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

AL OTRO LADO, INC.; ABIGAIL DOE,  
BEATRICE DOE, CAROLINA DOE,  
DINORA DOE, INGRID DOE, URSULA  
DOE, JOSE DOE, ROBERTO DOE,  
MARIA DOE, JUAN DOE, VICTORIA  
DOE, BIANCA DOE, EMILIANA DOE,  
AND CESAR DOE, individually and on  
behalf of all others similarly situated,

Plaintiffs,

v.

ALEJANDRO MAYORKAS, Secretary,  
U.S. Department of Homeland Security, in  
his official capacity; CHRIS MAGNUS  
Commissioner, U.S. Customs and Border  
Protection, in his official capacity; PETE  
FLORES, Executive Assistant  
Commissioner, Office of Field  
Operations, U.S. Customs and Border  
Protection, in his official capacity,

Defendants.<sup>1</sup>

Case No. 17-cv-2366-BAS-KSC

**REMEDIES OPINION**

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<sup>1</sup> Because all Defendants are sued in their official capacities, the successors for these public offices are automatically substituted as Defendants per Federal Rule of Civil Procedure 25(d).

1 In its September 2, 2021 decision, this Court held the right to access the U.S. asylum  
2 process conferred vis a vis § 1158(a)(1) applies extraterritorially to noncitizens who are  
3 arriving at Class A POEs along the U.S.-Mexico border, but who are not yet within the  
4 jurisdiction of the United States, and is of a constitutional dimension. (Op. Granting in  
5 Part and Denying in Part Parties’ Cross-Mots. for Summ. J. (“MSJ Opinion”), ECF No.  
6 742.) It further held that Defendants’ systematic turnbacks of asylum seekers arriving at  
7 Class A POEs (the “Turnback Policy”) amounted to an unlawful withholding by  
8 immigration officials of their mandatory ministerial “inspection and referral duties”  
9 detailed in 8 U.S.C. § 1225 (“§ 1225”), in violation of the Administrative Procedures Act,  
10 5 U.S.C. § 706(1) *et seq.*, and the Fifth Amendment Due Process Clause. (MSJ Opinion at  
11 33–34, 37–38); *see* 8 U.S.C. §§ 1225(a)(3) (mapping out immigration officials’ duty to  
12 inspect asylum seekers), 1225(b)(1)(A)(ii) (mapping out immigration officials’ duty to  
13 refer asylum seekers to the U.S.-asylum process).

14 In casting appropriate equitable relief to rectify the irreparable injury Defendants’  
15 unauthorized and constitutionally violative Turnback Policy has inflicted upon members  
16 of the Plaintiff class,<sup>2</sup> this Court ordinarily would be guided by the fundamental principle  
17 that an equitable remedy should be commensurate with the violations it is designed to  
18 vindicate. *See Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 465 (1979) (“[It is an]  
19 accepted rule that the remedy imposed by a court of equity should be commensurate with  
20 the violation ascertained.”). Equitable relief should leave no stone unturned: it should  
21 correct entirely the violations it is aimed at vindicating. That cornerstone of Article III  
22 courts’ equitable powers generally is unfaltering, whether the party against whom an  
23 injunction is sought is a private entity, a state actor, or, as here, a federal official. Thus, in  
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25 <sup>2</sup> Plaintiffs consist of the named Plaintiffs listed in the case caption, along with a certified class  
26 consisting of “all noncitizens who seek or will seek to access the U.S. asylum process by presenting  
27 themselves at a Class A [POE] on the U.S.-Mexico border, and were or will be denied access to the U.S.  
28 asylum process by or at the instruction of [Customs and Border Protection] officials on or after January 1,  
2016.” (Class Certification Order at 18, ECF No. 513.) The Court also certified a subclass consisting of  
“all noncitizens who were or will be denied access to the U.S. asylum process at a Class A POE on the  
U.S.-Mexico border as a result of Defendants’ metering policy on or after January 1, 2016.” (*Id.*)

1 the ordinary course of things, this Court would not hesitate to issue broad, programmatic  
2 relief enjoining Defendants from now, or in the future, turning back asylum seekers in the  
3 process of arriving at Class A POEs, absent a valid statutory basis for doing so.

4 Yet the circumstances with which this Court is presented are not ordinary because  
5 of the extraordinary, intervening decision of the United States Supreme Court in *Garland*  
6 *v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022). That decision takes a sledgehammer to the  
7 premise that immigration enforcement agencies are bound to implement their mandatory  
8 ministerial duties prescribed by Congress, including their obligation to inspect and refer  
9 arriving noncitizens for asylum, and that, when immigration enforcement agencies deviate  
10 from those duties, lower courts have authority to issue equitable relief to enjoin the  
11 resulting violations. It does so through unprecedented expansion of a provision of the  
12 Illegal Immigration Reform and Immigrant Responsibility Act of 1989 (“IIRIRA”), 8  
13 U.S.C. § 1252(f)(1) *et seq.* (“§ 1252(f)(1)”), which for years the Ninth Circuit has  
14 interpreted as placing a relatively narrow limit on injunctive relief. In essence, *Aleman*  
15 *Gonzalez* holds that § 1252(f)(1) prohibits lower courts from issuing class-wide injunctions  
16 that “require officials to take actions that (in the Government’s view) are not required” by  
17 certain removal statutes, including § 1225, or “to refrain from actions that (again in the  
18 Government’s view) are allowed” by those same provisions. *Id.*, 142 S. Ct. at 2065.  
19 Federal courts (except for the Supreme Court) now may only issue injunctions enjoining  
20 federal officials’ unauthorized implementation of the removal statutes in the individual  
21 cases of noncitizens against whom removal proceedings have been initiated. *See id.*

22 In no uncertain terms, the logical extension of *Aleman Gonzalez* appears to bestow  
23 immigration enforcement agencies *carte blanche* to implement immigration enforcement  
24 policies that clearly are unauthorized by the statutes under which they operate because the  
25 Government need only *claim* authority to implement to immunize itself from the federal  
26 judiciary’s oversight.

27 With acknowledgment that its decision will further contribute to the human suffering  
28 of asylum seekers enduring squalid and dangerous conditions in Mexican border

1 communities as they await entry to POEs, this Court finds the shadow of *Aleman Gonzalez*  
2 inescapable in this case. Even the most narrow, meaningful equitable relief would have  
3 the effect of interfering with the “operation” of § 1225, as that term is construed by the  
4 *Aleman Gonzalez* Court, and, thus, would clash with § 1252(f)(1)’s remedy bar. *Aleman*  
5 *Gonzalez* not only renders uneconomical vindication of Plaintiff class members’  
6 statutorily- and constitutionally-protected right to apply for asylum, those inefficiencies  
7 inevitably will lead to innumerable instances in which Plaintiff class members will be  
8 unable to vindicate their rights at all. Thus, while the majority and dissent in *Aleman*  
9 *Gonzalez* hash out their textual disagreements concerning § 1252(f)(1)’s scope in terms of  
10 remedies, make no mistake, *Aleman Gonzalez* leaves largely unrestrained immigration  
11 enforcement agencies to rapaciously scale back rights. See Tracy A. Thomas, *Ubi Jus, Ibi*  
12 *Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 San Diego L.  
13 Rev. 1633, 1634 (2004) (“Disputes over remedies provide a convenient way for dissenters  
14 to resist conformance to legal guarantees. Courts can declare rights, but then default in the  
15 remedy to avoid a politically unpopular result.” (footnote omitted)).

16 Although it is no substitute for a permanent injunction, class-wide declaratory relief  
17 is both available and warranted here. In lieu of even a circumscribed injunction enjoining  
18 Defendants from again implementing a policy under which they turn back asylum seekers  
19 presenting themselves at POEs along the U.S.-Mexico border, the Court enters a  
20 declaration in accordance with its MSJ Opinion that turning back asylum seekers  
21 constitutes both an unlawful withholding of Defendants’ mandatory ministerial inspection  
22 and referral duties under § 1158 and § 1225 in violation of both the APA and the Fifth  
23 Amendment Due Process Clause. The Court also issues relief as necessary to named  
24 Plaintiff Beatrice Doe.

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1 **I. BACKGROUND<sup>3</sup>**

2 On September 2, 2022, this Court granted Plaintiffs' motion for summary judgment  
3 on their APA and Fifth Amendment claims.<sup>4</sup> (*See generally* MSJ Op.) Specifically, this  
4 Court found that Defendants' implementation of the Turnback Policy withheld their  
5 mandatory ministerial duties to inspect and refer asylum seekers who present themselves  
6 at Class A POEs along the U.S.-Mexico border, but who are not yet within the jurisdiction  
7 of the United States, in violation of Section 706(1) of the APA.<sup>5</sup> (*See id.* at 34.) This Court  
8 further found that, because Defendants' withholding of inspection and referral duties  
9 infringed upon the Plaintiff class's right to access the U.S.-asylum process secured by  
10 § 1158(a)(1), and because the Plaintiff class's Fifth Amendment due process rights are  
11 coextensive with that statute, the Turnback Policy also violates the Fifth Amendment. (*Id.*  
12 at 37–38.)

13 The Court asked the parties to weigh in on what equitable relief these statutory and  
14 constitutional violations warrant. (*Id.* at 44.) The parties contemporaneously filed briefs  
15 in accordance with the MSJ Opinion on October 1, 2021. (*See* Pls.' Remedies Br., ECF  
16 No. 768; Defs.' Remedies Br., ECF No. 770.) Plaintiffs additionally filed a Proposed Order  
17 listing the injunctive, oversight, and declaratory relief they believe is appropriate to rectify  
18 Defendants' systemic violations. (*See* Proposed Order, ECF No. 773-4.) On October 22,  
19 2021, Defendants sought leave to file essentially a sur-reply, which addresses the purported  
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21 <sup>3</sup> Familiarity with this Court's prior orders granting in part and denying in part Defendants' motion  
22 to dismiss ("MTD Opinion") (ECF No. 280) and MSJ Opinion is presumed. The factual and procedural  
23 history needed to understand this Remedies Opinion is found in the background section of those Opinions.

24 <sup>4</sup> This Court also found legally invalid on summary judgment Plaintiffs' claims Defendants  
25 committed *ultra vires* violations of the Plaintiff class's right to seek asylum under the Immigration and  
26 Nationality Act ("INA") and violated the Alien Tort Statute. (MSJ Opinion at 11–13, 38–43.)

27 <sup>5</sup> The term "inspection and referral duties" to which the Court alludes throughout retains the same  
28 meaning given to that term in the MSJ Opinion. (MSJ Opinion at 8 n.7.) Those duties refer to the asylum  
provision in § 1158(a)(1), which this Court found bestows upon noncitizens who are in the process of  
arriving at a Class A POE—but who are still physically outside the international boundary line at the  
POE—a right to apply for asylum, and § 1225, which sets forth specific asylum processing duties  
Defendants must undertake to give meaning to that right. *See* 8 U.S.C. §§ 1225(a)(3) (delineating  
immigration officers' duty to inspect), 1225(b)(1)(A)(ii) (delineating immigration officers' duty to refer).

1 overbreadth of Plaintiffs’ proposed class-wide injunctions.<sup>6</sup> (*See* Mot. for Leave to File  
2 Sur-Reply, ECF No. 773; Defs.’ Sur-Reply, ECF No. 773-2.)

3 Several requests for relief Plaintiffs proffer are not in dispute. The parties agree  
4 Plaintiffs are entitled under the APA to vacatur of the Department of Homeland Security  
5 (“DHS”)’s Metering Guidance and Prioritization-Based Que Management (“PBQM”)  
6 Memorandum and the Office of Field Operations’ Metering Guidance Memorandum, both  
7 of which served to formalize Defendants’ Turnback Policy in approximately 2018. (*See*  
8 Proposed Order ¶ 5; Defs.’ Remedies Br. at 6–8 (proposing vacatur of the Memoranda as  
9 an appropriate form of relief).)

10 Furthermore, Defendants do not appear to oppose entry of an order restoring the  
11 *status quo ante* for named Plaintiffs Roberto Doe and Beatrice Doe, including requiring  
12 Defendants to issue any necessary travel documents to allow them to travel to the United  
13 States and to ensure their processing for asylum upon arrival. (*See* Proposed Order ¶ 7.)

14 Finally, Defendants appear to welcome Plaintiffs’ request for entry of a declaratory  
15 judgment giving legal effect to the MSJ Opinion’s conclusion that § 1158 and § 1225  
16 *require* Defendants to inspect and refer noncitizens who present themselves at Class A  
17 POEs but who are not yet within the jurisdiction of the United States (*see* MSJ Opinion  
18 33–34). (*See* Proposed Order ¶ 1; Defs.’ Remedies Br. at 6–8 (encouraging Court to enter  
19 class-wide declaratory relief, which can then be used “as a predicate to further relief,  
20 including an injunction” in individual suits by Plaintiff class members seeking an  
21 injunction against Defendants).)

22 Despite these areas of agreement, there is contentious disagreement concerning  
23 whether this Court has authority to enter class-wide injunctive relief and, if so, the proper  
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27 <sup>6</sup> The Court **GRANTS** Defendants leave to file a sur-reply (ECF No. 773), but notes that  
28 Defendants’ arguments therein were irrelevant to the issue on which this Court’s decision not to enter a  
class-wide injunction ultimately turns: whether § 1252(f)(1)’s remedy bar applies to this case. *See infra*  
Sec. III.A.

1 scope of such relief. Plaintiffs primarily request the Court to issue a class-wide injunction  
2 stating:

3 Defendants and others acting at their direction or in active concert or  
4 participation with them are PERMANENTLY ENJOINED from turning  
5 away, turning back, or otherwise denying access to inspection and/or asylum  
6 processing to noncitizens who have not been admitted or paroled and who are  
7 in the process of arriving in the United States at Class A Ports of Entry  
8 regardless of their purported justification for doing so, absent any  
9 independent, express, and lawful statutory authority to do so outside of Title  
10 8 of the U.S. Code.

11 (Proposed Order ¶ 2.) Plaintiffs also seek an ancillary injunction directing Defendants and  
12 the Executive Office of Immigration Review “[t]o inspect and provide asylum” to each  
13 Plaintiff class member “under the rules and regulations that would have applied [to each  
14 member] at the time” he or she would have first entered the United States, but for  
15 Defendants’ unlawful Turnback Policy. (*Id.* ¶ 3.)<sup>7</sup> Finally, Plaintiffs seek appointment of  
16 Magistrate Judge Karen S. Crawford as special master pursuant to Federal Rule of Civil  
17 Procedure (“Rule”) 65 to monitor and oversee Defendants’ implementation of all class-  
18 wide injunctive relief. (*Id.* ¶ 8.)

19 Defendants contend the IIRIRA at § 1252(f)(1) bars *any* class-wide injunctive relief  
20 in the instant case. (*See* Defs.’ Remedies Br. at 3–4.) They aver § 1252(f)(1), which  
21 prohibits lower courts from “enjoin[ing] or restrain[ing] the operation of [8 U.S.C. §§ 1221  
22 through 1332],” precludes entry of even a circumscribed injunction enjoining Defendants’  
23 unauthorized practice of turning back asylum seekers arriving at Class A POEs because  
24 such an injunction would interfere with the “operation” of § 1225. (Defs.’ Remedies Br.

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25 <sup>7</sup> Additionally, Plaintiffs ask the Court to convert into a permanent injunction the Preliminary  
26 Injunction enjoining application of 8 C.F.R. § 208.13(c)(4), known more commonly as the “Asylum Ban,”  
27 to the immigration proceedings of members of a provisionally certified class consisting of “non-Mexican  
28 asylum seekers who were unable to make a direct asylum claim at a [Class A POE] before July 16, 2019  
because of [Defendants’] metering policy” (Prelim. Inj., ECF No. 330). (*See* Proposed Order ¶ 4; *see also*  
Clarification Order, ECF No. 605.) The Court addresses this request for class-wide injunctive relief  
separately in its contemporaneously filed Opinion at ECF No. 816, which principally resolves Plaintiffs’  
motions to essentially clarify for a second time the contours of the Preliminary Injunction and Clarification  
Orders (*see* ECF Nos. 644, 736).

1 at 3–4.) Defendants further argue that Plaintiffs have failed to show that a balancing of the  
 2 parties’ respective hardships and the public interest favor entry of their proposed permanent  
 3 injunctions. Moreover, they contend the class-wide injunctions set forth in the Proposed  
 4 Order are overbroad, impermissibly vague, and would threaten to hamper implementation  
 5 of the Department of Health and Human Services’ Center for Disease Control and  
 6 Prevention (“CDC”) orders, which, with limited exceptions, effectively suspend asylum  
 7 processing at land POEs pursuant to 42 U.S.C. § 265 (“Title 42”) to prevent the spread of  
 8 COVID-19 virus at POE facilities. (*See* Defs.’ Remedies Br. at 8–18; Defs.’ Sur-Reply at  
 9 7–12.)

10 Several intervening factual developments since the MSJ Opinion have rendered  
 11 moot certain of Plaintiffs’ requests for relief in their Proposed Order. On November 2,  
 12 2022, Defendants voluntarily rescinded the PBQM and Metering Guidance Memoranda;  
 13 those Memoranda have not been replaced with revised or amended policy documents. (*See*  
 14 Rescission of June 5, 2018, Prioritization-Based Queue Management Memorandum, Ex. 2  
 15 to Notice of Administrative Action (“NOAA”), ECF No. 775-2; Guidance for Management  
 16 and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry,  
 17 Ex. 1 to NOAA, ECF No. 775-1.)<sup>8</sup> Then, on January 28, 2022, the parties indicated that  
 18 Plaintiff Roberto Doe had arrived in the United States by commercial airline and was  
 19 allowed to access the U.S.-asylum process. (*See* Joint Status Report, ECF No. 796.)

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 23 <sup>8</sup> Despite rescission of the PBQM and Metering Guidance Memoranda in November of 2021,  
 24 asylum processing at the U.S.-Mexico border is still restricted in light of the CDC’s COVID-19 Title 42  
 25 orders, which generally “suspend[s] the introduction of persons into the United States” who are “traveling  
 26 from Canada or Mexico (regardless of their country of origin) [and] who would otherwise be introduced  
 27 into a congregate setting in a land [POE] or Border Patrol station at or near the United States borders with  
 28 Canada and Mexico[.]” 85 Fed. Reg. 17,060 (Mar. 26, 2020). On April 1, 2022, CDC Director Rochelle  
 Walensky issued an order terminating the then-operative Title 42 order, *see* 87 Fed. Reg. 15,243 (Mar.  
 17, 2022). 87 Fed. Reg. 19,941 (Apr. 6, 2022). However, the CDC’s rescission was enjoined by a district  
 court in the Lafayette Division of the Western District of Louisiana on May 20, 2022. *See Louisiana v.*  
*Ctrs. for Disease Control & Prevention*, --- F. Supp. 3d ---, 2022 WL 1604901, at \*1 (W.D. La. May 20,  
 2022). The legality of the Title 42 orders is not at issue in this case.



1 In addition to these factual developments, the legal landscape concerning §  
2 1252(f)(1) has changed drastically since the MSJ Opinion. At the time of the MSJ Opinion,  
3 it was the law in the Ninth Circuit that § 1252(f)(1) “d[id] not . . . categorically insulate  
4 immigration enforcement from judicial classwide injunctions.” *Gonzalez v. United States*  
5 *Immigration & Customs Enf’t*, 975 F.3d 788, 812 (9th Cir. 2020). Rather, the Ninth Circuit  
6 left in place lower courts’ authority to enjoin or restrain immigration enforcement agencies’  
7 *violations* of the covered statutory provisions. *See Rodriguez v. Hayes*, 591 F.3d 1105,  
8 1120 (9th Cir. 2010) (citing *Ali v. Ashcroft*, 346 F.3d 873, 896 (9th Cir. 2003)). The Ninth  
9 Circuit did so on the ground that when immigration enforcement agencies implement their  
10 duties under §§ 1221 through 1332 in a manner that is not authorized by those statutes, an  
11 injunction rectifying the resulting violation(s) does not enjoin the “operation” of those  
12 statutes. *See id.*

13 But on June 13, 2022, the Supreme Court effectively held in *Garland v. Aleman*  
14 *Gonzalez*, 142 S. Ct. 2057 (2022) (“*Aleman Gonzalez*”), that § 1252(f)(1) prohibits lower  
15 court injunctions that enjoin even immigration enforcement agencies’ “unlawful” or  
16 “improper operation” of the covered provisions, including § 1225. *Id.* at 2065 (holding  
17 injunctions that “require officials [either] to take actions that (in the Government’s view)  
18 are not required by [§§ 1221–32]” or “to refrain from actions that (again in the  
19 Government’s view) are allowed by [§§ 1221–32]” are barred by § 1252(f)(1)). *Aleman*  
20 *Gonzalez* has breathed new life into Defendants’ contention that this Court is foreclosed  
21 by § 1252(f)(1) from simply enjoining Defendants’ unauthorized turnbacks or directing  
22 Defendants to administer their inspection and referral duties with respect to Plaintiff class  
23 members. (*See* Defs.’ Supp. Br., ECF No. 813.) Plaintiffs acknowledge *Aleman Gonzalez*  
24 has truncated the legal ground for the injunctive relief they seek; however, they aver there  
25 still exist paths forward to rectify in a single order the systemic statutory and constitutional  
26 violations found in the MSJ Opinion. (*See* Pls.’ Supp. Br., ECF No. 814.)

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## 1 II. LEGAL STANDARD

### 2 A. Permanent Injunctive Relief

3 In the Ninth Circuit, a plaintiff who seeks a permanent injunction must satisfy a four-  
4 factor test. *See Kurin, Inc. v. Magnolia Med. Techs., Inc.*, 473 F. Supp. 3d 1117, 1141  
5 (S.D. Cal. July 20, 2020) (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391  
6 (2006)). A plaintiff must establish:

7 (1) [t]hat it has suffered an irreparable injury; (2) that remedies available at  
8 law, such as monetary damages, are inadequate to compensate for that injury;  
9 (3) that, considering the balance of hardships between the plaintiff and  
10 defendant, a remedy in equity is warranted; and (4) that the public interest  
would not be disserved by a permanent injunction [(“*eBay* factors”)].

11 *eBay Inc.*, 547 U.S. at 391. Where the Government is the party opposing issuance of  
12 injunctive relief, the above-mentioned third and fourth factors—balancing of hardships and  
13 public interest—merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). This merger  
14 requires the Court to examine whether “any significant ‘public consequences’ would result  
15 from issuing the preliminary injunction” and, if so, whether they favor or disfavor its entry.  
16 *See Fraihat v. United States Immigration & Customs Enf’t*, 445 F. Supp. 3d 709, 749 (C.D.  
17 Cal. 2020) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

18 It is well-established that deprivation of a constitutional right “unquestionably  
19 constitutes irreparable injury,” and that no public interest is served by withholding  
20 equitable relief without which those rights will continue to be infringed. *Melendres v.*  
21 *Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (“*Melendres I*”) (quoting *Elrod v. Burns*, 427  
22 U.S. 347, 373 (1976)); *see also Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959 (9th  
23 Cir. 2002) (“[I]t is always in the public interest to prevent the violation of a party’s  
24 constitutional rights.”).

25 District courts have “broad discretion to fashion injunctive relief” to eliminate  
26 constitutional violations. *See Melendres v. Maricopa Cty.*, 897 F.3d 1217, 1221 (9th Cir.  
27 2018) (“*Melendres IV*”); *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) (“Where . . . a  
28 constitutional violation has been found, the remedy does not exceed the violation if the

1 remedy is tailored to cure the condition that offends the Constitution.” (internal quotation  
2 marks and citation omitted). “Further, where the enjoined party has a ‘history of  
3 noncompliance with prior orders,’ and particularly where the trial judge has ‘years of  
4 experience with the case at hand,’ [district courts are given] a ‘great deal of flexibility and  
5 discretion in choosing the remedy best suited to curing the violation.’” *Melendres IV*, 897  
6 F.3d at 1221 (quoting *Melendres v. Arpaio*, 784 F.3d 1254, 1265 (9th Cir. 2015)).

### 7 **B. Declaratory Judgment Act**

8 The Declaratory Judgment Act provides, in pertinent part, that “[i]n a case of actual  
9 controversy within its jurisdiction . . . any court of the United States, upon the filing of an  
10 appropriate pleading, may declare the rights and other legal relations of any interested party  
11 seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. §  
12 2201(a); *see* Fed. R. Civ. P. 57 (“The existence of another adequate remedy does not  
13 preclude a declaratory judgment that is otherwise appropriate.”); *see also In re Singh*, 457  
14 B.R. 790, 798 (Bankr. E.D. Cal. 2011) (“Declaratory relief is an equitable remedy  
15 distinctive in that it allows adjudication of rights and obligations on disputes regardless of  
16 whether claims for damages or injunction have arisen.”).

17 The question whether to issue declaratory relief is a matter of the district court’s  
18 sound discretion. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) (“By the  
19 Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court’s  
20 quiver[.]”). A court’s decision to enter declaratory relief must be firmly implanted “in  
21 sound reason,” *McGraw-Edison Co. v. Preformed Line Products. Co.*, 362 F.2d 339, 342  
22 (9th Cir. 1966) (quoting *Yellow Cab Co. v. City of Chicago*, 186 F.2d 946, 950–51 (7th  
23 Cir. 1951)), and should be issued with “two principal criteria guiding the policy in favor of  
24 rendering declaratory judgments” in mind: (1) “clarifying and settling the legal relations  
25 in issue”; and (2) “terminat[ing] and afford[ing] relief from the uncertainty, insecurity, and  
26 controversy giving rise to the proceeding,” *id.* (quoting Borchard, *Declaratory Judgments*  
27 299 (2d ed. 1941)). *See also Crossley v. California*, 479 F. Supp. 3d 901, 920 (S.D. Cal.  
28 2020).

1 **III. ANALYSIS**

2 **A. Class-Wide Permanent Injunction**

3 **1. 8 U.S.C. § 1252(f)(1)**

4 Among the “‘judicial power[s]’ committed to the federal courts by Article III” is the  
 5 power to grant broad, equitable relief, including on a class-wide basis. *Rodriguez v. Hayes*,  
 6 591 F.3d 1105, 1120 (9th Cir. 2010) (“*Rodriguez*”) (citing *Pennsylvania v. Wheeling &*  
 7 *Belmont Bridge Co.*, 59 U.S. 460, 462 (1855)). These “traditional equitable powers can be  
 8 curtailed only by an unmistakable legislative command.” *Id.*; see *Porter v. Warner*  
 9  *Holding Co.*, 328 U.S. 395, 398 (1946) (“Unless a statute in so many words, or by a  
 10 necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full  
 11 scope of that jurisdiction is to be recognized and applied.”).

12 Here, the remedy-stripping statute at issue is § 1252(f)(1). That provision states:

13 Regardless of the nature of the action or claim or of the identity of the party  
 14 or parties bringing the action, no court (other than the Supreme Court) shall  
 15 have jurisdiction or authority to enjoin or restrain the operation of the  
 16 provisions of part IV of this subchapter, [which includes § 1225,] as amended  
 17 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.

18  
 19 8 U.S.C. § 1252(f)(1). Section 1252(f)(1) is “nothing more or less than a limit on injunctive  
 20 relief.” *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999).

21 At the heart of the parties’ dispute concerning remedies is whether § 1252(f)(1) is so  
 22 broad in scope as to preclude the entry of any permanent class-wide injunction that  
 23 remediates Defendants’ statutory and constitutional violations.

24 **2. The Ninth Circuit’s Interpretation of § 1252(f)(1)**

25 It has been the law in the Ninth Circuit for nearly twenty years that § 1252(f)(1)  
 26 “does not . . . categorically insulate immigration enforcement from judicial classwide  
 27 injunctions.” *Gonzalez v. U.S. Immigration & Customs Enf’t*, 975 F.3d 788, 812 (9th Cir.  
 28 2020) (internal quotation marks omitted). The Ninth Circuit concluded in *Ali v. Ashcroft*,

1 346 F.3d 873, 886 (9th Cir. 2003) (“*Ali*”), *vacated on unrelated grounds sub nom. Ali v.*  
2 *Gonzales*, 421 F.3d 795 (9th Cir. 2005), and reaffirmed in *Rodriguez v. Hayes*, 591 F.3d  
3 1105, 1120 (9th Cir. 2010), that § 1252(f)(1) does not prohibit injunctions that “enjoin or  
4 restrain” *violations* of the covered provisions therein. The Ninth Circuit found there is a  
5 qualitative distinction between injunctions that “enjoin or restrain the *operation* of [ §§  
6 1221–32]” and those that direct immigration enforcement agencies to conform their extra-  
7 legal conduct that “is not even authorized” under the covered provisions. *Ali*, 346 F.3d at  
8 886 (emphasis added and citations omitted).

9 Thus, in the Ninth Circuit, lower courts have had authority to enter injunctions  
10 against violations of the detention statutes. *See Rodriguez*, 591 F.3d at 1120 (holding §  
11 1252(f)(1) “prohibits only injunction[s] of ‘the operation of’ the detention statutes, not  
12 injunction[s] of a violation of th[ose] statutes”); *see also Immigrant Defs. Law Ctr. v. U.S.*  
13 *Dep’t of Homeland Sec.*, No. CV 21-0395 FMO (RAOx), 2021 WL 4295139, at \*7 (C.D.  
14 Cal. July 27, 2021) (“To the extent plaintiffs establish that the remedy they seek addresses  
15 violations of the relevant statutes, § 1252(f) will not be an obstacle to relief.”); *Osny Sort-*  
16 *Vasquez Kidd v. Mayorkas*, No. 2:20-cv-3512-ODW (JPRx), 2021 WL 1612087, at \*5  
17 (C.D. Cal. Apr. 26, 2021) (“Whereas Plaintiffs seek . . . an injunction to prevent further  
18 violations, such requested relief does not target ‘the operation of’ the Immigration and  
19 Nationality Act (‘INA’). Plaintiffs’ attempt to enjoin ‘violation of’ the INA through  
20 unconstitutional practices falls outside the injunction bar of § 1252(f)(1).”); *accord Grace*  
21 *v. Barr*, 965 F.3d 883, 907 (D.C. Cir. 2020) (“[S]ection 1252(f)(1) . . . places no restriction

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1 on the district court’s authority to enjoin agency action found to be unlawful.” (emphasis  
2 omitted)).<sup>9</sup>

3 Prior to *Aleman Gonzalez*, this Court would have little difficulty finding that  
4 *Rodriguez* and *Ali* provide fertile ground upon which it could enter an injunction enjoining  
5 Defendants from turning back asylum seekers in the process of arriving at Class A POEs,  
6 or compelling Defendants to inspect and refer those individuals in accordance with §  
7 1158(a)(1) and § 1225, despite § 1252(f)(1)’s remedial bar. Defendants’ turning back of  
8 asylum seekers unlawfully withholds inspection and referral duties that § 1158(a)(1) and §  
9 1225 require Defendants to perform; by failing to perform those duties, Defendants act  
10 without statutory authority and commensurately violate the due process rights of Plaintiff  
11 class members. (See MSJ Opinion at 33–34, 37–38.) *Rodriguez* and *Ali* make explicitly  
12 clear that a class-wide injunction enjoining Defendants from withholding their inspection  
13 and referral duties would not interfere with the “operation” of § 1225 because such an  
14 injunction would be directed at unauthorized and unconstitutional practices. See also *Osny*  
15 *Sorto-Vasquez Kidd*, 2021 WL 1612087, at \*5.

16 Nor would this Court have difficulty concluding each of the *eBay* factors tip  
17 decidedly in favor of such an injunction. See 547 U.S. at 391; *Nken*, 556 U.S. at 435.  
18 Plaintiffs have established irreparable harm. Defendants’ Turnback Policy inflicted  
19 constitutional injuries upon members of the Plaintiff class. (MSJ Opinion at 37–38.)  
20 Deprivation of a Fifth Amendment due process right “unquestionably constitutes  
21 irreparable injury.” See *Melendres I*, 695 F.3d at 1002. And while this harm is sufficient,  
22 it deserves special mention that Plaintiff class members have endured—and, absent  
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24 <sup>9</sup> The Supreme Court in *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018), accepted without  
25 repudiation the underlying logic of the Ninth Circuit’s interpretation of § 1252(f)(1): that the injunction  
26 bar “d[oes] not affect [lower courts’] jurisdiction over . . . statutory claims because those claims d[o] not  
27 ‘seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct . . . not authorized  
28 by the statutes.’” *Id.* (quoting *Rodriguez*, 591 F.3d at 1120). Here, however, there is little distinction  
between Plaintiffs’ statutory and constitutional claims. Indeed, the MSJ Opinion found Plaintiffs’ Fifth  
Amendment due process right to access the U.S.-asylum process is derived exclusively from statute,  
specifically by way of § 1158(a)(1) and the process of inspection and referral afforded in § 1225.

1 injunctive relief, will continue to endure—another form of irreparable harm: preventable  
2 human suffering. *See Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017). As this  
3 Court has found repeatedly, and as the record reflects, Defendants’ Turnback Policy  
4 “resulted in asylum seekers’ deaths, assaults, and disappearances after they were returned  
5 to Mexico,” (*see, e.g.*, Decl. of Erika Pinheiro ¶ 17 (attesting that in a survey of 12,500  
6 refugees arriving at the U.S.-Mexico border prior to the Title 42 restrictions implemented  
7 in March of 2020, 30% of respondents reported having been kidnapped or having escaped  
8 attempted kidnapping and 40% reported having been assaulted while waiting in Mexico),  
9 ECF No. 768-2), and has contributed to humanitarian crises in the Mexican border  
10 communities adjacent to Class A POEs (*see id.* ¶ 11 (attesting that, in Tijuana alone,  
11 “[t]housands of migrants live in a makeshift tent encampment . . . next to San Ysidro,”  
12 where residents sleep under plastic tarps, have no bathrooms or access to running water,  
13 and are subjected to extreme weather conditions and organized crime)). (*See SMJ Opinion*  
14 *at 32–33; MTD Opinion at 16–17.*) Like constitutional injuries, the threat of physical  
15 danger and harm absent injunctive relief qualifies as irreparable. *Cf. Leiva-Perez v. Holder*,  
16 640 F.3d 962, 969 (9th Cir. 2011) (holding irreparable harm inures where a noncitizen  
17 shows removal from the United States would place an individual in physical danger).

18 Furthermore, intolerable public consequences would arise from withholding class-  
19 wide injunctive relief tailored to remediate the specific violations found in the MSJ  
20 Opinion. Without issuance of an injunction enjoining Defendants’ systemic withholding  
21 of their referral and inspection duties, Defendants will continue to have free rein to trample  
22 upon Plaintiffs’ statutory and constitutional rights. *See Melendres I*, 695 F.3d at 1002 (“[I]t  
23 is always in the public interest to prevent the violation of a party’s constitutional rights.”  
24 (quoting *Sammartano*, 303 F.3d at 974)). Moreover, absent an injunction, noncitizens  
25 awaiting entry to the United States in Mexican border communities will continue to be  
26 exposed to great risk of illness, kidnapping, assault, and death. *See Hernandez*, 872 F.3d  
27 at 996 (“Faced with such a conflict between [defendant’s] financial concerns and  
28 [plaintiff’s] preventable human suffering, we have little difficulty concluding that the

1 balance of hardships tips decidedly in plaintiffs’ favor.” (quoting *Lopez v. Heckler*, 713  
2 F.2d 1432, 1437 (9th Cir. 1983))).

3 However, as Defendants assert, and Plaintiffs concede, *Aleman Gonzalez* completely  
4 changes this Court’s calculus. (See Defs.’ Suppl. Br. at 1–3.) The Court must answer the  
5 question whether *Ali* and *Rodriguez* are still viable post-*Aleman Gonzalez* and, if not,  
6 whether § 1252(f)(1) precludes issuance of a permanent class-wide injunction in this  
7 case.<sup>10</sup>

### 8 **3. *Aleman Gonzalez* is Clearly Irreconcilable with *Ali* and *Rodriguez***

9 An intervening change in controlling law is found where the reasoning or theory of  
10 a case “is clearly irreconcilable with the reasoning or theory of intervening higher  
11 authority,” *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003), or where “a subsequent  
12 decision ‘creates a *significant shift* in [a court’s] analysis,’” *Teamsters Local 617 Pension*  
13 *& Welfare Funds v. Apollo Grp., Inc.*, 282 F.R.D. 216, 222 (D. Ariz. 2012) (quoting  
14 *Beckstrand v. Elec. Arts Grp. Long Term Disability Ins. Plan*, No. CV F 05-0323 AWI  
15 LJO, 2007 WL 177907, at \*2 (E.D. Cal. Jan. 19, 2007)). For example, “[i]ntervening  
16 Supreme Court authority only overrules past circuit precedent to the extent that the  
17 Supreme Court decision ‘undercut[s] the theory or reasoning underlying the prior circuit  
18 precedent in such a way that the cases are clearly irreconcilable.’” *United States v.*  
19 *Cisneros*, 763 F.3d 1236, 1240 (9th Cir. 2014) (quoting *Miller*, 335 F.3d at 900)).

20 Before the Supreme Court in *Aleman Gonzalez* was the question whether the  
21 discretionary detention provision at 8 U.S.C. § 1231(a)(6), which enables the federal  
22 government to detain noncitizens pending removal, requires the Immigration and  
23 Naturalization Service (“INS”) to provide bail hearings to individuals in DHS custody for  
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26 <sup>10</sup> Importantly, the Court notes that the Ninth Circuit requested briefing on precisely this issue on  
27 June 29, 2022 in *Leobardo Moreno Galvez v. Tracy Renaud*, No. 20-36052, Dkt. No. 62 (“The parties are  
28 directed to address . . . whether the Supreme Court’s decision in *Aleman Gonzalez* overrules this Court’s  
holding that Section 1252(f) prohibits only injunction of ‘the operation of the detention statutes, not  
injunction of a violation of the statutes.’” (citing *Rodriguez*, 591 F.3d at 1120)). As of the date of this  
Opinion, the Ninth Circuit has yet to weigh in on the fate of *Rodriguez* and *Ali*.



1 a period of six months or more. 142 S. Ct. at 2057. The district courts in the two underlying  
2 cases certified classes consisting of individuals detained pursuant to § 1231(a)(6) for at  
3 least six months, concluded INS likely is required by statute to hold a bail hearing in the  
4 case of an individual detained for six months or more, and issued class-wide preliminary  
5 injunctive relief requiring INS to administer bail hearings to all class members. *See*  
6 *Gonzalez v. Sessions*, 325 F.R.D. 616, 629 (N.D. Cal. 2018), *aff'd sub nom.*, *Aleman*  
7 *Gonzalez v. Barr*, 955 F.3d 762, 766 (9th Cir. 2020); *Baños v. Asher*, No. C16-1454JLR,  
8 2018 WL 1617706, at \*1 (W.D. Wash. Apr. 4, 2018), *aff'd in relevant part sub nom.*,  
9 *Flores Tejada v. Godfrey*, 954 F.3d 1245, 1247 (9th Cir. 2020). The Ninth Circuit affirmed  
10 the lower courts' class certification and issuance of injunctive relief. *See Aleman Gonzalez*,  
11 955 F.3d at 762; *Flores Tejada*, 954 F.3d at 1245. It did not address application of §  
12 1252(f)(1) in either decision. *Aleman Gonzalez*, 955 F.3d at 762; *Flores Tejada*, 954 F.3d  
13 at 1245.

14 The Government appealed to the Supreme Court, which granted certiorari and *sua*  
15 *sponte* requested additional briefing concerning whether § 1252(f)(1) precluded the lower  
16 courts from issuing preliminary injunctions in the first instance. *Aleman Gonzalez*, 142 S.  
17 Ct. at 2063.

18 On June 13, 2022, the Supreme Court held § 1252(f)(1) “generally prohibits lower  
19 courts from entering injunctions that order federal officials to take or to refrain from taking  
20 actions to enforce, implement, or otherwise carry out [§§ 1221–32],” with “one exception”:  
21 lower courts “retain the authority to ‘enjoin or restrain the operation of’ the relevant  
22 statutory provisions ‘with respect to the application of such provisions to an individual  
23 alien against whom proceedings under such part have been initiated.’” *Aleman Gonzalez*,  
24 142 S. Ct. at 2065 (quoting 8 U.S.C. §1252(f)(1)). Applying this principle, the Supreme  
25 Court vacated the lower courts' preliminary injunctions, finding § 1252(f)(1) precluded  
26 those orders because they “require[d] officials to take actions that (in the Government’s  
27 view) are not required by § 1231(a)(6) and to refrain from actions that (again in the  
28

1 Government’s view) are allowed by § 1231(a)(6)” and, thus, “interfere[d] with the  
2 Government’s efforts to operate § 1231(a)(6).” *Id.* at 2065.

3 Although it does not mention them by name, there can be little doubt *Aleman*  
4 *Gonzalez* repudiates the central holdings of *Ali* and *Rodriguez*. Indeed, the Supreme Court  
5 in *Aleman Gonzalez* poured cold water on the premise for which *Ali* and *Rodriguez* stand—  
6 that § 1252(f)(1) is inapplicable to injunctions that merely seek to force immigration  
7 enforcement agencies to implement the statute consistent with its terms—by concluding  
8 even injunctions that “enjoin or restrain” the “unlawful” or “improper operation,” *i.e.*,  
9 violations, of § 1252(f)(1)’s covered provisions clash with that statute’s remedy bar.<sup>11</sup>  
10 *Aleman Gonzalez*, 142 S. Ct. at 2066. Thus, following *Aleman Gonzalez*, this Court no  
11 longer can enter injunctive relief under *Ali* and *Rodriguez* that enjoins or restrains  
12 Defendants’ unauthorized implementation of their mandatory ministerial inspection and  
13 referral duties on the ground that the practice of turning back arriving asylum seekers  
14 constitutes a violation, as opposed to the “operation,” of § 1225.

#### 15 4. 8 U.S.C. § 1252(f)(1) Bars Class-Wide Injunctive Relief

16 Having concluded *Aleman Gonzalez* appears to repudiate *Ali* and *Rodriguez*, this  
17 Court finds itself at odds between two competing obligations: its duty to avoid interpreting  
18 and applying § 1252(f)(1) in a manner that “produce[s] absurd results,” *see Griffin v.*  
19 *Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982), and its overriding fidelity to apply  
20 controlling Supreme Court precedent, *see Hart v. Massanari*, 266 F.3d 1155, 1171 (9th  
21 Cir. 2001).

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23 <sup>11</sup> The *Aleman Gonzalez* Court’s interpretation rests principally upon its observation that “it is very  
24 common to refer to the ‘unlawful’ or ‘improper’ operation of whatever it is that is being operated,”  
25 pointing by way of example to, *inter alia*, cars, airplanes, railroads, radios, and video poker machines, all  
26 of which “can be unlawfully or improperly operated.” *Aleman Gonzalez*, 142 S. Ct. at 2066. Of course,  
27 whether lawfully operated or not, a car is still a car, an airplane is still an airplane, a railroad is still a  
28 railroad, a radio is still a radio, and a video poker machine is still a video poker machine. The unlawful  
or improper operation of those objects does not fundamentally change what they are. The same cannot be  
said of a law. As the dissent in *Aleman Gonzalez* opines, when officials unlawfully operate a statute, they  
put the statute at odds with itself: a contradiction that neither withstands textual interpretation nor logic.  
*Id.* at 2074 (Sotomayor, J., dissenting).

1 On the one hand, *Aleman Gonzalez* flips on their heads two fundamental principles  
2 that guide Article III courts in exercising their inherent judicial powers: that “it is  
3 emphatically the province and duty of the judicial department to say what the law is,”  
4 *Marbury v. Madison*, 5 U.S. 137, 177 (1803), and that when government officials exceed  
5 the scope of their statutory authority as properly interpreted by the federal courts, federal  
6 courts have broad equitable power to enjoin those violations, *see, e.g., Am. Sch. of*  
7 *Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902) (“That the conduct of the  
8 postoffice is a part of the administrative department of the government is entirely true, but  
9 that does not necessarily and always oust the courts of jurisdiction to grant relief to a party  
10 aggrieved by any action by the head, or one of the subordinate officials, of that Department,  
11 which is unauthorized by the statute under which he assumes to act.”).

12 “Generally, judicial relief is available to one who has been injured by an act of a  
13 government official which is in excess of his express or implied powers.” *Harmon v.*  
14 *Bruckler*, 355 U.S. 579, 581–82 (1958) (citing *McAnnulty*, 187 U.S. at 108). Indeed, since  
15 at least *Brown v. Board of Education*, 394 U.S. 294 (1955), the general rule has been that  
16 federal courts should exercise their broad equitable power to fashion injunctive relief to  
17 vindicate rights infringed by the systematic unlawfulness of government actors. *See*  
18 Richard H. Fallon, Jr. *et al.*, *The Federal Courts and the Federal System* 803 (5th ed. 2003);  
19 *cf. Brown*, 394 U.S. at 301 (affirming lower court’s issuance of a permanent injunction  
20 “ordering the immediate admission of the plaintiffs to schools previously attended only by  
21 white children”); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971)  
22 (affirming a district court’s injunction requiring school board to implement plan to  
23 desegregate school district); *Milliken*, 433 U.S. at 269 (upholding the equitable powers of  
24 a district court, as part of a desegregation decree, to “order compensatory or remedial  
25 educational programs for schoolchildren who have been subjected to past acts of *de jure*  
26 segregation”); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (affirming  
27 lower court’s permanent injunction enjoining INS, *inter alia*, from forcing detainees to sign  
28 voluntary departure agreements and transferring detainees irrespective of their established

1 attorney-client relationships on ground those practices violate the Fifth Amendment due  
2 process clause); *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017) (similar).<sup>12</sup>

3 It would be quite absurd if, in *Brown, Swann*, or *Milliken*, the lower courts were  
4 restrained to issue injunctive relief, schoolchild-by-schoolchild. See *Califano v. Yamasaki*,  
5 442 U.S. 682, 702 (1979) (“[T]he scope of injunctive relief is dictated by the extent of the  
6 violation established[.]”). One can hardly think of a remedial methodology that is less  
7 economical, particularly where the members of a class raise indistinguishable claims and  
8 seek identical relief, and less effective. Yet that is precisely the approach the Supreme  
9 Court deems proper for remediating statutory and constitutional violations committed by  
10 immigration enforcement agencies.

11 By restraining the lower federal courts’ authority to issue meaningful relief, *Aleman*  
12 *Gonzalez* simultaneously confers to immigration enforcement agencies power to  
13 unilaterally ignore or deviate from the Congressional mandates set forth in the removal  
14 provisions of the INA, see 8 U.S.C. §§ 1221–32. In this way, *Aleman Gonzalez* not only  
15 deflates the historical and traditional role of Article III courts, but it also undermines a  
16 fundamental principle of federalism: that when Congress explicitly speaks to a specific  
17 issue, federal agencies and courts are bound to “give effect to the unambiguously expressed  
18 intent of Congress.” *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837,  
19 842–43 (1984). Although § 1158 and § 1225 in no uncertain terms impose upon  
20 Defendants a mandatory ministerial duty to inspect and refer asylum seekers in the process  
21 of arriving at Class A POEs, *Aleman Gonzalez* appears to suggest that Defendants have  
22 *carte blanche* to refuse to do so, as long as they present to a lower court a *claimed* ground  
23 for their refusal, even if a federal court ultimately finds that basis meritless. *But see Gen.*  
24 *Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (holding courts need only  
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27 <sup>12</sup> While the Supreme Court decisions cited all involve unauthorized acts taken by state officials,  
28 it is well-settled that federal courts’ equitable powers extend to entering class-wide injunctive relief to  
enjoin violations of federal law *by federal officers*. See, e.g., *McAnnulty*, 187 U.S. at 110; *Harmon*, 355  
U.S. at 582.

1 defer to an agency’s “statutory interpretation . . . when the devices of judicial construction  
2 have been tried and found to yield no clear sense of congressional intent”).

3 Defendants suggest *Aleman Gonzalez*’s implications are not as damaging to the  
4 rights of the Plaintiff class as they appear at first glance. Defendants say that, if this Court  
5 issues class-wide declaratory relief, Plaintiff class members can institute a separate, non-  
6 class action suit and rely upon this Court’s declaratory judgment “as a predicate to further  
7 relief, including [an] injunction,” which would fit within § 1252(f)(1)’s carve out. (Defs.’  
8 Remedies Br. at 7.) But by requiring injunctive relief to be issued Plaintiff class member-  
9 by-member, there inevitably will be individuals deprived of their due process right to  
10 access asylum. As the dissent in *Aleman Gonzalez* observed:

11 Noncitizens subjected to removal proceedings are disproportionately unlikely to be  
12 familiar with the U.S. legal system or fluent in the English language. Even so, these  
13 individuals must navigate the Nation’s labyrinthine immigration laws without  
14 entitlement to appointed counsel or legal support.

15 142 S. Ct. at 2076 (Sotomayor, J., dissenting). These practical difficulties are amplified  
16 where, as here, the noncitizens in need of a permanent injunction are not even located  
17 within the United States, but rather in Mexican border communities, where they have even  
18 less access to legal assistance and must endure horrid conditions and threats to life and  
19 safety as they prosecute their cases.

20 On the other hand, this Court has an unfaltering obligation to faithfully apply  
21 pertinent Supreme Court precedent. *Hart*, 266 F.3d at 1171. “[I]ndividual judges, cloaked  
22 with the authority granted by Article III of the Constitution, are not at liberty to impose  
23 their personal view of a just result in the face of a contrary rule of law.” *In re United States*,  
24 945 F.3d 616, 627 (2d Cir. 2019). The instant case squarely is controlled by *Aleman*  
25 *Gonzalez*.

26 The inspection and referral duties this Court found Defendants had withheld by  
27 implementing their Turnback Policy are explicitly imposed by the INA at § 1225(a)(3)  
28 (delineating immigration officers’ duty to inspect) and § 1225(b)(1)(A)(ii) (delineating

1 immigration officers’ duty to refer asylum seekers). *See Al Otro Lado v. Wolf*, 952 F.3d  
2 999, 1010 (9th Cir. 2020) (holding § 1158(a)(1) “creates a right to apply for asylum” while  
3 § 1225 “imposes two key mandatory duties on immigration officers with respect to  
4 potential asylum seekers”). Section 1225 is among § 1252(f)(1)’s covered provisions.  
5 Clearly, after *Aleman Gonzalez*, such an injunction must be construed as “enjoin[ing] or  
6 restrain[ing] the operation” of § 1225 because it would have the effect of “interfer[ing]  
7 with the Government’s efforts to operate § [1225].” 142 S. Ct. at 2066.

8 Nevertheless, Plaintiffs fashion several creative arguments for why an injunction is  
9 appropriate despite *Aleman Gonzalez*’s repudiation of *Rodriguez* and *Ali*. None are  
10 availing.

11 **i. Vacatur under the Administrative Procedures Act**

12 First, Plaintiffs argue that the Court can issue vacatur relief. (Pls.’ Supplemental Br.  
13 at 2.) As an initial matter, Plaintiffs are wrong to suggest this Court simply can issue an  
14 injunction disguised as vacatur relief; though the two remedies may overlap, they are not  
15 the same. Unlike an injunction, a vacatur does not restrain the enjoined defendants from  
16 pursuing other courses of action to reach the same or a similar result as the vacated agency  
17 action. *See Daniel Mach, Rules Without Reasons: The Diminishing Role of Statutory*  
18 *Policy and Equitable Discretion in the Law of NEPA Remedies*, 35 Harv. Envtl. L. Rev.  
19 205, 237 (2011). For example, here, either vacatur or an injunction would suffice to strike  
20 down the Turnback Policy, but only an injunction, not vacatur, would restrain Defendants  
21 from, in the future, experimenting with and instituting a modified or amended version of  
22 the Turnback Policy. *See id.*

23 Moreover, although this Court believes (and Defendants appear to as well) that  
24 neither § 1252(f)(1) nor *Aleman Gonzalez* restrict lower courts from “set[ting] aside” or  
25 “vacating” a policy based upon an APA violation,<sup>13</sup> Defendants accurately observe that  
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27 <sup>13</sup> *See Texas v. United States*, --- F. Supp. 3d ---, 2022 WL 2466786, at \*5–6 (S.D. Tex. July 6,  
28 2022) (“There are meaningful differences between an injunction, which is a ‘drastic and extraordinary  
remedy,’ and a vacatur, which is ‘a less drastic remedy.’” (quoting *Monsanto Co. v. Geertson Seed Farms*,

1 because the PBQM and Metering Guidance Memoranda were rescinded in November of  
 2 2021, there exists no “agency action” for this Court to vacate (Defs.’ Supp. Br. at 3). *See*  
 3 5 U.S.C. § 706(2).

4 **ii. Anchoring an Injunction in § 1158**

5 Second, Plaintiffs argue that a separate line of Ninth Circuit precedent, besides *Ali*  
 6 and *Rodriguez*, provides this Court with authority to issue a class-wide permanent  
 7 injunction despite § 1252(f)(1)’s remedial bar. Specifically, citing *Gonzales v. Department*  
 8 *of Homeland Security*, 508 F.3d 1227, 1233 (9th Cir. 2007), in which the Ninth Circuit  
 9 held § 1252(f)(1) does not prohibit class-wide injunctions that directly implicate provisions  
 10 not covered by § 1252(f)(1), “even if that injunction has some *collateral* effect on the  
 11 operation of [one of § 1252(f)(1)’s] covered provision[s],” Plaintiffs argue this Court  
 12 simply should anchor its injunction in § 1158 as opposed to § 1225. *Aleman Gonzalez*, 142  
 13 S. Ct. at 2067 n.4 (interpreting *Gonzales*, 508 F.3d at 1233, and describing its central  
 14 holding as “nonresponsive” to the issues in the case at bar) (emphasis added); *see also*  
 15 *Catholic Soc. Servs., Inc. v. Immigration & Naturalization Servs.*, 232 F.3d 1139, 1149–  
 16 50 (9th Cir. 2000) (upholding preliminary injunction because it was issued under “Part V”  
 17 of the subchapter and thus “by its terms, the limitation on injunctive relief [in § 1252(f)(1)]  
 18 does not apply”); *Gonzalez v. U.S. Immigration & Customs Enf’t*, 975 F.3d 788, 814 (9th  
 19 Cir. 2020) (“[§ 1252(f)(1)’s] plain text makes clear that its limitations on injunctive relief  
 20 *do not* apply to *other* provisions of the INA [beyond 8 U.S.C. §§ 1221 through 1332].”  
 21 (emphasis added)).

22 Despite Plaintiffs’ assertion otherwise, *Gonzales* is not applicable here. Unlike in  
 23 *Gonzales*, there is practically no attenuation between § 1158, the statute in which Plaintiffs  
 24 ask this Court to anchor an injunction, and § 1225, the statute that Plaintiffs acknowledge  
 25 § 1252(f)(1) prohibits this Court from influencing through injunctive relief. Those statutes  
 26 are inextricably intertwined. (See MTD Opinion at 5 (“This case turns on [§] 1225(b)

27 \_\_\_\_\_  
 28 561 U.S. 139, 165 (2010)); *Capital Area Immigrants’ Rights Coal. v. Trump*, 471 F. Supp. 3d 25, 60  
 (D.D.C. 2020) (“[B]y vacating the Rule, the Court is not enjoining or restraining the INA’s operation.”).

1 asylum procedure that [§] 1158 incorporates”) and 42 (“As the Court has discussed, [§]  
2 1158(a)(1) incorporates [§] 1225, which in turn places a focus on immigration officers who  
3 process arriving aliens.”.) Section 1158(a)(1) provides noncitizens arriving at Class A  
4 POEs along the U.S.-Mexico border a right to apply for asylum; that statute does not  
5 explicitly impose any duties upon Defendants to carry out tasks to put that right into  
6 practice. *Al Otro Lado*, 952 F.3d at 1010; *see also Al Otro Lado v. Nielsen*, 327 F. Supp.  
7 3d 1284, 1310 n.12 (S.D. Cal. 2018) (observing § 1158(a)(1) “does not identify any specific  
8 obligations placed on an immigration officer”). Rather, § 1158(a)(1) only does so through  
9 its express incorporation of § 1225(b)(1). *See* 8 U.S.C. § 1158(a)(1) (“Any alien who . . .  
10 arrives in the United States . . . may apply for asylum in accordance with this section or,  
11 where applicable, *section 1225(b) of this title.*” (emphasis added)). Indeed, it is § 1225 that  
12 sets forth the specific asylum procedure that § 1158 incorporates. As this Court put it in  
13 its MTD Opinion, § 1225 imposes “certain inspection duties of immigration officers, which  
14 undergird additional specific duties that arise when certain aliens express an intent to seek  
15 asylum in the United States or a fear of persecution.” (MTD Opinion at 5.) Thus, the Court  
16 sees no way, and Plaintiffs do not explain how, an injunction anchored in § 1158 would  
17 have only collateral consequences on Defendants’ operation of § 1225. Accordingly, this  
18 argument, too, is unavailing.

19 **iii. Anchoring an Injunction in**  
20 **8 U.S.C. § 1103(a)(1) and 6 U.S.C. § 202**

21 Relying again on *Gonzales*, Plaintiffs aver that this Court can issue an injunction  
22 anchored in the statutory provisions Defendants claimed authorized their Turnback Policy:  
23 8 U.S.C. § 1103(a)(1) and 6 U.S.C. § 202. As this Court has explained previously,  
24 Defendants predicated the Turnback Policy based upon their interpretation of those statutes  
25 as authorizing the DHS Secretary with incredibly broad discretion to prioritize DHS’s  
26 responsibilities in the manner he or she deems necessary. (MTD Opinion at 55  
27 (“Defendants point to [§] 1103(a)(1) in particular, which provides that the Secretary ‘shall  
28 establish such regulations; prescribe such forms of bonds, reports, entries, and other papers;



1 issue instructions; and *perform other acts as he deems necessary for carrying out his*  
2 *authority under the provisions of this chapter.*” (emphasis added).)

3 While the Court is intrigued by this theory, Plaintiffs miss the mark. *Aleman*  
4 *Gonzalez* requires this Court to inquire whether an injunction would “interfere with  
5 [Defendants’] efforts to operate” § 1225, which this Court answered in the affirmative  
6 above, *see supra* Sec. III.A.4. *Aleman Gonzalez*, 142 S. Ct. at 2065. This is analytically  
7 distinct from the narrower question that Plaintiffs appear to propose as the relevant inquiry:  
8 under which statute did Defendants principally invoke as a legal basis to implement the  
9 unlawful regulation? Because any class-wide injunction in this case would “interfere” with  
10 Defendants’ “operation” of § 1225, as that word is construed in *Aleman Gonzalez*, this  
11 Court cannot simply anchor injunctive relief in 6 U.S.C. § 202 and 8 U.S.C. § 1103(a)(1)  
12 to evade § 1252(f)(1)’s remedial bar.

13 Accordingly, this Court concludes that § 1252(f)(1) prohibits it from entering a  
14 permanent class-wide injunction enjoining Defendants from turning back noncitizen  
15 asylum seekers in the process of arriving at Class A POEs or compelling Defendants to  
16 inspect and refer such asylum seekers.

17 \* \* \* \*

18 Having concluded § 1252(f)(1) strips this Court of authority to enter a permanent  
19 injunction, Plaintiffs’ request for oversight of all permanent injunctive relief is therefore  
20 moot.<sup>14</sup>

21 **B. Individual Relief**

22 Plaintiffs seek an order restoring the *status quo ante* for named Plaintiff Beatrice  
23 Doe prior to Defendants’ unlawful Turnback Policy. Defendants neither argue § 1252(f)(1)  
24 prohibits this Court from issuing such an injunction nor assert that such relief is  
25

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26  
27 <sup>14</sup> This decision does not cover Plaintiffs’ request to convert the Preliminary Injunction into a  
28 permanent one or Plaintiffs’ request for oversight over Defendants’ compliance with the Preliminary  
Injunction and Clarification Order. As mentioned above, *supra* note 7, those issues are addressed at ECF  
No. 816.

1 unwarranted. Indeed, it is apparent to the Court that Plaintiff Beatrice Doe is entitled to  
2 the relief sought in the Proposed Order. (See Proposed Order ¶ 7.) Accordingly, the Court  
3 orders Defendants to restore the *status quo ante* for named Plaintiff Beatrice Doe prior to  
4 Defendants’ unlawful conduct. This includes taking the necessary steps to facilitate  
5 Plaintiff Beatrice Doe’s entry into the United States, including issuing any necessary travel  
6 documents to allow her to travel to the United States (by air if necessary) and to ensure her  
7 asylum processing upon arrival.

8 Although Plaintiff Beatrice Doe does not seek an injunction directing Defendants to  
9 “inspect and refer” her to the U.S. asylum process at a Class A land POE along the U.S.-  
10 Mexico border, Defendants suggest that the appropriate recourse for the innumerable  
11 Plaintiff class members waiting in Mexican border communities is to seek individualized  
12 relief in accordance with § 1252(f)(1) and *Aleman Gonzalez*. The Court, therefore, takes  
13 this occasion to point out yet another absurd consequence *Aleman Gonzalez* produces when  
14 taken to its logical endpoint.

15 The Supreme Court held in *Aleman Gonzalez* that § 1252(f)(1) has “one exception”  
16 to its general prohibition against lower court injunctions: lower courts “retain authority to  
17 restrain or enjoin the operation of the [covered] statutory provisions ‘with respect to the  
18 application of such provisions to an individual *alien against whom [removal] proceedings*  
19 *. . . have been initiated.’” Aleman Gonzalez, 142 S. Ct. at 2065 (quoting 8 U.S.C. §*  
20 *1252(f)(1)) (emphasis added). But the text of § 1252(f)(1) places the individual members*  
21 *of the Plaintiff class in a devastatingly cruel catch-22. Unlike the class members in Aleman*  
22 *Gonzalez, removal proceedings have yet to be instituted against all members of the Plaintiff*  
23 *class here precisely because of Defendants’ unlawful Turnback Policy. Definitionally,*  
24 *inspection and referral is a prerequisite to removal. Thus, without Ali and Rodriguez to*  
25 *rest upon, Aleman Gonzalez appears to effectively render illusory Plaintiff class members’*  
26 *Fifth Amendment due process right to apply for asylum. This is despite Congress’s clear*  
27 *legislative intent in enacting § 1252(f)(1) that the statute “not hamper a district court’s*  
28

1 ability to address imminent rights violations.” *Padilla v. Immigration & Customs Enf’t*,  
 2 953 F.3d 1134, 1150–51 (9th Cir. 2020) (citing H.R. Rep. No. 104-469(I), at 161 (1996)).<sup>15</sup>

3 “The government of the United States has been emphatically termed a government  
 4 of laws, and not men. It will certainly cease to deserve this high appellation, if the laws  
 5 furnish no remedy for the violation of a vested legal right. *Marbury*, 5 U.S. (1 Cranch)  
 6 137, 163; *see also Ashby v. White*, 92 Eng. Rep. 126 (K.B. 1703) (“If the plaintiff has a  
 7 right, he must of necessity have means to vindicate and maintain it, and a remedy if he is  
 8 injured in the exercise of enjoyment of it; and indeed it is a vain thing to imagine a right  
 9 without a remedy and want of a remedy are reciprocal.”). Because of *Aleman Gonzalez*,  
 10 innumerable Plaintiff class members may well end up living in this gray area where they  
 11 possess a due process right but no remedy when that right is violated by rapacious executive  
 12 overreach.

### 13 C. Class-wide Declaratory Relief is Warranted

14 Although the issuance of a class-wide injunction is prohibited, § 1252(f)(1) does not  
 15 strip this Court of jurisdiction to issue a class-wide declaration. *See Rodriguez*, 591 F.3d  
 16 at 119 (construing § 1252(f)(1) narrowly as not banning class-wide declaratory relief), *cited*  
 17 *affirmatively by Padilla*, 953 F.3d at 1150; *see also Aleman Gonzalez*, 142 S. Ct. at 2065  
 18 n.2 (“Because only injunctive relief was entered here, we have no occasion to address [the  
 19 Government’s suggestion that § 1252(f)(1) bars class-wide declaratory relief].”).

20 The parties agree that this Court has both constitutional and statutory jurisdiction to  
 21 issue a declaratory judgment in this case. *See Gov’t Emps. Ins. Co. v. Dizol*, 133 F.3d 1220,  
 22

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23 <sup>15</sup> It is true that even if this dire interpretation of § 1252(f)(1) and *Aleman Gonzalez* is the correct  
 24 one, § 1252(f)(1) still leaves open the possibility that the Supreme Court can fashion class-wide injunctive  
 25 relief to vindicate the Plaintiff class’s right to access the U.S.-asylum process. *See Biden v. Texas*, 142 S.  
 26 Ct. 2528, 2539 (2022) (“A second feature of the text of section 1252(f)(1) leaves no doubt that this Court  
 27 has jurisdiction: the parenthetical explicitly preserving this Court’s power to enter injunctive relief.”).  
 28 But the Supreme Court “grants only a very small percentage of certiorari petitions.” *United States v.*  
*Burch*, 202 F.3d 1274, 1277 (10th Cir. 2000). The mere prospect that that Court might, after months or  
 years, grant certiorari in this case must be cold comfort to asylum seekers awaiting Defendants to fulfill  
 their mandatory ministerial asylum inspection and referral duties and, in so doing, give meaning to  
 Plaintiff class members’ Fifth Amendment due process right to apply for asylum.

1 1224 (9th Cir. 1998) (“[W]hen a district court has constitutional and statutory authority to  
2 hear a case brought pursuant to the Declaratory Judgment Act, the district court may  
3 entertain the action without *sua sponte* addressing whether jurisdiction should be declined”  
4 as a matter of discretion).

5 Both parties aver that declaratory relief will serve a useful purpose in clarifying  
6 where the balance lies between Defendants’ authority to regulate the flow and methodology  
7 of inspecting and processing asylum seekers in the process of arriving at Class A POEs and  
8 the Plaintiff class’s right to access the U.S. Asylum Process. (Pls.’ Remedy Br. at 7–8  
9 (“[T]he Court should issue a judgment declaring, pursuant to its earlier opinion on the  
10 parties’ cross-motion for summary judgment, that turnbacks of noncitizens in the process  
11 of arriving at POEs on the U.S.-Mexico border violate the INA, section 706(1) of the APA,  
12 and the Due Process Clause of the Fifth Amendment.”); *see* Defs.’ Remedy Br. at 6–7.)  
13 They also concur that a declaratory judgment memorializing the Court’s central holdings  
14 in its MSJ Opinion would extinguish the disputes giving rise to this action and avoid future  
15 litigation concerning the scope of Defendants’ inspection and referral duties. (*See* Pls.’  
16 Remedy Br. at 7–8 (arguing a declaratory judgment would terminate in advance disputes  
17 that might arise “should this Administration or another one wish to experiment with new  
18 ways of denying arriving noncitizens access to the asylum process at POEs.”); Defs.’  
19 Remedy Br. at 7 (“[A declaratory judgment] could be used by individual [AOL] Class  
20 Members ‘as a predicate to further relief, including an injunction.’” (quoting *Powell v.*  
21 *McCormack*, 395 U.S. 486, 499 (1969))).)

22 The Court is persuaded that declaratory relief that captures the central holdings of  
23 its MSJ Opinion would serve the dual purposes of the Declaratory Judgment Act.  
24 Accordingly, the Court enters the following declaratory relief:

25 This Court enters a DECLARATORY JUDGMENT that, absent any  
26 independent, express, and lawful statutory authority, Defendants’ refusal to  
27 deny inspection or asylum processing to noncitizens who have not been  
28 admitted or paroled and who are in the process of arriving in the United States

1 at Class A Ports of Entry is unlawful regardless of the purported justification  
2 for doing so.

3 **IV. CONCLUSION**

4 For the foregoing reasons stated above:

5 1) The Court **ORDERS** Defendants to restore the status quo ante for the named  
6 Plaintiffs prior to Defendants' unlawful conduct. This includes taking the necessary steps  
7 to facilitate Plaintiff Beatrice Doe's entry into the United States, including issuing any  
8 necessary travel documents to allow her to travel to the United States (by air if necessary)  
9 and to ensure her inspection and asylum processing upon arrival.

10 2) The Court **DECLARES** that, absent any independent, express, and lawful  
11 statutory authority, Defendants' refusal to deny inspection or asylum processing to  
12 noncitizens who have not been admitted or paroled and who are in the process of arriving  
13 in the United States at Class A Ports of Entry is unlawful regardless of the purported  
14 justification for doing so.

15 The parties are further **ORDERED** to meet and confer and lodge a Proposed Final  
16 Judgment that incorporates this Court's rulings in its MSJ Opinion (ECF No. 742) and set  
17 forth herein **by no later than August 22, 2022**.

18 **IT IS SO ORDERED.**

19 **DATED: August 5, 2022**

  
**Hon. Cynthia Bashant**  
**United States District Judge**