidance" they cited was the portion of the November 2021 CBP Guidance that stated: "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." *See* 2-ER-224 (citing November 2021 Guidance). Plaintiffs also pointed to other statements and indications in the CLP Rule that reiterated that statement, including that an advance appointment is not a "prerequisite to be inspected and processed," and that expedited removal procedures as amended by the CLP Rule contemplate that some noncitizens who are

[9] This illustrates how Plaintiffs' proposed injunction was overbroad and went beyond the terms of the November 2021 Guidance. It did not reference the November 2021 Guidance, was not grounded in its language or terms, enjoined acts that were not specified in the Guidance or adequately defined by Plaintiffs, and did not condition the relief on the continued existence of the Guidance. *See* 2-ER-99. Indeed, the government argued below that Plaintiffs' requested injunction was overbroad under the *Accardi* principle because it was not limited to the policy's terms (and did not concede the opposite, as Plaintiffs incorrectly state, at 45). 2-ER-89–91.

referred for expedited removal will not have appointments. *See supra* 17–18.

Thus, although Plaintiffs assert that they are seeking to enforce CBP policy rather than covered statutory provisions, *see, e.g.*, Opening Br. 31, nowhere in their brief do they meaningfully dispute that the acts they seek to require through enforcement of that CBP policy—inspection and processing of asylum-seekers who lack documents sufficient for admission—are covered by § 1225.

Further, although the requested injunction would prohibit "turning back" noncitizens and would not expressly order inspection and processing, the district court correctly recognized that the operative equivalent of prohibiting "turnbacks" in this context is compelling inspection and processing under the relevant procedures at § 1225. 1-ER-29; *see also Al Otro Lado*, 619 F. Supp. 3d at 1047 (holding that § 1252(f)(1) "prohibits" the court from "enjoining Defendants from turning back noncitizen asylum seekers in the process of arriving at Class A POEs"). Undocumented asylum-seekers who present at POEs are seeking to enter the United States at the POE, and their entrance at the POE—whether it occurs immediately after presenting at the border or after waiting in line to cross the border—triggers inspection and processing procedures. *See* 2-ER-258. Plaintiffs themselves argued that an internal prohibition on "turning back noncitizens without CBP one appointments" at POEs is a "self-imposed obligation to inspect and process such noncitizens." 2-ER-

45. Thus, even if the injunction were framed as a prohibition on "turnbacks," that prohibition itself, when read with the proposed class definition, would require federal officials to provide access to the U.S. asylum process by inspecting and processing the noncitizens who are not turned back.

Accordingly, the requested injunction would require the government to engage in the procedures set forth in 8 U.S.C. §§ 1225(a)(3), 1225(b)(1)(A)(ii), and 1225(b)(2) as to noncitizens, and would thus "order federal officials to take . . . actions to . . . implement, or otherwise carry out the specified statutory provisions," in contravention of § 1252(f)(1). *See Aleman Gonzalez*, 596 U.S. at 550. Even though the government's policy is that CBP officers are not to turn back undocumented noncitizens who have not scheduled their arrival using CBP One, the district court correctly concluded that it cannot issue a classwide order *requiring* as much, due to the constraints of § 1252(f)(1).

II. Plaintiffs' Arguments Ignore that the Objective and Direct Effect of their Proposed Injunction Is to Require Acts to Implement Covered Immigration Procedures.

Almost all of Plaintiffs' arguments against the application of § 1252(f)(1) hinge on the premise that their requested injunction would not "enjoin or restrain the operation of" § 1225, because Plaintiffs are seeking to enforce CBP's policy (specifically, the November 2021 Guidance) rather than § 1225 itself. Opening Br. 27–

28, 31, 34–35. At most, they claim, the injunction has an "attenuated, collateral effect" on inspection and processing obligations under § 1225. *See* Opening Br. 23, 27–28. Yet, as shown, the purpose and direct effect of Plaintiffs' requested injunction is to require the government to implement procedures covered by § 1225 in a particular way, and thus the district court's application of § 1252(f)(1) was correct and consistent with applicable authority.

A. Section 1252(f)(1) Applies to Orders that Enjoin the Operation of the Covered Provisions, Regardless of the Source of the Asserted Right.

It is immaterial that Plaintiffs sought relief based on an *Accardi* claim to enforce CBP policy, as their requested injunction would require the government to take actions to implement the covered statutes all the same. Neither the language of § 1252(f)(1) nor *Aleman Gonzalez* suggests that § 1252(f)(1)'s prohibition on injunctive relief is inapplicable where the underlying claim seeks to enforce something other than the statute. *See* Opening Br. 23–24, 31. To the contrary, the prohibition applies "regardless of the nature of the action or claim," 8 U.S.C. § 1252(f)(1), including when plaintiffs claim to enforce a constitutional right. *See, e.g.*, *Miranda v. Garland*, 34 F.4th 338, 354–57 (4th Cir. 2022) (striking down classwide injunction that was based on claims that detention procedures violated Due Process Clause);

Brito v. Garland, 22 F.4th 240, 246–50 (1st Cir. 2021) (same).[10] Regardless of whether Plaintiffs argue that it is the Constitution or a policy that requires the government to implement a covered statute in a particular way, the result is the same: the injunction would impose requirements on the government to carry out the statutory processes. Accordingly, the fact that Plaintiffs' claim is that CBP's own policy prevents turnbacks is of no moment. The requested injunction would still compel actions to implement inspection and processing under § 1225, and would still be barred by § 1252(f)(1). If an injunction that requires the covered procedures of inspection and processing (or imposes duties related thereto) could be permissible based an *Accardi* claim but impermissible when based on a statutory claim, that would mean that the applicability of § 1252(f)(1) would hinge on the nature of the underlying claim. And again, this runs contrary to the statutory language providing that the prohibition on injunctive relief applies "regardless of the nature of the action or claim." *See Aleman Gonzalez*, 596 U.S. at 553.

Aleman Gonzalez does not hold otherwise. *See* Opening Br. 23. Indeed, the

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[10] To illustrate, Plaintiffs' restrictive interpretation could allow relief enjoining or restraining the government's implementation of a statute based on asserted procedural rights, or based on an assertion that a policy is arbitrary and capricious for failure to consider relevant factors, but preclude relief based on an assertion that the policy is contrary to statute.

Supreme Court reiterated that the availability of injunctive relief could not depend on the "nature of the claim in question." *Aleman Gonzalez*, 596 U.S. at 553. It merely surmised that cases in "which a non-immigration statute, or some immigration statute not specified in § 1252(f)(1), might require injunctive relief against the enforcement of one of the covered immigration provisions" were exceptional. *Aleman Gonzalez*, 596 U.S. at 553–54 & n.4. The Supreme Court rejected an interpretation of § 1252(f)(1) that would allow classwide injunctions concerning the implementation of covered statutes if the injunction sought to enforce the plaintiffs' and the court's view of the proper interpretation of the covered statute, noting that would mean that "[w]ith *perhaps* a few small exceptions, the only claims to which § 1252(f)(1)'s prohibition would apply would be constitutional claims." *Id.* at 553–54 (emphasis in original). The Court did not state that those exceptional cases are outside the scope of § 1252(f)(1). Instead, it clearly contemplated that they would fall within its scope, and merely reasoned that such cases would be rare.

The implementing statutory authority for the November 2021 Guidance is similarly immaterial to whether Plaintiffs' requested injunction seeks to enforce a covered provision. *See* Opening Br. 31–32; ACLU Br. 20. The relevant inquiry for purposes of § 1252(f)(1) is not "which statute did Defendants principally invoke as

a legal basis" for their actions, but whether the injunction enjoins or restrains Defendants' operation of the covered statutes as defined in *Aleman Gonzalez*. *Al Otro Lado*, 619 F. Supp. 3d at 1047. The November 2021 Guidance provides "updated guidance" to CBP Officers concerning "the management and processing of noncitizens," including guidance as to how to make efforts to increase capacity to process undocumented noncitizens in furtherance of the government's strategy for promoting the use of orderly pathways. 2-ER-257–59. Guidance relating to the management and processing of noncitizens at POEs certainly implicates CBP's broader duties to manage POEs under the Homeland Security Act, including the balancing of its multiple missions and obligations. *See* Opening Br. 30, 31; *supra* 4–5; 6 U.S.C.§ 211(g)(3). But CBP's broader management duties—including its management of the intake of travelers at POEs—are intertwined with the statutory inspection and processing procedures that are triggered upon entrance to the United States at a POE. And again, the goal of Plaintiffs' enforcement of the November 2021 Guidance is to enforce immigration processing, which begins with the inspection obligation set forth in 8 U.S.C. § 1225(a)(3) and, for those without documents sufficient for admission, is then governed by the inspection and processing procedures at 8 U.S.C.

§§ 1225(b)(1)(A) and 1225(b)(2). *See supra* § I; 2-ER-123–24.[11] The portion of the Guidance that Plaintiffs seek to enforce through their *Accardi* claim is the sentence that says that "asylum seekers or others seeking humanitarian protection cannot be required to submit advance information in order to be processed." 2-ER-258; *see also* 2-ER-224. This sentence expressly refers to CBP's "process[ing]" of undocumented noncitizens who express an intent to seek asylum or claim fear from persecution or torture ("asylum seekers or others seeking humanitarian protection"), which Plaintiffs must acknowledge is governed by 8 U.S.C. § 1225. *See supra* § I. Further, even though Plaintiffs now also point on appeal to the Guidance's direction that "officers . . . may not instruct travelers that they must return to the POE at a later time or travel to a different POE for processing," Opening Br. 6, again, Plaintiffs

[11] CBP OFO's "Post-Title 42 Port Operations Muster" discusses available processing dispositions for noncitizens without documents sufficient for admission as "Expedited removal (ER), Notice to Appear (NTA), and where appropriate, WD [Withdrawal of application for admission]." 2-ER-124. Although the text of the muster does not cite the statutory bases for these processing dispositions, Plaintiffs cannot dispute that expedited removal is governed by § 1225(b)(1); notices to appear initiate removal proceedings under 8 U.S.C. § 1229a, and this is a permissible processing disposition under § 1225(b)(2)(A) and *Matter of E-R-M*, 25 I. & N. Dec. 520, 522 (BIA 2011); and withdrawal of applications for admission is governed by § 1225(a)(4), *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1089 (9th Cir. 2011).

have characterized similar language as a "self-imposed obligation to inspect and process such noncitizens." 2-ER-45.

Plaintiffs appear to suggest that the Court cannot consider the legal context surrounding CBP's use of the term "processing" as it relates to noncitizens without documents sufficient for admission because CBP cites no statutory provision in its November 2021 Guidance directed to the field. Opening Br. 31. But the Court must be able to examine the effect of the injunction in light of the legal and factual background, particularly given that Plaintiffs previously acknowledged that the aim and effect of their requested injunction is to require "inspect[ion] and process[ing]," which they themselves define by reference to § 1225. 2-ER-45; 4-ER-723, 771.

Nor is this a case of "post hoc rationalization." Opening Br. 41–42. The rule against consideration of *post hoc* rationalization—which "operates where an agency has provided a particular justification for a determination at the time the determination is made, but provides a different justification for that same determination when it is later reviewed by another body," *Indep. Min. Co. v. Babbitt*, 105 F.3d 502, 511 (9th Cir. 1997)—is not implicated here. The government is not defending CBP's November 2021 Guidance under the Administrative Procedure Act or any other judicial-review provision, making any arguments about the source of its authority to issue that Guidance, or even providing a definition of "processing" that differs from

one previously offered. Instead, the government is arguing that the terms of Plaintiffs' requested injunction would directly trigger inspection and processing of noncitizens without documents sufficient for admission, which are procedures governed by 8 U.S.C. § 1225.

Plaintiffs' Complaint reinforces that their requested injunction ultimately seeks to enforce covered provisions of the INA. All of Plaintiffs' claims attack the alleged "CBP One Turnback Policy," and all but one of their non-*Accardi* claims are expressly premised on various claimed statutory rights to the "asylum process" set forth in covered provisions. *See* 4-ER-765–66 (asserting unlawful failure to refer certain noncitizens for a credible-fear interview under 8 U.S.C. § 1225(b)(1)(A)(ii) or "place the noncitizen[s] directly into regular removal proceedings under 8 U.S.C. § 1229(a)(1)"); 4-ER-767 (asserting denial of "access to asylum process"); 4-ER-769 (asserting failure to take actions under 8 U.S.C. §§ 1158, 1225(a)(3), 1225(b)(1)(A)(ii), and 1225(b)(2)); 4-ER-771 (asserting due process claim based on claimed statutory rights at 8 U.S.C. §§ 1158, 1225(a)(3), 1225(b)(1)(A)(ii), 1225(b)(1)(B), and 1225(b)(2)); 4-ER-772 (alleging violation of customary international law). Plaintiffs cannot avoid the remedial bar that would certainly apply to these claims that are *expressly* based on covered statutes by seeking the exact same relief through enforcement of CBP policy.

Plaintiffs thus do seek enforcement of "statutory duties" under the INA concerning inspection and processing, Opening Br. 32, and their requested injunction does seek to remedy injuries that are "related to, or 'inextricably intertwined with'" the claimed failure of the government to provide inspection and processing under § 1225, Opening Br. 28. Even if Plaintiffs point to the November 2021 Guidance as the source of that asserted right, the relief sought directly implicates the operation of that covered provision. And regardless of the implementing authority for the November 2021 Guidance, enforcement of that policy in the manner Plaintiffs request would effectively, and directly, compel procedures governed by § 1225.

B. The Requested Injunction's Effect on the Operation of Covered Provisions is Not Collateral.

As explained, the requested injunction's direct object and effect are to require inspection under 8 U.S.C. § 1225(a)(3) and processing under 8 U.S.C. § 1225(b)(1)(A)(ii) or (2). Because the stated aim and operative equivalent of Plaintiffs' requested classwide injunction is to obtain and require inspection and processing of asylum-seekers under these provisions, this Court's prior precedent concerning injunctions that have a collateral effect on covered provisions is inapplicable here. *See* Opening Br. 23, 24–25; ACLU Br. 10–11, 18. In Plaintiffs' and Amicus's

view, the "effects" of an injunction on the government's implementation of a covered statute do not actually "enjoin or restrain" the government's operation of those provisions and must be categorized as "collateral." But that is contrary to the meaning of "collateral," and such a broad interpretation of the term would eviscerate the meaning of § 1252(f)(1) as set forth in *Aleman Gonzalez*. It would also encourage careful crafting of injunctive relief so as not to expressly invoke particularly statutory provisions or obligations. Here, the injunction is aimed at obtaining the covered procedures of inspection and processing, and the requested injunction would directly require acts to implement the covered inspection and processing provisions.

In *Aleman Gonzalez*, the Supreme Court distinguished cases like *Gonzales v. DHS*, which stands for the proposition "that a court may 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." *Aleman Gonzalez*, 596 U.S. at 553 n.4 (citing *Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007)). But this statement, in dicta, addresses cases where an injunction of another statutory provision has only a "collateral effect" on the operation of a covered provision. It does not override the Court's holding that § 1252(f)(1) prohibits injunctions that "order federal officials to take . . . actions . . . to enforce, implement, or otherwise carry out the specified statutory provisions." *Aleman Gonzalez*, 596 U.S. at 550. Here, the

requested injunction's terms would effectively require federal officials to take actions to implement the covered provisions of § 1225, thus its effect would be far from "collateral."

"Collateral" in similar contexts is defined as "[l]ying aside from the main subject, line of action, issue, purpose," that is, as "subordinate, indirect." *Wall v. Kholi*, 562 U.S. 545, 551–52 (2011) (quoting and citing 3 Oxford English Dictionary 473 (2d ed.1989) and Webster's Third New International Dictionary 444 (1993)); *see also United States v. Littlejohn*, 224 F.3d 960, 965 (9th Cir. 2000) (a consequence is collateral when it is not "direct" or "automatic" result of sentencing but instead "contingent upon action taken by an individual or individuals other th[a]n the sentencing court") (internal citations). "By definition, something that is 'collateral' is indirect, not direct." *Wall*, 562 U.S. at 552. In each of the cases Plaintiffs cite, the injunction at issue arose under a non-covered provision and had an indirect effect on the government's implementation of the covered provisions.

In *Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007), the district court entered an order precluding DHS from denying certain inadmissibility waivers under 8 U.S.C. § 1182(a)(9)(C)(ii) ("I-212 waivers"), and from giving legal effect to past denials based on those grounds, to those who were eligible for special adjustment of status under 8 U.S.C. § 1255(i). *Id.* at 1232. The government argued that

§ 1252(f)(1) barred the injunction because the injunction prevented the governing from commencing reinstatement proceedings to reinstate prior orders of removal under the covered provision at 8 U.S.C. § 1231(a)(5) because it could not give legal effect to the denied I-212 waivers. *Id.* at 1232–33. The Court determined that because reinstatement was a "collateral consequence of an unsuccessful adjustment application" the injunction's effect on reinstatement proceedings "is one step removed from the relief sought by Plaintiffs and therefore does not bring his action within the [§ 1252(f)] bar." *Id.* at 1233.

In *Catholic Social Services (CSS)*, 232 F.3d 1139 (9th Cir. 2000), this Court upheld the district court's order enjoining the government from executing final orders of removal in cases where the noncitizens' adjustment of status applications had been rejected because of an unlawful interpretation of the requirements for adjustment under 8 U.S.C. § 1255a. *Id.* at 1145, 1149–50.[12]

[12] It is questionable whether the *CSS* injunction is consistent with the Supreme Court's interpretation of § 1252(f)(1) in *Aleman Gonzalez*, because the injunction directly restrained the operation of covered removal provisions on a classwide basis. But the Court need not decide that issue in this appeal, as the *CSS* injunction is distinguishable from Plaintiffs' requested injunction. The requested injunction here is expressly aimed at remedying a "prevent[ion of] access[to] the U.S. asylum process" as set forth in covered statutory procedures, *see* 4-ER-460; 4-ER-723, while the aim of the *CSS* injunction was to remedy unlawful adjustment of status denials under a non-covered statute, not to enjoin removals.

This case is distinguishable from *Gonzales* and *CSS* in two key respects. *First*, the requested injunction of "turnbacks" imposes requirements on CBP with respect to the inspection and processing of those individuals who are not turned back. This is not a collateral, but a direct consequence of the injunction and of enforcement of CBP's policy. In *Gonzales*, this Court recognized that reinstatement of a removal order under a covered provision was not a direct result of a denied adjustment application, as plaintiffs argued it was "one of several available recourses following the denial." *Gonzales*, 508 F.3d at 1233. Here, imposing a requirement to inspect and process is not an "indirect," "subordinate," or ancillary result of the requested injunction, *see Wall*, 562 U.S. at 551–52, because the proposed class members are seeking to enter the United States at a POE, and their entrance at the POE—whether it occurs immediately after presenting at the border or after waiting in line to cross the border—triggers inspection and processing obligations. And any duties imposed by the November 2021 Guidance are "inextricably intertwined" with the inspection and processing procedures set forth in § 1225, even if the Guidance does not implement that authority. *See Al Otro Lado*, 619 F. Supp. 3d at 1046; *see also Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 193 (2023) (analyzing "collateral" as

"separate from" or "independent of" the primary issues).[13]

Second, requiring CBP to engage in inspection and processing is also the "primary object" and "target" of the injunction. *See* Amicus Br. 4, 17. In both *Gonzales* and *CSS*, the injunctions were aimed at remedying allegedly unlawful policies in denying adjustment applications (or accompanying applications for inadmissibility waivers), which in turn had a downstream effect on the government's ability to execute removal orders based on those allegedly defective denials or to reinstate prior removal orders. Here, Plaintiffs' *only* aim in enforcing CBP's policy is to compel

[13] Amicus references authority relating to the Anti-Injunction Act and Tax Injunction Act, which differ from the language of § 1252(f)(1). ACLU Br. at 14–19. For example, the Tax Injunction Act does not include the words "the operation of" in prohibiting courts from "enjoin[ing], suspend[ing], or restrain[ing] the assessment, levy, or collection of any tax under State law." ACLU Br. 14 (citing 28 U.S.C. § 1341). Regardless, however, the effect of the requested injunction on inspection and processing is not "collateral" under case law interpreting those statutes because it is the operative equivalent of imposing inspection and processing requirements for those who are not turned back and who enter or wait to enter the United States, and that is the aim of the injunction. *See, e.g.*, *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 10–11 (2015) (upholding injunction of notice and reporting provision that merely made a State's tax collection easier, in face of directive that federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law"); *CIC Servs., LLC v. Internal Revenue Serv.*, 593 U.S. 209, 218, (2021) (holding that Anti-Injunction Act did not bar suit whose "purpose," based on review of the Complaint and injuries alleged, was to challenge a notice imposing reporting requirements, and not a downstream tax penalty).

immigration inspection and processing as to noncitizens without documents sufficient for admission, which are the very procedures covered by 8 U.S.C. § 1225. *See supra* 32–34.[14]

Indeed, the fact that Plaintiffs' injunction aims to compel covered *procedures* is an important distinction between this case and the various hypotheticals posed by Amicus and Plaintiffs. Unlike those examples, this case does not involve a challenge to a substantive rule as applied in covered proceedings. *See* ACLU Br. 3–4, 7, 9–12, 18; Opening Br. 26–27, 32 (citing *E. Bay Sanctuary Covenant*, 2023 WL 4729278, at *8, and *Al Otro Lado v. Mayorkas*, 2022 WL 33142610, at *23) (S. D. Cal. 2022)), 34. For example, Plaintiffs are not challenging or seeking to influence inadmissibility determinations under 8 U.S.C. § 1182 as applied during an inspection under § 1225(a)(3), nor are they challenging an asylum eligibility rule that is applied in expedited removal credible-fear interviews. Instead, they are seeking to require the

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[14] *Gonzalez v. ICE* (cited at Opening Br. 23, 24) is likewise not instructive. In that case, the Court determined that an injunction of procedures regarding the issuance of immigration detainers was not barred by § 1252(f)(1), based on its conclusion that such detainers were not authorized or governed by the covered statutory detention provisions. *Gonzalez v. ICE*, 975 F.3d 788, 813–14 (9th Cir. 2020). Here, regardless of the implementing authority for the November 2021 Guidance, the procedures that would be required by the injunction are specifically authorized and governed by covered provisions.

government to implement the covered statutory procedures themselves. Thus, although the government's position is that Congress did intend to limit classwide injunctive relief as to immigration rules applied in covered proceedings, this case does not implicate those issues. *See* ACLU Br. 3, 7.

As the object and direct effect of the requested injunction here are inspection and processing under covered immigration provisions codified at § 1225, the district court's application of § 1252(f)(1) was correct and not in contradiction with this Ninth Circuit authority.

C. Plaintiffs' Statutory Interpretation Arguments Do Not Undermine the District Court's Conclusion.

The language, text, and history of § 1252(f)(1) support, and do not undermine, the district court's application of the remedial bar to Plaintiffs' requested injunction. Plaintiffs' arguments to the contrary largely hinge on their incorrect assertion that their requested injunction somehow does not require inspection or processing under § 1225 merely because they are seeking to enforce a policy to achieve that aim. *See* Opening Br. 28–42. Their arguments thus fail for the same reasons discussed above.

First, the parties agree that the plain language of the statute precludes orders that "enjoin or restrain the operation of the provisions of part IV of this subchapter."

8 U.S.C. § 1252(f)(1); Opening Br. 29. Indeed, this plain language supports the district court's conclusion that it may not issue an order that requires the government to take actions on a classwide basis to implement § 1225, which is a covered provision. *Supra* § I. The statutory text does not support the conclusion Plaintiffs posit—that § 1252(f)(1) precludes orders only when the underlying claim directly seeks enforcement of the covered provisions themselves, or of policies that expressly cite the covered provisions. Opening Br. 29–31. The phrase "'operation of the provisions' is a reference not just to the statute itself but to the way that it is being carried out." *Aleman Gonzalez*, 596 U.S. at 550 (cleaned up). The focus of the plain language is on the *effect of the injunction on the operation of the covered provisions* (*i.e.*, does it "enjoin or restrain" the operation), and not the source or authority for *issuing the injunction*. *See supra* § I, II(A), (B).

Second, the application of § 1252(f)(1) to bar the requested injunction is entirely consistent with the statute's structure and legislative history. The structure of the statute—particularly, other provisions of § 1252 enacted concurrently—reinforce that Congress meant to limit the availability of classwide relief. In 8 U.S.C. § 1252(e)(1)(B), Congress provided that no court may certify a class in any action for review of an expedited removal order under § 1252(e)(2) or for challenges to procedures under § 1252(e)(3). And in 8 U.S.C. § 1252(b)(9), Congress channeled

and consolidated judicial review of all issues arising from removal proceedings to review of individual removal orders. *See Singh v. Gonzales*, 499 F.3d 969, 977–78 (9th Cir. 2007) (explaining history of provision). In 2005, Congress further emphasized that individual petitions for review are the only means to challenge issues of law or fact arising from removal proceedings. *See id.* Section 1252(f)(1)'s limits on classwide remedies complements these other limitations on systemic judicial review. And Plaintiffs point to nothing in the structure or legislative history of § 1252(f)(1) that narrows its plain language to exclude injunctions that enjoin or restrain the operation of a covered statute if the claimed authority for the injunction arises out of a different statute, a policy, or the Constitution. *See* Opening Br. 33–35.

Third, the district court's reading of the statute to preclude an injunction that has the operative effect of requiring inspection and processing as provided by the covered statutory provisions is a natural, common-sense result that accords with Congress's clear and broad limit on equitable relief, the Supreme Court's interpretation of that limit as set forth in *Aleman Gonzalez,* and relevant canons of statutory construction. It is quite reasonable that Congress meant what it said in § 1252(f)(1): regardless of the nature of the claim, courts may not require "federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the

specified statutory provisions." *Aleman Gonzalez*, 596 U.S. at 550. This bars class-wide relief that falls within this framework, even where plaintiffs' claims implicate potential constitutional concerns. *See supra* 35–36; Opening Br. 36. Such constitutional concerns are not, however, implicated in this appeal and in any event would not extend to noncitizens who are in Mexico. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.,* 140 S. Ct. 2082, 2086 (2020) (collecting cases). And such an interpretation plainly does not ignore or "render meaningless" the reference to the covered provisions—it incorporates them expressly. Opening Br. 37.

D. The Injunction is Barred by § 1252(f)(1) Even Though Plaintiffs Seek to Enforce CBP's Own Policy.

Plaintiffs argue that, under *Aleman Gonzalez*, a court exceeds its authority *only* when it orders the government to "take or refrain from taking action contrary to what is 'in the Government's view' the lawful implementation of" covered provisions. Opening Br. 43. As an initial matter, Plaintiffs' argument incorrectly presumes that the Guidance represents actions that "in the government's view" are *required* by the relevant covered provision (§ 1225). *See* Opening Br. 44; *see also* ACLU Br. 19. Regardless of what actions CBP has voluntarily agreed to take (or not take) as part of its policy, DHS and CBP maintain that § 1225 does not impose obligations toward noncitizens still in Mexico or require it to take any particular action toward

such noncitizens. *See, e.g.*, *Al Otro Lado v. Mayorkas*, No. 22-55988 (9th Cir.) (appealing the *AOL I* district court's ruling in this regard). Further, CBP has inherent discretion to manage intake of travelers into its POEs to meet its multiple statutory law-enforcement and other obligations and missions. *See* 6 U.S.C. § 211(g); *see also* *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 761 (2005) (recognizing the "deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands"); *City of Chicago* v. *Morales*, 527 U.S. 41, 62 n.32 (1999). Thus, in the government's view, the statutory procedures Plaintiffs seek to compel as to proposed class members who are still in Mexico are not *required* by the statute, regardless of what CBP's policy contemplates.

Aleman Gonzalez addressed a situation where the district-court orders imposed bond-hearing requirements that the government believed were not required by statute. In that case, the plaintiffs argued that § 1252(f)(1) did not prohibit orders that enforced a *proper* interpretation of the statute. The Supreme Court rejected that argument and held that such orders nonetheless "'enjoin or restrain the operation' of [the covered detention provision codified at] § 1231(a)(6) because they require officials to take actions that (in the Government's view) are not required by § 1231(a)(6) and to refrain from actions that (again in the Government's view) are allowed by § 1231(a)(6)." *Aleman Gonzalez*, 596 U.S. at 551. This holding covers this case as

well, because here, as in *Aleman Gonzalez*, the "government's view" is that the requested injunction would require it to take actions under § 1225 that "are not required by" § 1225. *See Aleman Gonzalez*, 596 U.S. at 551.

In any event, § 1252(f)(1)'s scope is not textually limited to orders that require actions that are inconsistent with the government's policies. Instead, the plain language of § 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 statutory provisions." *Aleman Gonzalez*, 596 U.S. at 550. And again, the statute's language precludes such an interpretation, as its limits apply "regardless of the nature of the action or claim." 8 U.S.C. § 1252(f)(1). The point of § 1252(f)(1) is to prohibit particular remedies, not particular claims. It precludes exercise of judicial coercive power to effect classwide or other broad relief that requires the government to take actions or not take actions to carry out the covered statutory provisions.

Plaintiffs' narrow reading of § 1252(f)(1) as barring only orders that require actions that are inconsistent with the government's policies is contrary to the statutory interpretation set forth in *Aleman Gonzalez*. For example, under Plaintiffs' view, a classwide injunction prohibiting arrest and removal of a class of individuals without a criminal history would not violate § 1252(f)(1) if the government has adopted

a policy to not arrest and remove such individuals and the plaintiffs' requested injunction sought to enforce that policy. Plaintiffs may argue that such a hypothetical policy would be different because it is about prosecutorial discretion and, in their view, the November 2021 Guidance creates a procedural right that overcomes any discretion. But that would make the availability of an injunction depend on the merits of the claim, rather than the nature of the relief requested. *See Aleman Gonzalez*, 596 U.S. at 554 (rejecting interpretation that would make availability of relief depend on the merits of the claim).

The district court's reliance on the language of § 1252(f)(1) and the *Aleman Gonzalez* decision to deny Plaintiffs' requested injunction was thus proper. This Court should affirm the district court's decision.

III. This Court Cannot Grant a Preliminary Injunction or Class Certification in the First Instance on Appeal.

Should the Court nevertheless reverse the denial of a preliminary injunction, it should remand to the district court to consider whether the legal and discretionary standards for class certification and injunctive relief are met in the first instance. Given the procedural posture of this appeal, this Court lacks jurisdiction to issue an order directing the district court to provisionally certify the class and enter the preliminary injunction as to that class, because as a threshold issue, this Court lacks

jurisdiction over the class certification motion. Regardless, resolution of these motions would involve factual and equitable issues that the district court has not ruled on and are best left to that court to decide in the first instance.

A. There is No Jurisdiction to Grant Class Certification.

The Court lacks jurisdiction to direct the district court to certify the proposed class. Plaintiffs did not obtain permission to appeal the denial of class certification within 45 days of the District Court's order, and this Court therefore lacks independent jurisdiction over the issue. *See* Fed. R. Civ. P. 23(f); *Microsoft Corp. v. Baker,* 137 S. Ct. 1702, 1706 (2017); *Bates v. Bankers Life & Cas. Co.,* 848 F.3d 1236, 1238 (9th Cir. 2017). Interlocutory jurisdiction under § 1292(a)(1) extends only to the "matters inextricably bound up with the injunctive order from which the appeal is taken." *Paige v. State of Cal.*, 102 F.3d 1035, 1039 (9th Cir. 1996). Here, although the district court denied the preliminary injunction and the class certification motions in the same order, adjudication of the class certification issues is not "'necessary to ensure meaningful review' of the preliminary injunction decision." *See Paige*, 102 F.3d at 1039 (citing *Swint v. Chambers County Commission*, 514 U.S. 35, 51 (U.S. 1995)); *Melendres v. Arpaio*, 695 F.3d 990, 999 (9th Cir. 2012).

Plaintiffs filed two separate motions below: one for a preliminary injunction "on behalf of themselves and the class they seek to represent," 2-ER-222, and one

for provisional class certification in aid of that requested injunction, 4-ER-630. The district court determined as a threshold matter that § 1252(f)(1) barred the issuance of classwide injunctive relief. Because classwide injunctive relief was unavailable, the district court properly denied Plaintiffs' request for provisional class certification as moot without determining whether the requirements for class certification under Federal Rule of Civil Procedure 23(a) and 23(b)(2) were met. 1-ER-9–33; 4-ER-808; *see also* Fed. R. Civ. P. 23; *Gen. Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982) ("[A]ctual, not presumed, conformance with Rule 23(a) [is] indispensable."); *United Steel Workers v. ConocoPhillips Co.*, 593 F.3d 802, 807 (9th Cir. 2010) ("The party seeking class certification bears the burden of demonstrating that the requirements of Rules 23(a) and (b) are met."). And whether those class certification requirements are met is immaterial to the issue presented on appeal—whether Plaintiffs' requested *relief* would enjoin or restrain the operation of covered statutory provisions under § 1252(f)(1). The Court does not need to decide whether class certification would have been proper in order to determine whether the district court correctly applied § 1252(f)(1). It thus lacks jurisdiction to consider the class certification requirements.

B. The Court Cannot Grant a Preliminary Injunction in the First Instance.

Further, this Court lacks authority to direct the district court to grant the requested preliminary injunction in the absence of class certification. "Without a properly certified class, a court cannot grant relief on a class-wide basis." *Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 728 n.1 (9th Cir. 1983). The purpose of Plaintiffs' request for injunctive relief is to obtain such relief on behalf of a class. All of the Individual Plaintiffs have already received inspection and processing—either because they received CBP One appointments in the ordinary course without any intervention, or because they received manually scheduled CBP One appointments as a result of litigation agreements. 2-ER-10. Accordingly, regardless of their standing to pursue their claims, these Individual Plaintiffs cannot obtain prospective relief on their own behalf, as they have already been inspected and processed. *Presbyterian Church v. United States*, 870 F.2d 518, 528–29 (9th Cir. 1989) ("[W]hen injunctive relief is sought, litigants must demonstrate a credible threat of future injury.").

C. The Court Should Not Decide Factual Issues that Were Not Considered by the District Court.

Even if the Court disagrees that it lacks jurisdiction or authority over the merits of the preliminary-injunction and class-certification motions, the Court should

still decline Plaintiffs' unsupported request that it decide whether the legal and discretionary standards for a preliminary injunction and class certification are met. That would require intensively factual inquiries into issues that that were not decided by the district court below. "[T]he decision whether to grant [preliminary-injunctive] relief requires the making of factual and equitable determinations" that "are best left in the first instance to the district court." *Sega Enterprises Ltd. v. Accolade, Inc.,* 977 F.2d 1510, 1528 (9th Cir. 1992); *see also Alaska Wilderness Recreation & Tourism Ass'n v. Morrison,* 67 F.3d 723, 732 (9th Cir. 1995) (remanding to district court because the scope and appropriateness of an injunction raised "intensely factual issues"); *Sierra On–Line, Inc. v. Phoenix Software, Inc.,* 739 F.2d 1415, 1421 (9th Cir.1984) (remanding to district court because "[t]he grant of a preliminary injunction is a matter committed to the discretion of the trial judge"); *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1090 (9th Cir. 2010) (class certification decision generally contains an element of discretion).

Furthermore, the record below does not support the entry of an injunction on behalf of a borderwide proposed class. The Individual Plaintiffs' allegations of turnbacks relate to only three of the 25 POEs across the border, and the evidence submitted by Plaintiffs does not even touch on many of the 25 POEs. *See supra* 19–20. Further, much of the evidence submitted by Plaintiffs relates to reports of turnbacks

by Mexican officials on Mexican soil controlling access to bridges or other pathways to POEs, not turnbacks by CBP officials. *See supra* 20–21. Mexican officials' actions are not governed by CBP's policy, and, at a minimum, present different legal and factual questions than do claims concerning CBP Officers' conduct. Further, claims arising from Mexican officials' conduct cannot be redressed in federal court because the effectiveness of relief would depend entirely on the independent actions of a foreign country, *Dellums v. U.S. Nuclear Regul. Comm'n*, 863 F.2d 968, 976 (D.C. Cir. 1988).

The evidence does not support a finding of a borderwide noncompliance with the November 2021 Guidance, let alone a finding of conduct of the same nature that could be evaluated for compliance with the Guidance across a class. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 & n.7 (9th Cir. 2011) (where a plaintiff alleges that there is a "common pattern and practice that could affect the class *as a whole*," plaintiffs must provide evidence that the common policy or practice actually exists; otherwise, there is "no question common to the class." (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. at 355–56)); *B.K. v. Snyder*, 922 F.3d 957, 976 (9th Cir. 2019) (finding district court abused discretion in certifying subclass on theory of failure to comply with the Medicaid statute where it was not clear that the elements of the claim could be evaluated on a classwide basis). The question whether

conduct by particular CBP officers at the borderline violated CBP's guidance is highly fact-dependent, turning on the actions of and even the language used by the CBP officer in each encounter.

CONCLUSION

This Court should affirm the decision below.

//

DATED: January 5, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 5, 2024, I served a copy of this document on the Court and all parties by filing it with the Clerk of the Court through the ACMS system, which will provide electronic notice and a link to this document to all counsel of record.

DATED: January 5, 2024

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Federal Rules of Appellate Procedure 32(a)(4) and 32(a)(5) because it is double-spaced, has margins of at least one inch on all four sides, and uses proportionally-spaced, 14-point Times New Roman font.

I certify that this brief complies with the type-volume limitation of Circuit Rule 32-1(a) because it contains 13,976 words, including headings and footnotes, as measured by the word processing application used to prepare this brief.

DATED: January 5, 2024

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendants-Appellees identify the cross appeals in *Al Otro Lado v. Mayorkas*, Nos. 22-55988, 22-56036.

DATED: January 5, 2024

Respectfully submitted,

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ADDENDUM PURSUANT TO CIRCUIT RULE 28-2.7

8 U.S.C. § 1252(f)(1)

§ 1252. Judicial Review of Orders of Removal

. . .

(f) Limit on Injunctive Relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1225(a), (b)

§ 1225. Inspection by Immigration Officers; Expedited Removal of Inadmissible Arriving Aliens; Referral for Hearing

(a) Inspection

(1) Aliens Treated as Applicants for Admission

An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.

(2) Stowaways

An arriving alien who is a stowaway is not eligible to apply for admission or to be admitted and shall be ordered removed upon inspection by an immigration officer. Upon such inspection if the alien indicates an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview under subsection (b)(1)(B). A stowaway may apply for asylum only if the stowaway is found to have a credible fear of persecution under subsection (b)(1)(B). In no case may a stowaway be considered an applicant for admission or eligible for a hearing under section 1229a of this title.

(3) Inspection

All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers.

(4) Withdrawal of Application for Admission

An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States.

(5) Statements

An applicant for admission may be required to state under oath any information sought by an immigration officer regarding the purposes and intentions of the applicant in seeking admission to the United States, including the applicant's intended length of stay and whether the applicant intends to remain permanently or become a United States citizen, and whether the applicant is inadmissible.

(b) Inspection of Applicants for Admission

(1) Inspection of Aliens Arriving in the United States and Certain Other Aliens Who Have Not Been Admitted or Paroled

(A) Screening

(i) In general

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

(ii) Claims for asylum

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

(iii) Application to certain other aliens

(I) In general

The Attorney General may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause (II) as designated by the Attorney General. Such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time.

(II) Aliens described

An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph.

(B) Asylum interviews

(i) Conduct by asylum officers

An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the Attorney General.

(ii) Referral of certain aliens

If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum.

(iii) Removal without further review if no credible fear of persecution

(I) In general

Subject to subclause (III), if the officer determines that an alien does not have a credible fear of persecution, the officer shall

order the alien removed from the United States without further hearing or review.

(II) Record of determination

The officer shall prepare a written record of a determination under subclause (I). Such record shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in the light of such facts, the alien has not established a credible fear of persecution. A copy of the officer's interview notes shall be attached to the written summary.

(III) Review of determination

The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).

(IV) Mandatory detention

Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.

(iv) Information about interviews

The Attorney General shall provide information concerning the asylum interview described in this subparagraph to aliens who may be eligible. An alien who is eligible for such interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations prescribed by the

Attorney General. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process.

(v) “Credible fear of persecution” defined

For purposes of this subparagraph, the term “credible fear of persecution” means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title.

(C) Limitation on administrative review

Except as provided in subparagraph (B)(iii)(III), a removal order entered in accordance with subparagraph (A)(i) or (B)(iii)(I) is not subject to administrative appeal, except that the Attorney General shall provide by regulation for prompt review of such an order under subparagraph (A)(i) against an alien who claims under oath, or as permitted under penalty of perjury under section 1746 of title 28, after having been warned of the penalties for falsely making such claim under such conditions, to have been lawfully admitted for permanent residence, to have been admitted as a refugee under section 1157 of this title, or to have been granted asylum under section 1158 of this title.

(D) Limit on collateral attacks

In any action brought against an alien under section 1325(a) of this title or section 1326 of this title, the court shall not have jurisdiction to hear any claim attacking the validity of an order of removal entered under subparagraph (A)(i) or (B)(iii).

(E) “Asylum officer” defined

As used in this paragraph, the term “asylum officer” means an immigration officer who—

(i) has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications under section 1158 of this title, and

(ii)is supervised by an officer who meets the condition described in clause (i) and has had substantial experience adjudicating asylum applications.

(F) Exception
Subparagraph (A) shall not apply to an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry.

(G) Commonwealth of the Northern Mariana Islands
Nothing in this subsection shall be construed to authorize or require any person described in section 1158(e) of this title to be permitted to apply for asylum under section 1158 of this title at any time before January 1, 2014.

(2) Inspection of other aliens

(A) In general

Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

(B) Exception

Subparagraph (A) shall not apply to an alien—

(i) who is a crewman,

(ii) to whom paragraph (1) applies, or

(iii) who is a stowaway.

(C) Treatment of aliens arriving from contiguous territory

In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

(D) Challenge of decision

The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien whose privilege to be admitted is so challenged, before an immigration judge for a proceeding under section 1229a of this title.

8 U.S.C. § 1229(a)

§ 1229. Initiation of Removal Proceedings

(a) Notice to appear

(1) In general

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2)

(F)

(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G)

(i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

(2) Notice of change in time or place of proceedings

(A) In general

In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying—

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a(b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

(B) Exception

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F).

(3) Central address files

The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F).

8 U.S.C. § 1229a

§ 1229a. Removal Proceedings

(a) Proceeding

(1) In General

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

(b) Conduct of proceeding

(1) Authority of immigration judge

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.

(2) Form of proceeding

(A) In general

The proceeding may take place—

(i) in person,

(ii) where agreed to by the parties, in the absence of the alien,

(iii) through video conference, or

(iv) subject to subparagraph (B), through telephone conference.

(B) Consent required in certain cases

An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

(3) Presence of alien

If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

(4) Alien's rights in proceeding

In proceedings under this section, under regulations of the Attorney General—

(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,

(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national

security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

(5) Consequences of failure to appear

(A) In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2)). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

(B) No notice if failure to provide address information

No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.

(C) Rescission of order

Such an order may be rescinded only—

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1)), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1)

or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

(E) Additional application to certain aliens in contiguous territory

The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.

(6) Treatment of frivolous behavior

The Attorney General shall, by regulation—

(A) define in a proceeding before an immigration judge or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,

(B) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

(C) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.

Nothing in this paragraph shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

(7) Limitation on discretionary relief for failure to appear

Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or (2) of section 1229(a) of this title, was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1)) to attend a proceeding under this section, shall not be eligible for relief under section 1229b, 1229c, 1255, 1258, or 1259 of this title for a period of 10 years after the date of the entry of the final order of removal.

(c) Decision and burden of proof

(1) Decision

(A) In general

At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing.

(B) Certain medical decisions

If a medical officer or civil surgeon or board of medical officers has certified under section 1222(b) of this title that an alien has a disease, illness, or addiction which would make the alien inadmissible under paragraph (1) of section 1182(a) of this title, the decision of the immigration judge shall be based solely upon such certification.

(2) Burden on alien

In the proceeding the alien has the burden of establishing—

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(3) Burden on service in cases of deportable aliens

(A) In general

In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

(B) Proof of convictions

In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) An official record of judgment and conviction.

(ii) An official record of plea, verdict, and sentence.

(iii) A docket entry from court records that indicates the existence of the conviction.

(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

(C) Electronic records

In any proceeding under this chapter, any record of conviction or abstract that has been submitted by electronic means to the Service from a State or court shall be admissible as evidence to prove a criminal conviction if it is—

(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

(ii) certified in writing by a Service official as having been received electronically from the State's record repository or the court's record repository.

A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien—

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) Sustaining burden

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

(C) Credibility determination

Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the

consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(5) Notice

If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.

(6) Motions to reconsider

(A) In general

The alien may file one motion to reconsider a decision that the alien is removable from the United States.

(B) Deadline

The motion must be filed within 30 days of the date of entry of a final administrative order of removal.

(C) Contents

The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections [1] 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses, children, and parents

Any limitation under this section on the deadlines for filing such motions shall not apply—

(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title,,1 section 1229b(b) of this title, or section 1254(a)(3) of this title (as in effect on March 31, 1997);

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child; and

(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of this title [2] pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

(d) Stipulated removal

The Attorney General shall provide by regulation for the entry by an immigration judge of an order of removal stipulated to by the alien (or the alien's representative) and the Service. A stipulated order shall constitute a conclusive determination of the alien's removability from the United States.

(e) Definitions

In this section and section 1229b of this title:

(1) Exceptional circumstances

The term “exceptional circumstances” refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

(2) Removable

The term “removable” means—

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.