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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Al Otro Lado, Inc., *et al.*,

Plaintiffs,

v.

Kirstjen M. Nielsen, *et al.*,

Defendants.

Case No.: 3:17-cv-02366-BAS-KSC
Hon. Cynthia A. Bashant

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

SPECIAL BRIEFING SCHEDULED ORDERED

NO ORAL ARGUMENT REQUESTED BY THE COURT

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INTRODUCTION

This case challenges Defendants' unlawful denial of access to the U.S. asylum process to asylum seekers at ports of entry (POEs) along the U.S.-Mexico border. Based on the experiences of the Plaintiffs and hundreds of similarly situated asylum seekers, as alleged in the original Complaint, this Court held that Plaintiffs have "plausibly show[n] the existence of a pattern or practice of denials" of access to the asylum system—or "turnbacks"—sufficient to state claims under the Administrative Procedure Act (APA), 5 U.S.C. § 706(1). (ECF 166 at 15.) This Court also held that the original Complaint failed to identify a "final agency action" or sufficiently allege a "policy" of turnbacks under APA § 706(2), but permitted the filing of an amended complaint. (ECF 166 at 49–54.)

Plaintiffs filed a Second Amended Complaint (SAC, ECF 189), alleging in detail that as early as 2016, Defendants were implementing a policy mandating that Customs and Border Protection (CBP) officers restrict the flow of asylum seekers, publicly justified by a pretextual, false claim of a lack of "capacity" (Turnback Policy). This Turnback Policy is not driven by *bona fide* agency expertise or a neutral regulatory interest. Instead, it is part of a broader effort to "shut down" the border and deter asylum seekers from coming to the United States—further rendering the Turnback Policy a violation of existing law. In the weeks preceding this filing, the government effectively acceded to these allegations: President Trump proclaimed that CBP is categorically denying migrants entry into the United States,[1] and a Department of Homeland Security (DHS) official admitted that on the border there is "100 percent

[1] *See* Donald J. Trump (@realDonaldTrump), Twitter (Dec. 20, 2018, 4:39 AM), https://twitter.com/realdonaldtrump/status/1075732375169060869?lang=en ("With so much talk about the Wall, people are losing sight of the great job being done on our Southern Border by Border Patrol, ICE and our great Military. Remember the Caravans? Well, they didn't get through and none are forming or on their way. Border is tight.").

focus on harsher options that will deter."[2] The SAC also adds eight new Individual Plaintiffs[3] who, like the original Individual Plaintiffs, were subject to the Turnback Policy.[4]

Defendants' Partial Motion to Dismiss marshals arguments designed only to evade legal constraints imposed by Congress through the Immigration and Nationality Act (INA), and by the Fifth Amendment Due Process Clause and the *jus cogens* obligation of *non-refoulement*. Defendants characterize certain Individual Plaintiffs' turnback claims as "extraterritorial." Yet the SAC does not allege that any Individual Plaintiffs were standing on Mexican—as opposed to U.S.—soil at the moment they were turned back, rendering this asserted "extraterritoriality" defense inapplicable at this stage. But even if the SAC could be construed in Defendants' favor, so as to state that certain Individual Plaintiffs were standing on Mexican soil when turned back, the INA, the Due Process Clause, and the duty of *non-refoulement* apply to the conduct Plaintiffs allege was carried out by policymakers in the United States and CBP officers standing on U.S. soil. The

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[2] Manny Fernandez et al., *The Price of Trump's Migrant Deterrence Strategy: New Chaos on the Border*, N.Y. Times (Jan. 4, 2019), https://www.nytimes.com/2019/01/04/us/mexico-wall-policy-trump.html. In addition, in January 2019, Senator Jeff Merkley disclosed a joint DHS-Department of Justice memo outlining "Policy Options to Respond to Border Surge of Illegal Immigration," demonstrating that deterring asylum seekers from coming to the United States to seek humanitarian protection is a current policy priority for Defendants. Jeff Merkley, *Merkley Reveals Secret Trump Administration Plan to Create Border Crisis*, Medium (Jan. 17, 2019), https://medium.com/@SenJeffMerkley/merkley-reveals-secret-trump-administration-plan-to-create-border-crisis-f72a7c3de2bd.

[3] This memorandum refers to all Plaintiffs other than Al Otro Lado (AOL) as "Individual Plaintiffs."

[4] Plaintiffs cite evidence of Defendants' adoption of the Turnback Policy beginning in San Ysidro, CA, and extending border-wide starting in May 2016, in line with the timeframe when the original Individual Plaintiffs first sought access to the asylum process at the U.S. border. (*See* SAC ¶¶ 48–83, 119–20, 125–27, 133–34, 141, 149 (confirming that the original Individual Plaintiffs first sought to access the asylum process between August 2016 and June 2017).)

law likewise protects asylum seekers in the process of arriving in the United States who *would* enter but for CBP's practice of intentionally intercepting those asylum seekers as they seek to reach U.S. soil.

Next, Defendants assert that "metering"—CBP's practice of turning back asylum seekers at the border by requiring that they put their names on a dysfunctional waitlist maintained by a third party—is lawful and that, at worst, it results in delayed access to the asylum process. This bald assertion discounts dozens of allegations that show that metering has the purpose and practical effect of actually denying many asylum seekers access to the asylum process. These allegations—which must be presumed true—demonstrate both a high-level policy to restrict access to asylum under the false pretext of "capacity," and that such a policy is advanced as part of a broader goal to deter migration to the United States. This goal cannot justify Defendants' decision to turn back asylum seekers to life-threatening circumstances in Mexico.

Defendants also invoke the political question doctrine, arguing this Court lacks jurisdiction to evaluate Defendants' violations of the INA and the duty of *non-refoulement* (made enforceable through the Alien Tort Statute (ATS)), by identifying stray allegations regarding cooperation with Mexican officials. However, Plaintiffs do not seek review of any "foreign relations" between the United States and Mexico. Plaintiffs' claims focus on domestically-implemented U.S. government conduct, and, far from questioning the reasonableness of any discretionary executive judgments, Plaintiffs challenge the *legality* of Defendants' conduct under established law imposing a duty to process asylum seekers.

Judicial review of all these questions is necessary to prevent the executive from attempting to "govern without legal constraint." *Boumediene v. Bush*, 553 U.S. 723, 765 (2008). In reviewing our country's fundamental obligations under the INA, the Due Process Clause, and *non-refoulement* principles, it is the duty of the judiciary, not the executive, "to say what the law is." *Marbury v. Madison*, 5

U.S. (1 Cranch) 137, 177 (1803).

ARGUMENT

I. DEFENDANTS MISCHARACTERIZE PLAINTIFFS' CLAIMS AS "EXTRATERRITORIAL," IGNORING THE RULE 12 STANDARD OF REVIEW.

To survive a Rule 12(b)(6) motion to dismiss, Plaintiffs need only allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also* Fed. R. Civ. P. 12(b)(6). Courts must construe all factual inferences "in the light most favorable to the nonmoving party." *Abbit v. ING USA Annuity & Life Ins. Co.*, 999 F. Supp. 2d 1189, 1194 (S.D. Cal. 2014).

Defendants seek to evade their obligations under the INA, the Due Process Clause, and the ATS by labeling certain Plaintiffs "extraterritorial." But they can do this only by ignoring the Rule 12 standard of review and asking the Court to improperly find facts—namely, that the new Individual Plaintiffs were standing in Mexico when they confronted CBP officers. Contrary to Defendants' assertions, the SAC does not actually state that any Plaintiffs were in Mexican territory when CBP turned them back. The new Plaintiffs allege they were turned back at the "middle of the bridge" between the U.S. and Mexico, (SAC ¶¶ 29, 154 (Roberto Doe), ¶¶ 30, 162, 166 (Maria Doe), ¶¶ 31, 174 (Úrsula and Juan Doe)), or "at the San Ysidro POE," (SAC ¶¶ 32, 181 (Victoria Doe), ¶¶ 33, 185–86 (Bianca Doe) ¶¶ 34, 193 (Emiliana Doe), ¶¶ 35, 199 (César Doe)), and otherwise use the term "at the border."[5] None of those phrases definitively places the new Plaintiffs in

[5] POEs on the southern border occupy U.S. territory from the physical border to some point north of the border, beyond the inspection station. The inspection station may be located, for example, "about 100 yards north of the border with Mexico," like the Mariposa POE in Nogales, AZ. *United States v. Vasquez-Hernandez*, 849 F.3d 1219, 1223 (9th Cir. 2017). The space between the physical border and the inspection station is the "pre-inspection area." *Id.* Many POEs, like

Mexico when they were turned back, and by Defendants' own logic, all individuals "at" a POE "are located within the territorial United States." (ECF 192-1 at 11.)

On a motion to dismiss, without the benefit of discovery, the Court must take Plaintiffs' allegations as true and construe them in the light most favorable to Plaintiffs; this requires the Court to assume that all Individual Plaintiffs were on U.S. soil when Defendants turned them back. Thus, Defendants' arguments that the INA, Due Process Clause, and *non-refoulement* principles do not apply to Plaintiffs outside the United States, (ECF 192-1 at 2, 6–25), are irrelevant at this juncture.[6]

Furthermore, it makes no sense to label Plaintiffs "extraterritorial," when Plaintiffs allege Defendants were and are *acting within the United States*—and thus seek *domestic* application of U.S. law. (SAC ¶¶ 48–49, 52–56, 58–60, 62, 65, 67–71, 75, 78, 83–118 (summarizing conduct of CBP officers on U.S. soil); SAC ¶¶ 48–83 (summarizing actions of high-level policymakers in the United States).) *See Rodriguez v. Swartz*, 899 F.3d 719, 747 (9th Cir. 2018) ("Swartz was an American agent acting within the scope of his employment. Swartz's bullets crossed the border, but he pulled the trigger here. We have a compelling interest in regulating our own government agents' conduct on our own soil."), *petition for cert. filed*, 2018 WL 4348517 (U.S. Sept. 7, 2018) (No. 18-309).

II. THE INA MANDATES THAT DEFENDANTS PROCESS PLAINTIFFS SEEKING ACCESS TO THE ASYLUM PROCESS AT POES, EVEN *IF* THEY WERE JUST ON THE MEXICAN SIDE OF THE BORDER.

The INA is the underlying substantive statute giving rise to Plaintiffs' claims under APA § 706(1) and (2) and the Due Process Clause. Three sections of the INA, independently and construed together, establish that Defendants must inspect

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Mariposa, have a designated pedestrian lane in which individuals traveling on foot can line up in the pre-inspection area to present themselves for inspection. *Id.*

[6] Even if the Court adopts Defendants' interpretation of the SAC regarding the geographic location of the Individual Plaintiffs, all Plaintiffs' claims must survive the motion to dismiss because the INA, the Due Process Clause, and the duty of *non-refoulement* still apply, as argued in Sections II, IV, and VI.

and process asylum seekers arriving at POEs, despite Defendants' best efforts to deny them physical access to U.S. territory:

(1) 8 U.S.C. § 1225(b)(1)(A)(ii): "[i]f an immigration officer determines that an alien . . . who *is arriving in* the United States . . . is inadmissible . . . and the alien indicates either an intention to apply for asylum . . . or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer" (emphasis added);

(2) 8 U.S.C. § 1225(a)(3): "[a]ll aliens . . . who are *applicants for admission* or *otherwise seeking admission* . . . shall be inspected by immigration officers" (emphasis added); and

(3) 8 U.S.C. § 1158(a)(1): "[a]ny alien who is physically present in the United States or who *arrives in* the United States . . . may apply for asylum" (emphasis added).

See also 8 U.S.C. § 1225(a)(1) (defining "applicant for admission" to include "[a]n alien present in the United States who has not been admitted or who *arrives in* the United States") (emphasis added)). This Court has recognized the mandatory nature of the duties to inspect and process in § 1225(a)(3) and (b)(1)(A)(ii), and Defendants appear to concede this point. (*See* ECF 166 at 36–37; *see also* ECF 192-1 at 7 (describing CBP's statutory duties to "inspect" and "refer."))

Defendants argue these INA provisions do not cover those Individual Plaintiffs who, under Defendants' inappropriate reading of the SAC, were turned back steps away from the border. Yet, a proper textual reading of each provision demonstrates that they apply to all Individual Plaintiffs, even if they were on Mexican soil when turned back.

First, under 8 U.S.C. § 1225(b)(1)(A)(ii), all Individual Plaintiffs were plainly "*arriv**ing*** in the United States" (emphasis added), and therefore are covered by this section. The provision's present continuous tense indicates an action that is ongoing but not yet completed, and logically applies to a noncitizen just on the other side of the border in the process of crossing. Reinforcing this plain reading, INA regulations define the similar term, "arriv*ing* alien" as "an applicant for admission coming *or attempting to come* into the United States at a port-of-entry[.]" 8 C.F.R. § 1.2

(emphasis added). Defendants simply ignore the "attempting" language in § 1.2, which on its face plainly covers Individual Plaintiffs who were en route to the United States and would have crossed the border but for Defendants' intentional conduct to turn them back. Defendants argue only that the phrase "at a port-of-entry" in § 1.2 limits the regulation's scope to inside U.S. territory. But the regulation does not use the term "***in*** a port-of-entry." The preposition "at" "indicate[s] presence or occurrence in, on, *or near*" a place or event. *At*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/at (last updated Jan. 14, 2019) (emphasis added). The Individual Plaintiffs whom Defendants turned away at the international border were "*at* the port-of-entry," even if Defendants prevented them from entering *into* it.[7]

Second, because all Individual Plaintiffs were arriving in the United States, they are covered by 8 U.S.C. § 1158(a)(1) (covering "[a]ny alien who is physically present in the United States or who *arrives in* the United States (emphasis added)) and 8 U.S.C. § 1225(a)(3) (covering "applicants for admission"). *See* § 1225(a)(1) (defining "applicant for admission" as "[a]n alien present in the United States who has not been admitted or *who arrives in* the United States") (emphasis added)). Defendants deprive the phrase "arrives in" of its natural meaning by repeatedly rendering the arrival in the past tense—suggesting that only those who have *retrospectively* "arrive[d] in" the United States can access the asylum process. (ECF 192-1 at 8, 9 (alteration in Defendants' brief).) But the phrase does not require someone to have already arrived. Sections 1158(a)(1) and 1225(a)(3) use the present simple tense—"arrives in"—meaning they cover someone who is in the process of "arriv[ing] in" the United States.

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[7] *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017) (en banc) and *United States v. Barajas-Alvarado*, 655 F.3d 1077 (9th Cir. 2011), do not support Defendants' claimed textual bright line that affords no rights to people standing just steps away from the U.S. border. Defendants' quotation from *Bringas-Rodriguez* discusses the Attorney General's ability to *grant* asylum—irrelevant to this case, which addresses the right to *access* the asylum process. 850 F.3d at 1062. Also inapposite, *Barajas-Alvarado* addresses the limited administrative and judicial review available for orders of expedited removal. 655 F.3d at 1081.

Even if Individual Plaintiffs never physically crossed the border, they were in the process of "arriv[ing] in the United States"—and even would have "arrive[d] in the United States"—but for Defendants' efforts to intercept and turn them back. Moreover, Congress would have had no reason to add the phrase "arrives in" to §§ 1158(a)(1) and 1225(a)(1) if it had the same meaning as "physically present," since both provisions refer to both those "present" *and* those who "arrive in" the United States. Congress does not speak in surplusage. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001). "[A]rrives in" therefore must mean something different than geographic presence inside the United States. *Cf. Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1118 (9th Cir. 2007) (explaining that noncitizens "already physically present inside the country" and those "at the border" are both types of "applicants for admission").

Third, even if Individual Plaintiffs are not "applicants for admission," they surely fit within the catch-all category of noncitizens "who are . . . otherwise seeking admission" covered by § 1225(a)(3). Rather than grapple with the natural meaning of this term, Defendants argue that Individual Plaintiffs in the process of seeking access to a POE "were not 'seeking admission' in the manner prescribed by statute and regulation." (ECF 192-1 at 8.)[8] What Individual Plaintiffs were doing after traveling hundreds of miles from their homes, if not seeking admission to the United States at a POE, Defendants leave unsaid.

Plaintiffs' reading of the statute best accords with Congress's intent. "Immigration statutes, by their very nature, pertain to activity at or near international borders. It is natural to expect that Congress intends for laws that regulate conduct that occurs near international borders to apply to some activity that takes place on the

[8] Defendants attempt to defend their position by citing 8 C.F.R. § 235.1(a) (ECF 192-1 at 8), which directs applicants for admission to seek admission to the United States at an open POE, as opposed to entering elsewhere along the border without inspection. Section 235.1(a) supports Plaintiffs' argument because it directs individuals to seek admission at a POE—which is exactly what Plaintiffs were trying to do.

foreign side of those borders." *United States v. Villanueva*, 408 F.3d 193, 199 (5th Cir. 2005); *see also E. Bay Sanctuary Covenant v. Trump*, 2018 WL 6053140, at *1 (N.D. Cal. Nov. 19, 2018) ("Asylum is a protection granted to foreign nationals already in the United States *or at the border* who meet the international law definition of a 'refugee.'" (emphasis added)).

III. PLAINTIFFS ALLEGE COGNIZABLE APA § 706(2) CLAIMS.

A. Plaintiffs Plausibly Allege a Turnback Policy.

The Turnback Policy, like policies reviewed in *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 138–39 (D.D.C. 2018), and *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 174–77, 184–85 (D.D.C. 2015), is an agency action reviewable under 5 U.S.C. § 706(2), even if it is not in writing. (ECF 166 at 51–52 (discussing *Aracely, R.* and *R.I.L-R*).) Allegations tending to support the existence of a policy include: (1) a connection between Defendants' creation of the policy and conduct pursuant to the policy (ECF 166 at 53); (2) in lieu of a policy document, an effective concession from the agency that the policy exists (ECF 166 at 51–52), and (3) firsthand knowledge and data demonstrating effects consistent with the policy as alleged (ECF 166 at 51–53).[9] *See Aracely, R.*, 319 F. Supp. 3d at 145–49 (discussing these factors and finding, based on the evidence of a policy, Plaintiffs were likely to succeed on the merits at the preliminary injunction stage); *R.I.L-R*, 80 F. Supp. 3d at 174–76 (same). Here, unlike in *Aracely, R.* and *R.I.L-R*, Plaintiffs need allege only "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

Plaintiffs allege that Defendants, high-level agency officials, have adopted a

[9] Plaintiffs maintain a court can identify an unwritten but actionable policy from a persistent, widespread practice, as courts do in the *Monell* context. (*See* ECF 143 at 21–23.) *See also Navarro v. Block*, 72 F.3d 712, 714–15, 715 n.3 (9th Cir. 1995). "A contrary rule 'would allow an agency to shield its decisions from judicial review simply by refusing to put those decisions in writing'" or to concede them publicly. *Aracely, R.*, 319 F. Supp. 3d at 139 (quoting *Grand Canyon Tr. v. Pub. Serv. Co. of N.M.*, 283 F. Supp. 2d 1249, 1252 (D.N.M. 2003)).

policy mandating that CBP officers at POEs drastically restrict the flow of asylum seekers at POEs along the U.S.-Mexico border by turning them back to Mexico when they present themselves for inspection, based on false claims of "capacity" constraints. First, Plaintiffs allege the Turnback Policy originated in 2016, was formalized in 2018 as a culmination of the agency's decisionmaking process, and is being actively implemented along the border. (*See* SAC ¶¶ 48–83 (explaining the initiation and development of the Turnback Policy, based on publicly available materials and limited discovery from CBP).) *Cf. Aracely, R.*, 319 F. Supp. 3d at 145, 149 (finding plaintiffs proved a policy that started in 2014 or before and was "re-emphasized" "with renewed vigor after the 2016 Presidential election").

Second, Plaintiffs allege facts giving rise to an inference that Defendants have or are likely to "essentially concede[]," *R.I.L-R*, 80 F. Supp. 3d at 175, that the Turnback Policy exists and is motivated by the goal of deterring asylum seekers rather than any *bona fide* administrative need. *Cf. Aracely, R.*, 319 F. Supp. 3d at 146 (noting official statements "indicating the existence of a deterrence policy influencing all aspects of DHS's administration of the INA"); *R.I.L-R*, 80 F. Supp. 3d at 175–76. For example, the SAC cites a DHS Office of Inspector General report indicating that DHS has embraced a policy to limit access to the asylum process, (SAC ¶¶ 70–71); statements from former Attorney General Sessions, President Trump, DHS Secretary Nielsen, Commissioner McAleenan, and CBP employees indicate the same, (SAC ¶¶ 60–66, 68–69, 71, 75). President Trump recently stated that asylum seekers in the "Caravans" "didn't get through," and the "Border is tight," due to "the great job done on our Southern Border by Border Patrol"—effectively acknowledging that his Administration has a policy of denying access to the asylum process on the southern border.[10]

[10] *See* Donald J. Trump, *supra* note 1; *see also* Letter from Congresspersons Nadler, Thompson & Lofgren to CBP Comm'r Kevin K. McAleenan 1 (Dec. 17, 2018), https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/Nadler-Lofgren-Thompson%2012.17%20Letter%20to%20CBP%20

Third, the SAC contains extensive allegations about the Turnback Policy's on-the-ground effects that support the existence of the policy, like the evidence in *Aracely, R.*, 319 F. Supp. 3d at 147–48, and *R.I.L-R*, 80 F. Supp. 3d at 174–75. (*See* SAC ¶¶ 49, 75, 77–78, 83–201.) While this Court previously concluded the original Complaint did not plausibly allege a policy of *categorical* turnbacks of asylum seekers at POEs (ECF 166 at 53), here Plaintiffs allege not a policy of categorical denials of entry, but rather a policy to intentionally slow the flow of and deter asylum seekers through turnbacks. *See Aracely, R.*, 319 F. Supp. 3d at 123, 145–49 (accepting, as evidence of a policy to heavily weight deterrence in parole decisions, a drop in parole rates from 80% to 47%, as opposed to requiring evidence of categorical denials); *R.I.L-R*, 80 F. Supp. 3d at 174 (rejecting plaintiffs' allegation of a categorical policy of denying release to *all* Central American families, but accepting plaintiffs' alternative, narrower formulation of a policy directing ICE officers to consider deterrence of mass migration *as a factor* in custody determinations). Although there are no publicly available comprehensive government data on turnbacks, the factual allegations and limited evidence available showing increasingly frequent turnbacks along the border plausibly demonstrate the

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Commissioner.pdf (quoting high-level DHS official's statement that Defendants limit the number of individuals processed at the San Ysidro POE because "**[t]he more we process, the more will come**").

The Court can take judicial notice of President Trump's tweets because they are official statements of the President. *See* Defs.' Suppl. Submission at 4, *James Madison Project v. Dep't of Justice*, No. 17-cv-00144-APM (D.D.C. Nov. 13, 2017), https://assets.documentcloud.org/documents/4200037/Trump-Twitter-20171113.pdf ("[T]he government is treating the President's statements . . . by tweet . . . as official statements of the President . . . ."); *see also Associated Builders & Contractors of Cal. Cooperation Comm., Inc. v. Becerra*, 231 F. Supp. 3d 810, 817 (S.D. Cal. 2017) (noting courts may take judicial notice of online government documents). In any case, the Court can consider Plaintiffs' evidence on a motion to dismiss because it "illustrate[s] the facts [Plaintiffs] expect[] to be able to prove." *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012); *see also Vermillion v. Corr. Corp. of Am.*, No. CVF08-1069LJOSMS, 2009 WL 939721, at *5 (E.D. Cal. Apr. 7, 2009) ("To defeat a motion to dismiss, plaintiff may argue any set of facts that are consistent with the complaint . . . that if proved would entitle him to judgment.").

existence of a policy to drastically restrict the flow of asylum seekers. (*See, e.g.*, SAC ¶ 49 (alleging that Defendants have turned back thousands of asylum seekers at POEs across the U.S.-Mexico border).)

Defendants argue the Turnback Policy is no more than an "amorphous description of the [CBP's] practices" with a "policy" label attached.[11] (ECF 192-1 at 16 (quoting *Bark v. U.S. Forest Serv.*, 37 F. Supp. 3d 41, 50 (D.D.C. 2014)).) Defendants try to conflate the Turnback Policy with the programs found not to constitute reviewable agency action in *Bark*, 37 F. Supp. 3d at 50, and *Lujan v. National Wildlife Federation*, 497 U.S. 871, 890 (1990). However, in those cases, plaintiffs challenged the general "continuing (and thus constantly changing) operations" of an agency. *Lujan*, 497 U.S. at 890; *see Bark*, 37 F. Supp. 3d at 50. Here, to the contrary, Plaintiffs "attack *particularized* agency action," *R.I.L-R*, 80 F. Supp. 3d at 184—specifically, high-level Defendants' decisions to purposefully restrict access to the asylum process in violation of their statutory obligations, motivated by deterrence and based on false claims of lack of capacity. *See Ramirez v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 7, 20–21 (D.D.C. 2018) (finding that "aggregation of similar, discrete purported injuries—claims that many people were injured in similar ways by the same type of agency action" is not "a broad programmatic attack"); *see also Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 388 (D.C. Cir. 2018) (reversing district court's grant of motion to dismiss and distinguishing *Lujan* where plaintiffs challenged "cabined and direct" "identified transgression" of statutory and regulatory mandate). Plaintiffs use the term "Turnback Policy" as shorthand to refer to the particularized agency action they challenge; Defendants need not refer to the policy

[11] *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 67 (2004), (ECF No. 192-1 at 18), where the Court rejected "pervasive" judicial oversight of "broad statutory mandate[s]" to "manage" federal programs *under § 706(1)*, is inapposite to Plaintiffs' § 706(2) claim pinpointing particularized agency action violating a clear statutory requirement. *See Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 482 F. Supp. 2d 1248, 1264 (W.D. Wash. 2007) (explaining *Norton* does not control § 706(2) claims).

with a succinct label in a formal policy document for it to be challengeable. *See R.I.L-R*, 80 F. Supp. 3d at 184 (noting that a policy of "consideration of an allegedly impermissible factor" is "*particularized* agency action," without discussing whether ICE had a formal label for the policy).

Defendants make a factual argument that the alleged Turnback Policy does not exist, (ECF 192-1 at 15–18)—a question inappropriate for resolution on a motion to dismiss. Moreover, Defendants seek to undermine Plaintiffs' allegations by pointing to their own admissions that asylum seekers are being asked to "come back," given an appointment, or told they will be processed at some nebulous time in the future. (ECF 192-1 at 15–16.) Defendants suggest that by "metering," they are putting asylum seekers on a legitimate waitlist, but—as discussed in Section III.B.—their Turnback Policy actually deprives a significant number of asylum seekers of access to the asylum process. Thus, Defendants' admissions confirm Plaintiffs' allegations that as a matter of policy, CBP officers flout their statutory obligations to process asylum seekers. *See* 5 U.S.C. § 706(2)(C), (D); 8 U.S.C. § 1225(a)(3), (b)(1)(A)(ii). Taken together and as true, as required at the motion to dismiss stage, Plaintiffs' factual allegations "allow[] the court to draw the reasonable inference" that CBP maintains an unlawful Turnback Policy actionable under § 706(2). *Iqbal*, 556 U.S. at 678.

B. The Turnback Policy Is a Final Agency Action, As Are Individual Turnbacks.

Defendants' adoption of the Turnback Policy and each turnback are "final agency actions" under § 706(2). Agency action is "final" when (1) it "mark[s] the 'consummation' of the agency's decisionmaking process" and (2) as a result of the action, "'rights or obligations have been determined,' or . . . 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) and *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). Courts interpret finality in "a pragmatic and flexible manner," "focus[ing] on the practical and legal effects of the agency action." *Or. Natural Desert Ass'n v.*

U.S. Forest Serv., 465 F.3d 977, 982 (9th Cir. 2006).

1. The Turnback Policy Is a Final Agency Action.

First, the Turnback Policy, as alleged, "is surely a 'consummation of the agency's decisionmaking process.'" *Venetian Casino Resort, LLC v. EEOC*, 530 F.3d 925, 931 (D.C. Cir. 2008) (quoting *Bennett*, 520 U.S. at 178). An agency action satisfies the finality test's first prong when it reflects a "conscious" and "deliberate decision," *ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1137 (9th Cir. 1998), and is not "merely tentative or interlocutory [in] nature," *Bennett*, 520 U.S. at 178. The Turnback Policy represents a consummation of the agency's decisionmaking process because Defendants consciously and deliberately created it. (SAC ¶¶ 48–83.) Rather than being tentative or interlocutory, the Turnback Policy is "an active program implemented by the agency." *Wagafe v. Trump*, Case No. C17-0094-RAJ, 2017 WL 2671254, at *10 (W.D. Wash. June 21, 2017); *see R.I.L-R,* 80 F. Supp. 3d at 184 (concluding an implemented policy directing an ongoing practice affecting individual cases was final agency action).

Second, legal consequences flow from the Turnback Policy because its active implementation affects asylum seekers at POEs. *See Aracely, R.*, 319 F. Supp. 3d at 139 (finding a policy amounted to final agency action when Defendants' actions had "actual or immediately threatened effects"); *Wagafe*, 2017 WL 2671254, at *10 (finding final agency action when a policy "affect[ed] the thousands of applicants whose qualified applications are allegedly indefinitely delayed or denied" pursuant to the policy). As alleged, the Turnback Policy deprived Individual Plaintiffs of the opportunity to seek asylum—violating their rights under the INA. (*See* ECF 192-1 at 6–11 (revealing Defendants' belief that if they succeed in preventing asylum seekers at POEs from setting foot across the international border pursuant to the Turnback Policy, CBP officers evade any legal duty to process them).) Defying the Congressional command to process asylum seekers, *supra* Section II, Defendants force them to contend with a dysfunctional waitlist system in dangerous Mexican border towns, facing threats of *refoulement*, pursuit by persecutors, and physical violence. (*E.g.*, SAC

¶¶ 3, 7, 25, 29, 44–47, 96, 98–102, 113, 126–31, 154–59.) Out of desperation, some turned-back asylum seekers feel compelled to enter the United States without inspection despite significant safety risks and possible criminal prosecution. (SAC ¶ 9.) These "actual or immediately threatened effect[s]" satisfy the finality test's second prong. *Lujan*, 497 U.S. at 894.

2. Individual Turnbacks Constitute Final Agency Action.

Similarly, each individual turnback identified in the SAC also represents a final agency action. First, each turnback marks the consummation of the agency's decisionmaking process because it serves as a functional denial of access to the asylum process. *See Aguayo v. Jewell*, 827 F.3d 1213, 1223 (9th Cir. 2016) (noting "denial" of relief and "failure to act" are "agency action" that can be "final" under 5 U.S.C. § 551(13)); *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1094–95 (9th Cir. 2014) (considering the practical effect of agency action); *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) ("[I]naction may represent effectively final agency action that the agency has not frankly acknowledged."). (*E.g.*, SAC ¶¶ 3, 5, 7–8, 79, 218, 223, 226, 235, 239, 259, 275 (alleging explicit as well as constructive turnbacks).)

Although CBP officers *formally* tell some asylum seekers to "wait," such decisions have the practical and intended effect of preventing many turned-back asylum seekers from actually waiting.[12] In such cases there are no "further steps to be taken" by the agency. *Indus. Customers of Nw. Utils. v. Bonneville Power Admin.*, 408 F.3d 638, 646 (9th Cir. 2005) (quoting *Dalton Equip. Co. v. Brown*,

[12] (*See, e.g.*, SAC ¶¶ 72–74, 109–10, 114, 131, 143, 156–58, 163, 166–68, 181, 187, 193 (alleging CBP officers arrange for Mexican officials to remove waiting asylum seekers and advise turned back asylum seekers to coordinate with Mexican authorities, with the purpose or knowledge that Mexican authorities could deport them from Mexico); SAC ¶¶ 85–90, 101, 111, 113–16, 131, 142–44, 151 (alleging poor treatment of asylum seekers at POEs, implying intent to deter waiting); SAC ¶¶ 98–102, 110, 113, 115–16, 155, 162, 174, 185, 188, 193 (alleging CBP processes people at arbitrary and unpredictable times and volumes, leaving turned-back asylum seekers in limbo in poor conditions).)

594 F.2d 195, 197 (9th Cir. 1979)). Defendants in this case do not "hold" applications for admission, unlike the agency in *Beshir v. Holder*. 10 F. Supp. 3d 165, 178–79 (D.D.C. 2014). Being told to "wait" has no bearing on whether an asylum seeker is permitted to present herself at a POE in a "future yet distinct administrative process." *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 593 (9th Cir. 2008); *see also Hosseini v. Johnson*, 826 F.3d 354, 362 (6th Cir. 2016) (noting that an applicant's ability to "reapply . . . as often as he wants" did not make denial of an application nonfinal). And each turnback reflects a "conscious" and "deliberate decision" to limit access to the asylum process at POEs. *ONRC Action*, 150 F.3d at 1137. (*E.g.*, SAC ¶¶ 1, 3, 8, 48–84.)

Second, legal consequences flow from each individual turnback, as described in Section III.B.1. *Cf. Ramirez*, 310 F. Supp. 3d at 21–23 & n.4 (concluding each "specific, discrete instance" when ICE denied a plaintiff's request to change his detention placement was a final agency action because, as a denial, it represented the consummation of the agency's decisionmaking process, and legal consequences flowed in that each plaintiff had to bear detention more restrictive than that contemplated by statute). Perversely, Defendants' policy encourages asylum seekers to enter between POEs, through the desert or across the river—endangering them and empowering smuggling networks.[13]

C. Plaintiffs Adequately Plead That the Turnback Policy and Individual Turnbacks Are Unlawful Under 5 U.S.C. § 706(2).

The Turnback Policy and individual turnbacks are "in excess of statutory jurisdiction, authority, or limitations" and "without observance of procedure required

[13] *See* Azam Ahmed, *Migrants' Despair Is Growing at U.S. Border. So Are Smugglers' Profits*, N.Y. Times (Jan. 6, 2019), https://www.nytimes.com/2019/01/06/world/americas/mexico-migrants-smugglers.html ("As a result of this metering, migrants are now waiting on the Mexican side of the border for weeks and months before they can submit their applications. In Reynosa and elsewhere, the delays caused by the policy are prompting many migrants to weigh the costs and dangers of a faster option: hiring a smuggler, at an increasingly costly rate, to sneak them into the United States.").

by law." 5 U.S.C. § 706(2)(C), (D). "[A]n agency's power is no greater than that delegated to it by Congress,"[14] and an agency cannot remake a statutory command through a policy of delay and defiance. *Lyng v. Payne*, 476 U.S. 926, 937 (1986). Under the governing *Chevron* analysis, an agency interpretation is invalid at step one when, as Plaintiffs argue here, Congress's intent is "unambiguously expressed." *Nw. Envtl. Advocates v. U.S. EPA*, 537 F.3d 1006, 1014, 1020–22 (9th Cir. 2008) (quoting *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984)). The plain language and intent of the INA's asylum provisions unambiguously preclude Defendants from adopting a policy or otherwise engaging in a practice of denying individuals access to the U.S. asylum process at POEs, even if Defendants prevent those asylum seekers from physically crossing the U.S.-Mexico border.

1. Both the Turnback Policy and Individual Turnbacks Exceed Defendants' Authority and Occur Without Observance of Statutorily Required Procedures.

The Turnback Policy and individual turnbacks violate the statutory scheme set out in 8 U.S.C. §§ 1158(a)(1), 1225(a)(3), and (b)(1)(A)(ii) and discussed in Section II—an "unambiguous[] express[ion]" of Congressional intent. *Chevron*, 467 U.S. at 843. When Defendants, acting pursuant to the Turnback Policy, screen out asylum seekers from other applicants for admission approaching POEs and send them back to an uncertain fate in Mexico, they ignore the mandatory procedures to inspect and process asylum seekers that Congress has put in place.[15] (*See* ECF 166 at 36–37.)

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[14] Because the INA mandates that Defendants process asylum seekers at POEs, claims that Defendants fail to do so are reviewable, and not "committed to agency discretion by law," because the statutory scheme is "not 'drawn so that a court would have no meaningful standard against which to judge'" Defendants' conduct. *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370–72 (2018) (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)); *see also Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 494 (9th Cir. 2018) (noting only "rare" agency actions fit this "narrow" committed-to-agency-discretion exception to judicial reviewability).

[15] Similarly, DHS fails to follow its own regulations requiring the processing of asylum seekers, *see* 8 C.F.R. §§ 235.3(b)(2)(i),(4), 235.4; DHS Form I-867A,

Furthermore, the Turnback Policy and individual turnbacks are *ultra vires* of Defendants' statutory authority because, as discussed in Section III.B.2, they result in widespread denials of access to the asylum process. Under traditional tools of statutory interpretation, Secretary Nielsen's authority to "perform such other acts as [she] deems necessary for carrying out" her authority to enforce the INA, (ECF 192-1 at 12 (quoting 8 U.S.C. § 1103(a)(3)), and to operate POEs, 6 U.S.C. § 202, simply cannot include authority to contravene more specific provisions of the INA requiring the processing of asylum seekers at POEs.[16] *Supra* Section II. Specific statutes control over general ones. *See BNSF Ry. Co. v. Cal. Dep't of Tax & Fee Admin.*, 904 F.3d 755, 766 (9th Cir. 2018). Defendants' specific statutory obligation to inspect and process asylum seekers—part of a directive "prescrib[ing] the terms and conditions upon which [noncitizens] may come to this country" of the type "entrusted exclusively to Congress," *Kleindienst v. Mandel*, 408 U.S. 753, 766–67 (1972) (citations omitted)—limits any general authority Defendants may have to control the flow of travelers at the border and precludes Defendants from transforming that narrow authority into a broader attempt to delay, deny and subvert the Congressionally mandated asylum process. *See Ramirez*, 310 F. Supp. 3d at 20–22 (noting agency conduct may be unlawful where a plaintiff identifies specific statutory provisions that "clearly rein[ ] in the agency's discretion" and "argue[s] that the agency ha[s] failed to act in accordance with that mandate," as Plaintiffs do here). A decision to radically change this country's asylum law at the border must be made by Congress, not by an

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which also violates § 706(2). *See Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures."); *United States v. 1996 Freightliner Fld. Tractor VIN 1FUYDXYB0TP822291*, 634 F.3d 1113, 1116 & n.9 (9th Cir. 2011) ("[T]he government is bound by the regulations it imposes on itself.").

[16] *See* H.R. Rep. No. 104-828, at 209–10 (1996) (Conf. Rep.) (stating that the then-new expedited removal procedures in § 1225 would provide "an opportunity for [an asylum seeker] to have the merits of his or her claim *promptly* assessed by officers with full professional training in adjudicating asylum claims" (emphasis added)).

agency. *See Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 328 (2014) ("[It is a] core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.").

Moreover, the cases Defendants cite regarding CBP's general authority to search travelers, or to exclude them pursuant to a Congressional delegation of authority in times of war or international strife, do not address the specific statutory scheme related to asylum seekers.[17] In all of these cases, agency officials are carrying out a discretionary function in accordance with Congressional design, but Congress determined that asylum seekers should be treated differently. As the legacy Immigration and Naturalization Service (INS) explained in implementing final regulations under the 1980 Refugee Act, the "uniform asylum policy" driving the Act was "[a] fundamental belief that the granting of *asylum is inherently a humanitarian act distinct from the normal operation and administration of the immigration process*." Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30674-01, 30675 (July 27, 1990) (to be codified at 8 CFR Parts 3, 103, 208, 236, 242, and 253) (emphasis added). Providing access to the asylum process is a non-discretionary mandate, unlike the ultimate decision to grant or deny asylum. The agency cannot seek to displace Congressional policy through an administrative re-write of the INA.[18]

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[17] *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272–75 (1973) (recognizing a limited power to stop travelers crossing a border in order to conduct routine searches of their belongings); *Carroll v. United States*, 267 U.S. 132, 154 (1925) (similar); *United States ex. rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542–44 (1950) (discussing the Attorney General's ability to exclude noncitizens in light of national security concerns in wartime pursuant to a Congressional grant of authority); *Shaughnessy v. United States ex. rel. Mezei*, 345 U.S. 206, 210–11 (1953) (similar). Additionally, no statute or regulation cited in footnote 5 of Defendants' brief specifically limits the statutory scheme governing access to the asylum process at POEs. (*See* ECF 192-1 at 13–14 n.5.)

[18] Similarly, Defendants' argument that they have "inherent authority" to deny or unreasonably delay access to the asylum process also must fail. *See, e.g.*, *Ivy*

United States v. Chen , upon which Defendants heavily rely, only highlights the critical distinction between lawful discretion and unlawful statutory revision. 2 F.3d 330 (9th Cir. 1993). In *Chen*, the Ninth Circuit "held that the Attorney General could augment the authority of the INS by delegating to the agency general law enforcement powers [related to enforcement on the high seas] granted to her directly," subject to constitutional limitations. *Yepes-Prado v. U.S. I.N.S.*, 10 F.3d 1363, 1369 n.9 (9th Cir. 1993); *see Chen*, 2 F.3d at 333–34. The court did not allow an agency to unilaterally limit a Congressional policy choice. Moreover, the "expansive view of agency authority implicit in *Chen* is inappropriate" here, "where the power at issue is not merely unspecified [in any grant of authority to the Attorney General] but calls for an intrusion into fundamental rights, personal identity, or well-being." *Yepes-Prado*, 10 F.3d at 1369 n.9.[19]

2. The Turnback Policy and Individual Turnbacks Are Impermissibly Aimed at Deterrence and Are Based on False Claims of Lack of Capacity.

Courts must ensure an agency has not "relied on factors which Congress has not intended it to consider, . . . [or] offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994–95 (9th Cir. 2014) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).[20]

Sports Med., LLC v. Burwell, 767 F.3d 81, 86 (D.C. Cir. 2014) ("[A]ny inherent [agency] authority does not apply . . . where Congress has spoken.").

[19] *Cunningham v. Neagle*, 10 S. Ct. 658 (1890), which Defendants cite and which recognized executive authority to dispatch a U.S. marshal to protect a Supreme Court Justice, is not relevant. *Id.* at 667–69.

[20] Section 706(2)(A) is regularly invoked as the source of this standard of review. *E.g.*, *Locke*, 776 F.3d at 994–95. Plaintiffs assert that § 706(2)(C) also provides a basis for attacking Defendants' improper deterrence motive and false claims of a lack of capacity in this instance, since Defendants' actions are *ultra vires*. *See Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 496 (9th Cir. 2018) ("Both

Here, Plaintiffs plausibly allege that the Turnback Policy is motivated by deterrence (SAC ¶¶ 4–6, 48, 61, 66, 72–73, 76–78, 109, 111, 274), which is not a factor that Congress intended the agency to consider when processing asylum seekers at POEs. Even if some measure of delay in processing asylum seekers at POEs might be lawful under certain types of exigent circumstances not present here, that is not the principal factor driving turnbacks. *See Aracely R.*, 319 F. Supp. 3d at 154 (finding plaintiffs' challenge to a policy that took deterrence into account when making parole determinations showed a likelihood of success on the merits by "demonstrat[ing] the incompatibility of the deterrence policy and [applicable law]"); *R.I.L-R*, 80 F. Supp. 3d at 174–76 (similar); *cf. Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991) ("[F]oreign policy and border enforcement considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution[.]").

In addition, the Court must accept as true Plaintiffs' allegations that lack of capacity is an unsubstantiated excuse that runs counter to the evidence before the agency, despite Defendants' self-serving statements to the contrary. (*See, e.g.*, SAC ¶¶ 3, 72, 76–78 (alleging the "capacity" excuse is false).[21]) Defendants' mischaracterization of Plaintiffs' argument as seeking "entry upon demand, at any point in time, regardless of whether the port has the capacity," (ECF 192-1 at 1), is

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[agencies'] power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires."). If the Court finds that the proper standard of review lies in § 706(2)(A), Plaintiffs request that the Court apply this provision *sua sponte* or grant leave to amend the complaint to reference § 706(2)(A). *See Obesity Research Inst., LLC v. Fiber Research Int'l, LLC*, 310 F. Supp. 3d 1089, 1122–23 (S.D. Cal. 2018) (explaining that the court should give leave to amend "freely" and with "extreme liberality").

[21] *See also* David Bier, *Obama Tripled Migrant Processing at Legal Ports—Trump Halved It*, Cato at Liberty (February 8, 2019, 09:01 AM), https://www.cato.org/blog/obama-tripled-migrant-processing-legal-ports-trump-halved-it (asserting, based on anecdotal evidence and statistics, "that the government is intentionally inflating 'capacity' issues in order to justify turning away asylum seekers").

a misleading attempt to dodge the well-pleaded allegations in the SAC. Moreover, Defendants twice cite to a declaration from Sidney K. Aki that was filed in another case in an attempt to support their arguments on the limits of POEs' "operational capacity." (ECF 192-1 at 5, 13.) Because Defendants' evidence goes directly to the contested merits of the dispute, it cannot be the basis for dismissal of the SAC. *See United States v. Ritchie*, 342 F.3d 903, 907–09 (9th Cir. 2003).

3. Alternatively, the Turnback Policy Is Unlawful Because It Unreasonably Delays Processing of Asylum Seekers.

Even if the Court finds that the Turnback Policy results in delay in accessing the asylum process rather than outright denial, it is still actionable under § 706(2). Normally, courts review individual instances of delay under § 706(1) and the "*TRAC* factors" test, to determine if that delay is unreasonable. *Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 507 & n.7 (9th Cir. 1997).[22] But an affirmative policy of unreasonably delaying mandatory agency action is itself an "agency action" challengeable under § 706(2). *See, e.g.*, *Wagafe*, 2017 WL 2671254, at *10 (reviewing a policy of allegedly unreasonable processing delays and unexplained denials of applications as a final agency action under § 706(2)).

Accordingly, the Turnback Policy is unlawful—resulting in delay that is unreasonable *per se* under the *TRAC* factors—because it is the result of the sixth *TRAC* factor, bad faith. *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987) ("If the Court determines that the agency delays in bad faith, it should conclude that the delay is unreasonable."), *quoted in Babbitt*, 105 F.3d at 510. Defendants are not

[22] The *TRAC* factors are: (1) whether the agency's timeline is governed by a "rule of reason"; (2) whether "Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute"; (3) & (5) (usually considered together) the "nature and extent of the interests prejudiced by the delay," with delays "that might be reasonable in the sphere of economic regulation [being] less tolerable than when human health and welfare are at stake"; (4) "the effect of expediting delayed action on agency activities of a higher or competing priority"; and (6) whether the agency acted in bad faith, though bad faith is not necessary to find a delay unreasonable. *Babbitt*, 105 F.3d at 507 n.7 (quoting *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984)).

"free to make [even] otherwise allowable administrative changes with the intent to defeat the mandate of the law by making the process so slow and/or cumbersome to endure" that a disproportionately small number of asylum seekers are processed at POEs. *Babbitt*, 105 F.3d at 510.[23]

Plaintiffs' well-pleaded allegations regarding Defendants' false "capacity" excuse and deterrence motives demonstrate bad faith, as does Defendants' practice of attempting to prevent asylum seekers' physical entry into the United States in order to evade judicial review. *See Rajput v. Mukasey*, No. C07-1029RAJ, 2008 WL 2519919, at *5 (W.D. Wash. June 20, 2008) (noting concern over the agency's "apparently conscious decision to adopt a policy to evade judicial review").[24]

IV. PLAINTIFFS STATE DUE PROCESS CLAIMS, EVEN IF THEY WERE IN MEXICO WHEN TURNED BACK.

It is "unobjectionable" that procedural due process rights attach to statutorily-created liberty interests. *Kerry v. Din*, 135 S. Ct. 2128, 2136 (2015). As discussed in Section II, the right to seek asylum under the INA extends to noncitizens who are attempting to enter the United States through a POE to access the asylum process, and are denied entry by U.S. officials standing on U.S. soil, even if the noncitizens stand

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[23] In addition to the dispositive nature of bad faith in *TRAC* analysis, bad faith is also a basis to determine that an agency acted unlawfully under § 706(2)(A). *Simmons v. Smith*, 888 F.3d 994, 1001 (8th Cir. 2018); *see Styrene Info. & Research Ctr., Inc. v. Sebelius*, 944 F. Supp. 2d 71 (D.D.C. 2013) (explaining that under § 706(2)(A), "the reasonableness of the agency's actions is judged in accordance with its stated reasons . . . unless there is a showing of bad faith or improper behavior" (emphasis omitted) (quoting *In re Subpoena Duces Tecum*, 156 F.3d 1279, 1279 (D.C. Cir. 1998)).

[24] Though bad faith is dispositive in this case, Plaintiffs also have strong, uniformly applicable allegations on all other *TRAC* factors: (1) Delays in processing are arbitrary and based on a scheme to flout the mandatory duty to process rather than on a rule of reason; (2) the statutory structure and legislative history suggest that an asylum seeker should be processed at the time she presents herself at a POE; (3)/(5) the extreme negative impacts on health and human welfare cannot be overstated; and (4) the agency's argument that it must balance resource and capacity limits is not genuine.

just over a territorial line. Thus, they can only be deprived of those statutory rights subject to due process. Defendants' deploy a formalistic bright-line conception of the applicability of the Constitution that is misguided, ignores binding precedent, and serves instrumentally as an attempt to evade the jurisdiction of the court. Indeed, based on the correct application of Supreme Court precedent, the Ninth Circuit has already held that U.S. officials' actions, taken inside the United States but with cross-border reach, are subject to constitutional constraints—and thus resolves this question. *See Rodriguez*, 899 F.3d at 730–31.

Specifically, in *Boumediene*—a critical decision that Defendants largely elide—the Supreme Court announced that, in assessing noncitizens' extraterritorial constitutional rights, a court should no longer apply the "formalistic," "rigid and abstract rule" that Defendants urge here; rather courts should examine the "'particular circumstances, the practical necessities, and the possible alternatives which Congress had before it' and, *in particular*, whether judicial enforcement of the provision would be 'impracticable and anomalous.'" 553 U.S. at 759, 762 (quoting *Reid v. Covert*, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring)) (emphasis added). In short, "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 764; *see also Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 995 (9th Cir. 2012) (explaining "the Supreme Court has held . . . that the border of the United States is not a clear line that separates aliens who may bring constitutional challenges from those who may not," and collecting cases).[25]

[25] The *Boumediene* Court examined various practical concerns, including whether it would be "impracticable and anomalous" to apply the Suspension Clause to Guantanamo detainees, but it never discussed the "voluntary connections" test from *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), that Defendants now press this Court to apply. (ECF 192-1 at 20–21.) Given *Boumediene*, it is not possible that, as Defendants argue, the "voluntary connections" test alone controls Plaintiffs' due process claims. The Ninth Circuit's recent opinion in *Ibrahim*, (cited in ECF 192-1 at 19–21), is not to the contrary. While the Ninth Circuit applied the "voluntary connections" test in that case, it *also* applied *Boumediene*'s "functional approach." 669 F.3d at 995–97.

Defendants make no reference to the "impracticable and anomalous" test *Boumediene* applied or the functional approach it mandated. But there would be nothing "impracticable [or] anomalous" in applying elementary due process protections at the U.S. border. *See Rodriguez*, 899 F.3d at 731 (holding that the Fourth Amendment applies to cross-border shooting because, "unlike the American agents in [*United States v.*] *Verdugo-Urquidez*, [494 U.S. 259 (1990),] who acted on Mexican soil, Swartz acted on American soil"). Furthermore, *Verdugo-Urquidez*, upon which Defendants so heavily rely, says nothing about routine CBP operations in the immediate vicinity of the border. Unlike the U.S. Drug Enforcement Agency's one-time search of a criminal suspect's residences in Mexican cities, *Verdugo-Urquidez*, 494 U.S. at 262, to which it would indeed be "impractical and anomalous" to apply constitutional due process, Plaintiffs here urge the court to require CBP officers who routinely enforce statutes "pertain[ing] to activity at or near international borders," *Villanueva*, 408 F.3d at 199, to comply with due process in the enforcement of those statutes. Plaintiffs' constitutional claims rest squarely within the Supreme Court's longstanding command that "[i]n the enforcement of [Congress's] policies [pertaining to the entry of aliens], the Executive Branch . . . must respect the procedural safeguards of due process." *Mandel*, 408 U.S. at 766–67 (quoting *Galvan v. Press*, 347 U.S. 522, 531 (1954)).

In addition, the "particular circumstances, the practical necessities, and the possible alternatives which Congress had before it" illustrate that there are no functional challenges to applying basic due process to interactions between U.S. officials and Individual Plaintiffs seeking entry who might be just steps away from the U.S. border. *Boumediene*, 553 U.S. at 759. First, the "particular circumstances" of the Individual Plaintiffs' situation are those of U.S. officials standing on U.S. soil implementing U.S. policy to deny entry to noncitizens just steps from the U.S. border. Second, "the practical necessities" involve the creation of a dangerous band

of law-free territory designed to prevent access to U.S. legal protections. Finally, "the possible alternatives which Congress had before it" show a clear preference for applying the INA to those attempting to access the asylum process. *See infra* Section II.

Ultimately, what *would* be "impracticable and anomalous" is to deny asylum seekers due process rights because Defendants intentionally intercept them just shy of the border in an attempt to manipulate the Constitution's reach. Such jurisdictional gamesmanship would allow the political branches to impermissibly "switch the Constitution on or off at will." *Boumediene*, 553 U.S. at 765.

V. THE COURT MAY REVIEW PLAINTIFFS' INA AND DUE PROCESS CLAIMS INDEPENDENTLY OF THE APA.

Defendants argue Plaintiffs may not seek enforcement of the INA independently of the APA's judicial review provisions found at 5 U.S.C. §§ 704 and 706. (ECF 192-1 at 23.) To the extent the Court finds it previously resolved this issue, (*see* ECF 166 at 45–46, 49), Plaintiffs request that the Court revise its decision, as permitted under Fed. R. Civ. P. 54(b).[26]

A claim that an agency acted *ultra vires* of statutory authority or unconstitutionally is actionable separately from the APA through so-called "nonstatutory review." *See R.I. Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 42 (1st Cir. 2002); *Clinton v. Babbitt*, 180 F.3d 1081, 1087 (9th Cir. 1999) (recognizing nonstatutory review); *Olivas v. Whitford*, No. 14cv1434-WQH-BLM, 2015 WL 867350, at*4–6 (S.D. Cal. Mar. 2, 2015) (allowing a nonstatutory review action seeking non-monetary relief from government officials allegedly violating the plaintiff's constitutional rights under the general grant of subject matter jurisdiction found in 28 U.S.C. § 1331, and concluding Congress waived sovereign immunity in 5 U.S.C. § 702). Nonstatutory review is available when plaintiffs have

[26] This issue was not squarely addressed in the briefing on Defendants' first motion to dismiss, given that Defendants did not specifically move to dismiss Plaintiffs' INA or constitutional claims on this basis.

no other "meaningful and adequate means of vindicating [their] . . . rights," and Congress did not clearly intend to preclude review. *Bd. of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43–44 (1991).

If this Court ultimately decides that Plaintiffs cannot prove the elements of their APA claims, Plaintiffs would have no other "meaningful and adequate means of vindicating [their] . . . rights" outside of nonstatutory review to adjudicate their constitutional and INA claims. *MCorp*, 502 U.S. at 43. And as there is no clear Congressional intent to preclude review of Plaintiffs' INA or due process claims, *see id.* at 44, this Court may rely on the "residuum of power" that it retains "even after passage of the APA" to review and enjoin *ultra vires* or unconstitutional agency action, *R.I. Dep't of Envtl. Mgmt.*, 304 F.3d at 42. Thus, dismissal of Plaintiffs' non-APA claims would be premature at the motion-to-dismiss stage.

Graham v. FEMA does not counsel otherwise. 149 F.3d 997, 1001 n.2 (9th Cir. 1998), *abrogated on other grounds by Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010). (*See* ECF 166 at 45–46 (citing *Graham*).) The *Graham* court reversed dismissal of APA claims and "declined to address" the dismissal of parallel constitutional claims other than to order the dismissal be without prejudice, to allow for potential later adjudication. *Id. Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1194 (9th Cir. 2000), discusses the standard of review for actions brought under APA § 706(2)(A). (*See* ECF 166 at 45 (citing *Ninilchik*).) It does not preclude nonstatutory review challenges to agency action as *ultra vires* or unconstitutional, separate from the APA.

VI. PLAINTIFFS STATE CLAIMS UNDER THE ATS, EVEN IF THEY WERE IN MEXICO WHEN TURNED BACK.

Defendants' understanding of Plaintiffs' ATS claims is deeply confused. (*See* ECF 192-1 at 22–25.) Plaintiffs do not seek to directly enforce U.S. treaty obligations in this Court. Instead, as they allege in Count Five, they seek to enforce the *jus cogens* norm of *non-refoulement*—the universally recognized state obligation not to return individuals to their home countries or third countries where they fear persecution or

torture—through the Alien Tort Statute, 28 U.S.C. § 1350. The ATS, in turn, confers jurisdiction on federal courts to hear a cause of action for a "violation of the law of nations."[27] The Supreme Court has explained that ATS causes of action arise out of violations of international law norms that are "specific, universal and obligatory." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (quoting *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

The duty of *non-refoulement* has achieved the status of a *jus cogens* norm—*i.e.* "an elite subset of . . . customary international law" from which no derogation is ever permitted, *Siderman de Blake v. Rep. of Argentina*, 965 F.2d 699, 714-15 (9th Cir. 1992)—and satisfies this *Sosa* requirement, as Plaintiffs have alleged. (SAC ¶¶ 234, 296.)[28] Other than remarking that *refoulement* is not as egregious a human rights violation as torture, (ECF 192-1 at 25), (while ignoring that numerous Plaintiffs *would* face torture if returned to their home countries or forced to remain in Mexico), Defendants make *no* arguments to the contrary and have waived their opportunity to do so.

The *jus cogens* norm of *non-refoulement* derives in part from express incorporation in a range of fundamental international treaties, including Article 33 of the Convention on the Status of Refugees and its Protocol ("Refugee Convention"), Article 13 of the International Covenant on Civil and Political Rights ("ICCPR"), and Article 3 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment ("CAT"). Relevant international law bodies have recognized

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[27] "[T]he APA's unqualified waiver of sovereign immunity supplies a waiver for the [nonmonetary] ATS claims asserted in this case." (ECF 166 at 31.) It does not follow, as Defendants appear to argue, (ECF 192-1 at 23), that the APA limits the substantive law or potential relief available under the ATS.

[28] To determine whether a norm of customary international law has attained *jus cogens* status, courts look to "'the works of jurists,'" "'the general usage and practice of nations,'" and judicial decisions on international law, and must in addition determine whether the international community recognizes the norms as non-derogable. *Siderman de Blake*, 965 F.2d at 714–15 (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61 (1820)).

the *non-refoulement* norm as *jus cogens*. The Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) stated as early as 1982 that *non-refoulement* "was progressively acquiring the character of a peremptory rule of international law." Executive Committee Conclusion No. 25, *General Conclusion on International Protection* (1982). In 1996 the Executive Committee explicitly concluded that *non-refoulement* had achieved the status of a *jus cogens* norm "not subject to derogation." Executive Committee Conclusion No. 79, *General Conclusion on International Protection* (1996). A number of commentators on international law have also concluded that *non-refoulement* is a *jus cogens* norm. *See, e.g.*, Jean Allain, *The* Jus Cogens *Nature of Non-refoulement*, 13(4) Int'l J. Refugee L. 533, 538 (2002); Alexander Orakhelashvili, Peremptory Norms in International Law 55 (Oxford University Press 2006).

The "prevailing international interpretation" of the *non-refoulement* principle is that it covers not only refugees or asylum seekers who have entered a country, but also those who present themselves at a country's borders. Mark Gibney, *Refugees*, 4 Encyclopedia of Human Rights 315, 318 (Oxford University Press, 2009). "In practice, this means that a . . . state must either admit the person to its territory and process her claim for protection or send the person to a safe third state." *Id.*; *see also* Cordule Droege, *Transfers of Detainees: Legal Framework, Non-refoulement and Contemporary Challenges*, 90 Int'l Rev. Red Cross 669, 671 & n.5 (2008); 1951 Refugee Convention, Art. 33 (prohibiting states from returning "a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened on account of" an enumerated ground) (emphasis added).

Relying on an inaccurate characterization of the SAC, Defendants assert that Individual Plaintiffs cannot enforce the duty of *non-refoulement* through their ATS claim if CBP officers turned them back when they were still on Mexican territory. Citing to a lengthy section of *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 180–87 (1993), Defendants' only argument on that point is that the United States

has no *non-refoulement* obligation to noncitizens outside its borders. (ECF 192-1 at 23.) Notwithstanding dicta from *Sale* regarding U.S. obligations under Article 33 of the Refugee Convention, the United States *does* owe a non-derogable *non-refoulement* duty to migrants at the border who seek to access the asylum process.

In *Sale*, the Court held that the *non-refoulement* provision in Article 33 of the Refugee Convention and the since-abrogated INA § 243(h)(1), 8 U.S.C. § 1253(h)(1), did not apply to the Coast Guard's interdiction and forced repatriation of Haitian refugees on the high seas. 509 U.S. at 159. *Sale* is unambiguously limited to government action undertaken in international waters, not government actions at the U.S.-Mexico border. *Sale* does not analyze the ATS or customary international law, and the Court's discussion of the Refugee Convention, upon which Defendants rely, is explicitly focused on the context of the high seas. *Id.* at 177 (questioning refugee rights of noncitizens "beyond the territorial waters of the United States"); *id*. at 187 (concluding Article 33 does not "apply to aliens interdicted on the high seas"). Because the *Sale* Court was focused on a very different geographic context, its discussion of U.S. conduct at the border is imprecise and inapposite to the questions before this Court.

Any understanding of the duty of *non-refoulement* that permits Defendants' challenged conduct at the U.S.-Mexico border would completely undermine this binding *jus cogens* norm, by allowing countries to militarize their borders and prevent anyone from entering or leaving a territory, including refugees and asylum seekers. Accordingly, all Plaintiffs have stated a cognizable claim under the ATS, which authorizes the declaratory and injunctive relief Plaintiffs seek. *See Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 725 F.3d 940, 944–45 (9th Cir. 2013).

VII. THIS CASE DOES NOT PRESENT A POLITICAL QUESTION.

The political question doctrine ("PQD") is a "narrow exception" to the judicial duty to decide cases, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012)—a duty that cannot be avoided because "the question is difficult, the

consequences weighty, or the potential real for conflict with the policy preferences of the political branches," *id.* at 205 (Sotomayor, J., concurring).[29] Here, Defendants invoke the PQD because, they argue, this case involves "[f]oreign-relations matters" "constitutional[ly] commit[ed] . . . to a coordinate political department." (ECF 192-1 at 27 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962).) This assertion is overbroad, premature and insufficient to deprive the Court of jurisdiction.

Defendants' talismanic invocation of "foreign relations"—based merely on the presence of some allegations of "coordination with Mexican officials"—plainly does not preclude judicial review. It is incorrect to "suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211. The foreign relations implications of immigration-related executive actions simply do not make such actions unreviewable. *E.g.*, *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1232 (9th Cir. 2018) (reviewing the legality of executive action in the immigration realm).

Plaintiffs do not question the wisdom of any diplomatic decisionmaking between the United States and Mexico, and Defendants do not identify a particularly sensitive political or discretionary inter-governmental decision that is in play or would be jeopardized by adjudication of Plaintiffs' claims. Instead, Plaintiffs challenge the *legality* of Defendants' Turnback Policy and individual turnbacks. *See El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) (distinguishing claims that question whether military action was "wise" as nonjusticiable "policy choice" committed to executive discretion, from claims "presenting purely legal issues such as whether the government had legal authority to

[29] Indeed, in the fifty years since *Baker v. Carr*, 369 U.S. 186 (1962), and despite numerous invocations, the Supreme Court has ordered a case dismissed on PQD grounds only twice. *See El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (citing *Nixon v. United States*, 506 U.S. 224 (1993), and *Gilligan v. Morgan*, 413 U.S. 1 (1973)).

act") (internal citations omitted)). The legality of Defendants' conduct, in turn, depends on whether it is consistent with "specific statutory right[s]" under the INA and with the *jus cogens* norm of *non-refoulement* that gives rise to an ATS claim—an assessment which is a "familiar judicial exercise." *Zivotofsky*, 566 U.S. at 196; *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (refusing to find a political question in a case "which calls for applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented below"). Because Defendants have no discretion to violate the INA or a *jus cogens* norm, this case presents no political question. *See Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 158 (4th Cir. 2016) ("The commission of unlawful acts is not based on 'military expertise and judgment,' and is not a function committed to a coordinate branch of government.").

Furthermore, PQD cannot be deployed as a broad cudgel; it requires courts to undertake a "discriminating inquiry into the precise facts and posture of the particular case." *Baker*, 369 U.S. at 217. Here, the Defendants misleadingly suggest this case rises and falls on a theory regarding Defendants' "coordination" with Mexican officials. (ECF 192-1 at 25 (citing SAC ¶¶ 3, 7, 50–83).) In fact, while the SAC includes a handful of allegations—out of more than 230 total factual allegations—stating that Defendants have deployed low-level Mexican officers as *one* of numerous tactics to effectuate its overall Turnback Policy, the allegations overwhelmingly demonstrate this case hinges on conduct of *U.S.* officials on *U.S.* soil who are amenable to an injunction by this Court.

Specifically, Plaintiffs' policy-related allegations attribute illegality squarely to U.S. officials, including Defendants McAleenan and Nielsen and various POE officials—and seek to enjoin their nondiscretionary unlawful conduct. (*See* SAC ¶¶ 51, 55–57, 60, 65, 68–71, 74–76, 78.) Plaintiffs' allegations regarding expert and NGO reports similarly attribute the Turnback Policy directly to U.S. officials. (SAC ¶¶ 107–15.) Like the Plaintiffs in the original Complaint, each of the new Plaintiffs added to

the SAC attributes illegal conduct to CBP personnel. (SAC ¶¶ 154–56 (Roberto Doe), 162, 166–67 (Maria Doe), 174 (Úrsula and Juan Doe), 181 (Victoria Doe), 185, 188 (Bianca Doe), 193 (Emiliana Doe), 199 (César Doe).) And each of Plaintiffs' various causes of action challenges the illegality of Defendants' conduct. (SAC ¶¶ 247–52 (attributing conduct challenged in Count One directly to Defendants, independent of Mexican "cooperation"), 258–65 (same for Count Two), 272–78 (same for Count Three), 287–91 (same for Count Four), 295–301 (same for Count Five).) Plaintiffs do not ask the Court to enjoin Mexican officials' conduct.

Communications between U.S. and Mexican officials could illustrate Defendants' policy and their knowledge about the fate of turned-back asylum seekers, in which case such communications would be relevant evidence making Plaintiffs' claims more plausible. The fact that this case tangentially touches such communications does not rise to the level of an intrusion into foreign relations.

Because Defendants have not met the burden of demonstrating that political questions are "inextricable from the case," *Baker*, 369 U.S. at 217, their arguments should be denied outright or, at most, deferred to summary judgment pending further development of Plaintiffs' claims. *See Harris v. Kellogg, Brown & Root Servs., Inc.*, 724 F.3d 458, 474–78 (3d Cir. 2013) (deferring PQD decision).

VIII. AL OTRO LADO STATES COGNIZABLE CLAIMS.

Ignoring this Court's prior ruling, Defendants argue that AOL fails to state cognizable claims because the relevant INA and treaty provisions "pertain exclusively to 'aliens' or 'refugees,'" (ECF 192-1 at 28–29). Defendants' argument fails because, as this Court and the Ninth Circuit have already held, AOL's interests fall squarely within the zone of interests protected by the INA and AOL's ongoing injuries flow from Defendants' misconduct. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129–30, 132–33 (2014); *see also E. Bay Sanctuary Covenant*, 909 F.3d at 1243–45 (finding AOL has statutory standing to bring INA-related APA challenge). (*See* ECF 166 at 12–14, 16–21

(finding AOL has Article III standing and stated a statutory cause of action to enforce the INA through the APA in this case).)

On the question of proximate cause, *see Lexmark*, 572 U.S. at 132–33, this Court found that "[t]he alleged conduct of CBP officers has caused [AOL] to expend significant time and resources to assist asylum seekers in responding to CBP officials' alleged conduct of foreclosing even the most basic aspect of the INA's asylum procedures—the opportunity to be processed in the first place." (ECF 166 at 21.) Because the requested declaratory and injunctive relief would remedy AOL's injuries by restoring prompt access to the asylum process at POEs (SAC ¶ 304), AOL has stated valid causes of action under the APA.

IX. DEFENDANTS CANNOT DEFEAT ABIGAIL, BEATRICE AND CAROLINA DOE'S APA §706(1) CLAIMS THROUGH COERCION.

Defendants argue for dismissal of Abigail, Beatrice and Carolina Doe's APA § 706(1) claims because they withdrew their applications for admission, despite the fact that CBP coerced them into doing so. While conceding that a noncitizen's decision to withdraw an application for admission must be voluntary, (ECF 192-1 at 30 n.10), Defendants maintain these Plaintiffs' allegedly coerced withdrawals terminated Defendants' obligation to process them, (ECF 192-1 at 29–30). However, this Court previously held that these Plaintiffs stated § 706(1) claims based on their alleged denial of access to the U.S. asylum process. (ECF 166 at 43.)[30]

[30] Plaintiffs respectfully disagree with and preserve for appeal the Court's conclusion that it cannot compel relief under § 706(1) based on Defendants' alleged violations of 8 C.F.R. § 235.4 (requiring that the decision to withdraw an application for admission must be made voluntarily).

CONCLUSION

For the foregoing reasons, Defendants' Partial Motion to Dismiss should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Southern District of California by using the CM/ECF system on February 14, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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3:17-cv-02366-BAS-KSC Al Otro Lado, Inc. et al v. Nielsen, et al

NON-COMPLIANCE,PROTO,SEALDC

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Southern District of California

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