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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(San Diego)

AL OTRO LADO, Inc., *et al.*, *Plaintiffs*, v. ALEJANDRO N. MAYORKAS, Secretary of Homeland Security, *et al.*, in their official capacities, *Defendants*.	Case No. 3:23-cv-01367-AGS-BLM Hon. Andrew G. Schopler **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT** Hearing Date: December 15, 2023

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INTRODUCTION

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

Plaintiffs claim that CBP's alleged practice violates its own policies, the Administrative Procedure Act (APA), due process, and the non-refoulement doctrine. The individual Plaintiffs, however, have since received the relief they seek—"access to the U.S. asylum process"—and the relief they seek on behalf of the putative class is barred by statute. Further, there is no cohesive policy on which to base classwide relief. The organizational Plaintiffs do not have standing to seek relief relating to policies concerning the enforcement of immigration law as to third parties. Regardless of standing, however, Plaintiffs' APA claims fail at the threshold because they have not identified an actual agency "turnback" policy that could possibly be evaluated by this Court under APA standards, and they seek to dictate how CBP should manage intake at POEs of undocumented noncitizens, which is committed to agency discretion. Plaintiffs' APA and due process claims also should be dismissed because the statutory asylum, inspection, and referral obligations on which they are premised do not extend to those—like Plaintiffs and the proposed class—who are still in Mexico. Plaintiffs' due process claim is entirely duplicative of the APA claims in that it is premised solely upon alleged deprivation of a statutory interest and does not allege

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

BACKGROUND

A. Background on 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 Class A land POEs[1] along the U.S.-Mexico border. Compl. ¶¶ 42 (naming 20 such POEs), 44. These POEs fall within the jurisdiction of four Field Offices: San Diego, Tucson, El Paso, and Laredo. *Id.* ¶ 43.

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 Immigration and Nationality Act (INA), Title 8 of the U.S. Code, 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 Section 1225(a)(3), "[a]ll aliens . . . who are applicants for admission or otherwise seeking admission or readmission to or transit through the

[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).

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

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

> Any alien who is physically present in the United States 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), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

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

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. This may include processing under the expedited removal procedures at Section 1225(b), which provide generally that the noncitizen may be removed without further review. 8 U.S.C. § 1225(b)(1)(A). But if the 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). The 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. DHS has discretion to process inadmissible arriving noncitizens for expedited removal under Section 1225(b)(1) or to place them in Section 1229a removal proceedings pursuant to Section 1225(b)(2)(A), where the noncitizens may raise claims for humanitarian protection before an immigration judge. *See Matter of E-R-M-*, 25 I. & N. Dec. 520, 521–24 (BIA 2011).

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

In 2017, Plaintiff 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). The plaintiffs in *AOL I* 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)). 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 n. 1, 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 did not define these "turnbacks" to include 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 Court subsequently entered a declaratory judgment, *see Al Otro Lado v. Mayorkas*, 2022 WL 3970755 (S.D. Cal. Aug. 23, 2022), but concluded that classwide injunctive relief was prohibited under 8 U.S.C. § 1252(f)(1), because any such order would enjoin or restrain CBP's efforts to operate 8 U.S.C. § 1225. *Al Otro Lado, Inc. v. Mayorkas*, 619 F. Supp. 3d 1029, 1045 (S.D. Cal. 2022). The cross-appeal from final judgment is fully briefed with argument scheduled for November 28, 2023. *See Al Otro Lado, Inc. v. Mayorkas*, No. 22-55988 (9th Cir.).

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, CBP rescinded its prior guidance and issued a memorandum to OFO regarding the management and processing of undocumented noncitizens at POEs along the U.S.-Mexico border (November 2021 Guidance). *See* Compl. ¶ 51; Defs.' Ex. 1 (Nov. 2021 Guidance).[3] Recognizing that the Title 42 orders were still in effect at the time of its issuance, the Guidance contemplates that it will apply

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

once they are lifted, and 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." Defs.' Ex. 1, at 1, 2. "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." *Id.* "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 memorandum 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.* It instructs: "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.*

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 irregularly enter the United States at the southwest border to surge 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 spike in the number of migrants at the southwest border seeking to enter the United States without authorization, the Department of Justice and DHS promulgated the Circumvention of Lawful Pathways Rule, effective May 11, 2023 (the Rule). *Id.* at 31,314, 31,324; *see also* 88 Fed. Reg. at 11,704; Compl. ¶ 52. The Rule provides that most noncitizens who enter the United States

during a two-year period 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 asylum ineligibility unless they avail themselves of orderly processes for entry into the United States or seek and are denied asylum or other protection in a third country. 88 Fed. Reg. at 31,321–23. Noncitizens may be excepted from the presumption, however, if they followed the orderly process of "[p]resent[ing] 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). They also may be able to rebut the presumption by demonstrating that exceptionally compelling circumstances exist. *Id.* §§ 208.33(a)(3)(i), 1208.33(a)(3)(i). 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 land-border 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 "noncitizens 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 Submission and Appointment Scheduling," https://www.cbp.gov/about/mobile-apps-directory/cbpone (last visited Sept. 13, 2023); Compl. ¶ 87. There are currently 1,450 such appointments available per day. *See CBP One Appointments Increased to 1,450 Per Day* (June 30, 2023), https://www.cbp.gov/newsroom/national-media-release/cbp-one-appointments-increased-1450-day. Use of appointments allows these POEs to streamline in-person processing and efficiently manage

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

C. The Complaint.

Al Otro Lado (AOL) and Haitian Bridge Alliance (HBA) (Organizational Plaintiffs), and nine noncitizens (Individual Plaintiffs)[4] allege that CBP has 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. 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. The Complaint asserts the "CBP One Turnback Policy" and each application thereof violates the APA as arbitrary and capricious, contrary to law or in excess of statutory authority, and withholding or unreasonably delaying required agency action, and that it violates the agency's stated policies, due process, and a customary international-law obligation of non-refoulement.

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

[4] Former Plaintiff Alexander Doe voluntarily dismissed his claims. *See* ECF 35.

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

As to the San Ysidro POE, Plaintiffs allege that CBP Officers have told undocumented noncitizens "they could not be processed without an appointment." *Id.* ¶ 96. They also allege that Mexican officials have prevented or discouraged undocumented noncitizens from waiting in line to enter the POE, and that CBP "requests [the] assistance [of Mexican immigration and law enforcement officers] in clearing the backlog of people." *See id.* ¶¶ 97-99. Six of the nine Individual Plaintiffs allege experiences at the San Ysidro POE: Plaintiffs Guadalupe and Somar Doe allege that they went to the San Ysidro POE in early June 2023 and were told that they needed a CBP One appointment or could wait in line. *See id.* ¶ 20. They allege that they then attempted to present at the "Ped West" entrance to that POE in late July 2023, and that the CBP Officer made suggestions as to how to obtain a CBP One appointment, and in response to an AOL staff member's inquiry about placement on "an emergency list," referred them to Mexican immigration officials at the "Ped East" entrance. *Id.* ¶ 20. Diego Doe alleges that a CBP Officer at the POE told him on July 26, 2023, to "speak to Mexican immigration officials about his issues with the [CBP One] app." *Id.* ¶ 13. Elena Doe alleges that on an unspecified date, she approached the "Ped West" entrance to the POE and was told by a Mexican immigration official that she could not get through without a CBP One appointment; she alleges she returned to the San Ysidro POE in mid-July and CBP officers "refused to allow her to proceed" so she left. *Id.* ¶ 17. Michelle Doe alleges that in mid-July 2023, a CBP Officer at the POE said that "people cannot cross without using the CBP One App." *Id.* ¶ 12. Luisa Doe alleges that she went twice to the San Ysidro POE in June and July 2023, and that "CBP officials blocked her from entering and told her she needed

a CBP One appointment [to seek asylum]." *Id.* ¶ 19.[5]

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

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

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

within this field office. *Id.* ¶ 15.

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

LEGAL STANDARDS

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

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

ARGUMENT

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

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

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

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

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

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

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

The Organizational Plaintiffs have not identified a "legally and judicially

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

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

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

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

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

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

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

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

the suit." *Id.* at 399.

Plaintiffs' APA claims are based on the INA, and in particular, the asylum statute, 8 U.S.C. § 1158, the provision requiring inspection of noncitizens, 8 U.S.C. § 1225(a)(3), the provision regarding referral for credible-fear interviews at 8 U.S.C. § 1225(b)(1)(A)(ii), and the provision regarding placement in § 1229a removal proceedings at 8 U.S.C. § 1225(b)(2). Neither the INA generally, nor any of these provisions, suggest that Congress intended to permit organizations to sue over their voluntary expenditures taken in response to an alleged failure to implement these provisions toward noncitizens in a particular manner. *See INS v. Legalization Assistance Project*, 510 U.S. 1301, 1302 (1993) (O'Connor, J., in chambers) (determining that organizations that "provide legal help to immigrants" were not within zone of interests of immigration statute granting limited amnesty that was "clearly meant to protect the interests of undocumented aliens, not the interests of organizations"). Indeed, the asylum statute provides to the contrary: "Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." 8 U.S.C. § 1158(d)(7). And all these statutory provisions are addressed only to the noncitizens regulated by the INA. That the INA carefully prescribes a scheme of judicial review of asylum and removal issues that affords only noncitizens—not third-party organizations—an opportunity to challenge them underscores that immigration-services organizations like Plaintiffs are not within the zone of interests protected by the asylum and expedited removal statutes. *See* 8 U.S.C. § 1252(a)(5), (b)(9), (e), (g).[6]

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

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

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

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

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

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

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

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

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

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

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

IV. Plaintiffs' APA Claims Fail at the Threshhold.

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

[7] As discussed just above (*supra* § II), the APA is the only proper vehicle for Plaintiffs' *Accardi* claim in their First Claim for Relief.

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

A. The Complaint Does Not Identify a Discrete "Agency Action."

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

There is no question that the Complaint fails to identify an actual policy document, regulation, or official agency decision like "a memorandum that formally articulate[s] the agency's position," *Wild Fish Conservancy,* 730 F.3d at 801, that reflects a policy of "turning back" noncitizens without appointments. To the contrary, Plaintiffs assert that DHS and CBP's November 2021 Guidance "prohibit[s] Turnbacks." Compl. ¶ 51. Plaintiffs thus do not challenge a particular agency policy that applies to the putative class that is amenable to review under the APA.

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

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

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

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

B. "Turnbacks" Are Not Final Agency Action.

As there is no agency policy or similar action capable of review under the APA, there is certainly no "final" agency action at issue. Plaintiffs may argue that, regardless of whether there is an agency policy, each "turnback" constitutes a reviewable agency action. Yet they cannot amalgamate a variety of individual decisions into one class action for review. As noted, it is not entirely clear from the Complaint what Plaintiffs believe constitutes a "turnback." And, in any event, each "turnback" is not "final" for purposes of APA review. *See* 5 U.S.C. § 704 (providing for judicial review of "final agency action for which there is no other adequate

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

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

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

Plaintiffs' APA claims should be dismissed for the independent reason that they ask the Court to review CBP's management of intake and processing of undocumented noncitizens, which implicates the "complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," and is therefore "committed to agency discretion by law" and unreviewable under the APA. 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

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

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

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

Plaintiffs will likely argue that this discretion is overridden by mandatory statutory duties of inspection and referral under Section 1225. *See, e.g.*, *Al Otro Lado*, 394 F. Supp. 3d at 1211. This argument fails because these statutory duties do not extend to those still outside the United States. *Infra* § V. But even if the statutes did apply extraterritorially, CBP and DHS must be able to exercise discretion over border management to control whether and how to exercise their duty to inspect individuals under Section 1225(a)(3) (the precursor to any referral or processing duties under Section 1225(b)). The Supreme Court has made clear that even seemingly mandatory duties give way to discretion in the law-enforcement context, including immigration law enforcement. *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 761 (2005) (noting 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); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (recognizing "discretion to abandon" removal

efforts despite mandatory statutory language). This complaint cannot be used to obtain supervision over individualized discretionary decisions made at each POE each day.

Accordingly, Plaintiff cannot assert an APA claim challenging an alleged denial or delay of inspection and processing—even one based on alleged violation of CBP's guidance—because DHS and CBP's management of intake at POEs is committed to their discretion, and there are no meaningful standards by which to judge that exercise of discretion.

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

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

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

but also to those who are "in the process of arriving in" the United States because they have approached the border with an intent to enter at a POE. *See Al Otro Lado*, 2021 WL 3931890, at *10 (citing *Al Otro Lado*, 394 F. Supp. 3d at 1198–1205). Defendants raise this argument to preserve it, particularly given that the appeal from the *AOL I* judgment—in which Defendants challenge that holding—is scheduled to be argued on November 28.[10]

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

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

asylum.

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

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

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

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

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

VI. Plaintiffs Cannot State a Due Process Claim.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

This Court should dismiss Plaintiffs' Complaint for lack of jurisdiction or failure to state a claim.

DATED: November 13, 2023

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CERTIFICATE OF SERVICE

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

DATED: September 13, 2023

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