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

18 Al Otro Lado, Inc., *et al.*,  
19 Plaintiffs,

20 v.

21 Kirstjen M. Nielsen, *et al.*,  
22 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

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

12 Plaintiffs filed a Second Amended Complaint (SAC, ECF 189), alleging in  
13 detail that as early as 2016, Defendants were implementing a policy mandating that  
14 Customs and Border Protection (CBP) officers restrict the flow of asylum seekers,  
15 publicly justified by a pretextual, false claim of a lack of “capacity” (Turnback Policy).  
16 This Turnback Policy is not driven by *bona fide* agency expertise or a neutral  
17 regulatory interest. Instead, it is part of a broader effort to “shut down” the border and  
18 deter asylum seekers from coming to the United States—further rendering the  
19 Turnback Policy a violation of existing law. In the weeks preceding this filing, the  
20 government effectively acceded to these allegations: President Trump proclaimed that  
21 CBP is categorically denying migrants entry into the United States,<sup>1</sup> and a Department  
22 of Homeland Security (DHS) official admitted that on the border there is “100 percent  
23  
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25 <sup>1</sup> See Donald J. Trump (@realDonaldTrump), Twitter (Dec. 20, 2018, 4:39  
26 AM), <https://twitter.com/realdonaldtrump/status/1075732375169060869?lang=en>  
27 (“With so much talk about the Wall, people are losing sight of the great job  
28 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.”).

1 focus on harsher options that will deter.”<sup>2</sup> The SAC also adds eight new Individual  
 2 Plaintiffs<sup>3</sup> who, like the original Individual Plaintiffs, were subject to the Turnback  
 3 Policy.<sup>4</sup>

4 Defendants’ Partial Motion to Dismiss marshals arguments designed only to  
 5 evade legal constraints imposed by Congress through the Immigration and  
 6 Nationality Act (INA), and by the Fifth Amendment Due Process Clause and the  
 7 *jus cogens* obligation of *non-refoulement*. Defendants characterize certain  
 8 Individual Plaintiffs’ turnback claims as “extraterritorial.” Yet the SAC does not  
 9 allege that any Individual Plaintiffs were standing on Mexican—as opposed to  
 10 U.S.—soil at the moment they were turned back, rendering this asserted  
 11 “extraterritoriality” defense inapplicable at this stage. But even if the SAC could be  
 12 construed in Defendants’ favor, so as to state that certain Individual Plaintiffs were  
 13 standing on Mexican soil when turned back, the INA, the Due Process Clause, and  
 14 the duty of *non-refoulement* apply to the conduct Plaintiffs allege was carried out  
 15 by policymakers in the United States and CBP officers standing on U.S. soil. The  
 16

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17 <sup>2</sup> 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,  
 18 Senator Jeff Merkley disclosed a joint DHS-Department of Justice memo outlining  
 19 “Policy Options to Respond to Border Surge of Illegal Immigration,”  
 20 demonstrating that deterring asylum seekers from coming to the United States to  
 21 seek humanitarian protection is a current policy priority for Defendants. Jeff  
 22 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>.

23 <sup>3</sup> This memorandum refers to all Plaintiffs other than Al Otro Lado (AOL) as  
 24 “Individual Plaintiffs.”

25 <sup>4</sup> Plaintiffs cite evidence of Defendants’ adoption of the Turnback Policy  
 26 beginning in San Ysidro, CA, and extending border-wide starting in May 2016, in  
 27 line with the timeframe when the original Individual Plaintiffs first sought access  
 28 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).)

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

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

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

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



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

## 2 ARGUMENT

### 3 **I. DEFENDANTS MISCHARACTERIZE PLAINTIFFS' CLAIMS AS** 4 **"EXTRATERRITORIAL," IGNORING THE RULE 12 STANDARD** 5 **OF REVIEW.**

6 To survive a Rule 12(b)(6) motion to dismiss, Plaintiffs need only allege  
 7 "sufficient factual matter, accepted as true, to 'state a claim to relief that is  
 8 plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell*  
 9 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also* Fed. R. Civ. P.  
 10 12(b)(6). Courts must construe all factual inferences "in the light most favorable to  
 11 the nonmoving party." *Abbit v. ING USA Annuity & Life Ins. Co.*, 999 F. Supp. 2d  
 12 1189, 1194 (S.D. Cal. 2014).

13 Defendants seek to evade their obligations under the INA, the Due Process  
 14 Clause, and the ATS by labeling certain Plaintiffs "extraterritorial." But they can  
 15 do this only by ignoring the Rule 12 standard of review and asking the Court to  
 16 improperly find facts—namely, that the new Individual Plaintiffs were standing in  
 17 Mexico when they confronted CBP officers. Contrary to Defendants' assertions,  
 18 the SAC does not actually state that any Plaintiffs were in Mexican territory when  
 19 CBP turned them back. The new Plaintiffs allege they were turned back at the  
 20 "middle of the bridge" between the U.S. and Mexico, (SAC ¶¶ 29, 154 (Roberto  
 21 Doe), ¶¶ 30, 162, 166 (Maria Doe), ¶¶ 31, 174 (Úrsula and Juan Doe)), or "at the  
 22 San Ysidro POE," (SAC ¶¶ 32, 181 (Victoria Doe), ¶¶ 33, 185–86 (Bianca Doe)  
 23 ¶¶ 34, 193 (Emiliana Doe), ¶¶ 35, 199 (César Doe)), and otherwise use the term "at  
 24 the border."<sup>5</sup> None of those phrases definitively places the new Plaintiffs in

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25 <sup>5</sup> POEs on the southern border occupy U.S. territory from the physical border  
 26 to some point north of the border, beyond the inspection station. The inspection  
 27 station may be located, for example, "about 100 yards north of the border with  
 28 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



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

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

9 Furthermore, it makes no sense to label Plaintiffs “extraterritorial,” when  
10 Plaintiffs allege Defendants were and are *acting within the United States*—and thus  
11 seek *domestic* application of U.S. law. (SAC ¶¶ 48–49, 52–56, 58–60, 62, 65, 67–  
12 71, 75, 78, 83–118 (summarizing conduct of CBP officers on U.S. soil); SAC  
13 ¶¶ 48–83 (summarizing actions of high-level policymakers in the United States).)  
14 *See Rodriguez v. Swartz*, 899 F.3d 719, 747 (9th Cir. 2018) (“Swartz was an  
15 American agent acting within the scope of his employment. Swartz’s bullets  
16 crossed the border, but he pulled the trigger here. We have a compelling interest in  
17 regulating our own government agents’ conduct on our own soil.”), *petition for*  
18 *cert. filed*, 2018 WL 4348517 (U.S. Sept. 7, 2018) (No. 18-309).

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

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

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

27 <sup>6</sup> Even if the Court adopts Defendants’ interpretation of the SAC regarding the  
28 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.

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

3 (1) 8 U.S.C. § 1225(b)(1)(A)(ii): “[i]f an immigration officer determines that an  
4 alien . . . who *is arriving in* the United States . . . is inadmissible . . . and the  
5 alien indicates either an intention to apply for asylum . . . or a fear of  
6 persecution, the officer shall refer the alien for an interview by an asylum  
7 officer” (emphasis added);

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

11 (3) 8 U.S.C. § 1158(a)(1): “[a]ny alien who is physically present in the United  
12 States or who *arrives in* the United States . . . may apply for asylum”  
13 (emphasis added).

14 *See also* 8 U.S.C. § 1225(a)(1) (defining “applicant for admission” to include “[a]n  
15 alien present in the United States who has not been admitted or who *arrives in* the  
16 United States”) (emphasis added)). This Court has recognized the mandatory  
17 nature of the duties to inspect and process in § 1225(a)(3) and (b)(1)(A)(ii), and  
18 Defendants appear to concede this point. (*See* ECF 166 at 36–37; *see also* ECF  
19 192-1 at 7 (describing CBP’s statutory duties to “inspect” and “refer.”))

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

25 First, under 8 U.S.C. § 1225(b)(1)(A)(ii), all Individual Plaintiffs were plainly  
26 “*arriving* in the United States” (emphasis added), and therefore are covered by this  
27 section. The provision’s present continuous tense indicates an action that is ongoing  
28 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, “*arriving 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

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

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

23 \_\_\_\_\_  
24 <sup>7</sup> *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017) (en banc) and  
25 *United States v. Barajas-Alvarado*, 655 F.3d 1077 (9th Cir. 2011), do not support  
26 Defendants’ claimed textual bright line that affords no rights to people standing  
27 just steps away from the U.S. border. Defendants’ quotation from *Bringas-*  
28 *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.

1 Even if Individual Plaintiffs never physically crossed the border, they were in the  
2 process of “arriv[ing] in the United States”—and even would have “arrive[d] in the  
3 United States”—but for Defendants’ efforts to intercept and turn them back. Moreover,  
4 Congress would have had no reason to add the phrase “arrives in” to §§ 1158(a)(1) and  
5 1225(a)(1) if it had the same meaning as “physically present,” since both provisions  
6 refer to both those “present” *and* those who “arrive in” the United States. Congress  
7 does not speak in surplusage. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001).  
8 “[A]rrives in” therefore must mean something different than geographic presence  
9 inside the United States. *Cf. Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1118 (9th  
10 Cir. 2007) (explaining that noncitizens “already physically present inside the country”  
11 and those “at the border” are both types of “applicants for admission”).

12 Third, even if Individual Plaintiffs are not “applicants for admission,” they  
13 surely fit within the catch-all category of noncitizens “who are . . . otherwise  
14 seeking admission” covered by § 1225(a)(3). Rather than grapple with the natural  
15 meaning of this term, Defendants argue that Individual Plaintiffs in the process of  
16 seeking access to a POE “were not ‘seeking admission’ in the manner prescribed  
17 by statute and regulation.” (ECF 192-1 at 8.)<sup>8</sup> What Individual Plaintiffs were  
18 doing after traveling hundreds of miles from their homes, if not seeking admission  
19 to the United States at a POE, Defendants leave unsaid.

20 Plaintiffs’ reading of the statute best accords with Congress’s intent.  
21 “Immigration statutes, by their very nature, pertain to activity at or near international  
22 borders. It is natural to expect that Congress intends for laws that regulate conduct that  
23 occurs near international borders to apply to some activity that takes place on the  
24

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25 <sup>8</sup> Defendants attempt to defend their position by citing 8 C.F.R. § 235.1(a)  
26 (ECF 192-1 at 8), which directs applicants for admission to seek admission to the  
27 United States at an open POE, as opposed to entering elsewhere along the border  
28 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.

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

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

#### 7 **A. Plaintiffs Plausibly Allege a Turnback Policy.**

8 The Turnback Policy, like policies reviewed in *Aracely, R. v. Nielsen*, 319 F.  
 9 Supp. 3d 110, 138–39 (D.D.C. 2018), and *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164,  
 10 174–77, 184–85 (D.D.C. 2015), is an agency action reviewable under 5 U.S.C.  
 11 § 706(2), even if it is not in writing. (ECF 166 at 51–52 (discussing *Aracely, R.* and  
 12 *R.I.L-R*.) Allegations tending to support the existence of a policy include: (1) a  
 13 connection between Defendants’ creation of the policy and conduct pursuant to the  
 14 policy (ECF 166 at 53); (2) in lieu of a policy document, an effective concession from  
 15 the agency that the policy exists (ECF 166 at 51–52), and (3) firsthand knowledge and  
 16 data demonstrating effects consistent with the policy as alleged (ECF 166 at 51–53).<sup>9</sup>  
 17 *See Aracely, R.*, 319 F. Supp. 3d at 145–49 (discussing these factors and finding, based  
 18 on the evidence of a policy, Plaintiffs were likely to succeed on the merits at the  
 19 preliminary injunction stage); *R.I.L-R*, 80 F. Supp. 3d at 174–76 (same). Here, unlike  
 20 in *Aracely, R.* and *R.I.L-R*, Plaintiffs need allege only “sufficient factual matter,  
 21 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S.  
 22 at 678 (quoting *Twombly*, 550 U.S. at 570).

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

24 <sup>9</sup> Plaintiffs maintain a court can identify an unwritten but actionable policy  
 25 from a persistent, widespread practice, as courts do in the *Monell* context. (*See*  
 26 ECF 143 at 21–23.) *See also Navarro v. Block*, 72 F.3d 712, 714–15, 715 n.3 (9th  
 27 Cir. 1995). “A contrary rule ‘would allow an agency to shield its decisions from  
 28 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)).

1 policy mandating that CBP officers at POEs drastically restrict the flow of asylum  
2 seekers at POEs along the U.S.-Mexico border by turning them back to Mexico  
3 when they present themselves for inspection, based on false claims of “capacity”  
4 constraints. First, Plaintiffs allege the Turnback Policy originated in 2016, was  
5 formalized in 2018 as a culmination of the agency’s decisionmaking process, and  
6 is being actively implemented along the border. (*See* SAC ¶¶ 48–83 (explaining the  
7 initiation and development of the Turnback Policy, based on publicly available  
8 materials and limited discovery from CBP).) *Cf. Aracely, R.*, 319 F. Supp. 3d at  
9 145, 149 (finding plaintiffs proved a policy that started in 2014 or before and was  
10 “re-emphasized” “with renewed vigor after the 2016 Presidential election”).

11 Second, Plaintiffs allege facts giving rise to an inference that Defendants  
12 have or are likely to “essentially concede[],” *R.I.L-R*, 80 F. Supp. 3d at 175, that  
13 the Turnback Policy exists and is motivated by the goal of deterring asylum  
14 seekers rather than any *bona fide* administrative need. *Cf. Aracely, R.*, 319 F. Supp.  
15 3d at 146 (noting official statements “indicating the existence of a deterrence  
16 policy influencing all aspects of DHS’s administration of the INA”); *R.I.L-R*, 80 F.  
17 Supp. 3d at 175–76. For example, the SAC cites a DHS Office of Inspector  
18 General report indicating that DHS has embraced a policy to limit access to the  
19 asylum process, (SAC ¶¶ 70–71); statements from former Attorney General  
20 Sessions, President Trump, DHS Secretary Nielsen, Commissioner McAleenan,  
21 and CBP employees indicate the same, (SAC ¶¶ 60–66, 68–69, 71, 75). President  
22 Trump recently stated that asylum seekers in the “Caravans” “didn’t get through,”  
23 and the “Border is tight,” due to “the great job done on our Southern Border by  
24 Border Patrol”—effectively acknowledging that his Administration has a policy of  
25 denying access to the asylum process on the southern border.<sup>10</sup>

26 <sup>10</sup> *See* Donald J. Trump, *supra* note 1; *see also* Letter from Congresspersons  
27 Nadler, Thompson & Lofgren to CBP Comm’r Kevin K. McAleenan 1 (Dec. 17,  
28 2018), [https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/  
documents/Nadler-Lofgren-Thompson%2012.17%20Letter%20to%20CBP%20](https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/Nadler-Lofgren-Thompson%2012.17%20Letter%20to%20CBP%20)



1 Third, the SAC contains extensive allegations about the Turnback Policy’s on-  
 2 the-ground effects that support the existence of the policy, like the evidence in *Aracely*,  
 3 *R.*, 319 F. Supp. 3d at 147–48, and *R.I.L.-R*, 80 F. Supp. 3d at 174–75. (See SAC ¶¶ 49,  
 4 75, 77–78, 83–201.) While this Court previously concluded the original Complaint did  
 5 not plausibly allege a policy of *categorical* turnbacks of asylum seekers at POEs (ECF  
 6 166 at 53), here Plaintiffs allege not a policy of categorical denials of entry, but rather a  
 7 policy to intentionally slow the flow of and deter asylum seekers through turnbacks.  
 8 See *Aracely, R.*, 319 F. Supp. 3d at 123, 145–49 (accepting, as evidence of a policy to  
 9 heavily weight deterrence in parole decisions, a drop in parole rates from 80% to 47%,  
 10 as opposed to requiring evidence of categorical denials); *R.I.L.-R*, 80 F. Supp. 3d at 174  
 11 (rejecting plaintiffs’ allegation of a categorical policy of denying release to *all* Central  
 12 American families, but accepting plaintiffs’ alternative, narrower formulation of a  
 13 policy directing ICE officers to consider deterrence of mass migration *as a factor* in  
 14 custody determinations). Although there are no publicly available comprehensive  
 15 government data on turnbacks, the factual allegations and limited evidence available  
 16 showing increasingly frequent turnbacks along the border plausibly demonstrate the

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

20 The Court can take judicial notice of President Trump’s tweets because they  
 21 are official statements of the President. See Defs.’ Suppl. Submission at 4, *James*  
 22 *Madison Project v. Dep’t of Justice*, No. 17-cv-00144-APM (D.D.C. Nov. 13, 2017),  
 23 <https://assets.documentcloud.org/documents/4200037/Trump-Twitter-20171113.pdf>  
 24 (“[T]he government is treating the President’s statements . . . by tweet . . . as official  
 25 statements of the President . . .”); see also *Associated Builders & Contractors of Cal.*  
 26 *Cooperation Comm., Inc. v. Becerra*, 231 F. Supp. 3d 810, 817 (S.D. Cal. 2017)  
 27 (noting courts may take judicial notice of online government documents). In any case,  
 28 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.”).

1 existence of a policy to drastically restrict the flow of asylum seekers. (*See, e.g.*, SAC  
2 ¶ 49 (alleging that Defendants have turned back thousands of asylum seekers at POEs  
3 across the U.S.-Mexico border).)

4 Defendants argue the Turnback Policy is no more than an “amorphous  
5 description of the [CBP’s] practices” with a “policy” label attached.<sup>11</sup> (ECF 192-1 at  
6 16 (quoting *Bark v. U.S. Forest Serv.*, 37 F. Supp. 3d 41, 50 (D.D.C. 2014)).)  
7 Defendants try to conflate the Turnback Policy with the programs found not to  
8 constitute reviewable agency action in *Bark*, 37 F. Supp. 3d at 50, and *Lujan v.*  
9 *National Wildlife Federation*, 497 U.S. 871, 890 (1990). However, in those cases,  
10 plaintiffs challenged the general “continuing (and thus constantly changing)  
11 operations” of an agency. *Lujan*, 497 U.S. at 890; *see Bark*, 37 F. Supp. 3d at 50. Here,  
12 to the contrary, Plaintiffs “attack *particularized* agency action,” *R.I.L.-R*, 80 F. Supp. 3d  
13 at 184—specifically, high-level Defendants’ decisions to purposefully restrict access to  
14 the asylum process in violation of their statutory obligations, motivated by deterrence  
15 and based on false claims of lack of capacity. *See Ramirez v. U.S. Immigration &*  
16 *Customs Enf’t*, 310 F. Supp. 3d 7, 20–21 (D.D.C. 2018) (finding that “aggregation of  
17 similar, discrete purported injuries—claims that many people were injured in similar  
18 ways by the same type of agency action” is not “a broad programmatic attack”); *see*  
19 *also Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 388 (D.C. Cir. 2018) (reversing  
20 district court’s grant of motion to dismiss and distinguishing *Lujan* where plaintiffs  
21 challenged “cabined and direct” “identified transgression” of statutory and regulatory  
22 mandate). Plaintiffs use the term “Turnback Policy” as shorthand to refer to the  
23 particularized agency action they challenge; Defendants need not refer to the policy

24 <sup>11</sup> *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 67 (2004), (ECF  
25 No. 192-1 at 18), where the Court rejected “pervasive” judicial oversight of “broad  
26 statutory mandate[s]” to “manage” federal programs *under § 706(1)*, is inapposite  
27 to Plaintiffs’ § 706(2) claim pinpointing particularized agency action violating a  
28 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).



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

5 Defendants make a factual argument that the alleged Turnback Policy does not  
6 exist, (ECF 192-1 at 15–18)—a question inappropriate for resolution on a motion to  
7 dismiss. Moreover, Defendants seek to undermine Plaintiffs’ allegations by pointing to  
8 their own admissions that asylum seekers are being asked to “come back,” given an  
9 appointment, or told they will be processed at some nebulous time in the future. (ECF  
10 192-1 at 15–16.) Defendants suggest that by “metering,” they are putting asylum  
11 seekers on a legitimate waitlist, but—as discussed in Section III.B.—their Turnback  
12 Policy actually deprives a significant number of asylum seekers of access to the  
13 asylum process. Thus, Defendants’ admissions confirm Plaintiffs’ allegations that as a  
14 matter of policy, CBP officers flout their statutory obligations to process asylum  
15 seekers. *See* 5 U.S.C. § 706(2)(C), (D); 8 U.S.C. § 1225(a)(3), (b)(1)(A)(ii). Taken  
16 together and as true, as required at the motion to dismiss stage, Plaintiffs’ factual  
17 allegations “allow[] the court to draw the reasonable inference” that CBP maintains an  
18 unlawful Turnback Policy actionable under § 706(2). *Iqbal*, 556 U.S. at 678.

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

21 Defendants’ adoption of the Turnback Policy and each turnback are “final  
22 agency actions” under § 706(2). Agency action is “final” when (1) it “mark[s] the  
23 ‘consummation’ of the agency’s decisionmaking process” and (2) as a result of the  
24 action, “‘rights or obligations have been determined,’ or . . . ‘legal consequences  
25 will flow.’” *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (quoting *Chi. & S. Air*  
26 *Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) and *Port of Bos.*  
27 *Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71  
28 (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.*

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

2 **1. The Turnback Policy Is a Final Agency Action.**

3 First, the Turnback Policy, as alleged, “is surely a ‘consummation of the  
4 agency’s decisionmaking process.’” *Venetian Casino Resort, LLC v. EEOC*, 530 F.3d  
5 925, 931 (D.C. Cir. 2008) (quoting *Bennett*, 520 U.S. at 178). An agency action  
6 satisfies the finality test’s first prong when it reflects a “conscious” and “deliberate  
7 decision,” *ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1137 (9th Cir.  
8 1998), and is not “merely tentative or interlocutory [in] nature,” *Bennett*, 520 U.S. at  
9 178. The Turnback Policy represents a consummation of the agency’s decisionmaking  
10 process because Defendants consciously and deliberately created it. (SAC ¶¶ 48–83.)  
11 Rather than being tentative or interlocutory, the Turnback Policy is “an active program  
12 implemented by the agency.” *Wagafe v. Trump*, Case No. C17-0094-RAJ, 2017 WL  
13 2671254, at \*10 (W.D. Wash. June 21, 2017); *see R.I.L.-R*, 80 F. Supp. 3d at 184  
14 (concluding an implemented policy directing an ongoing practice affecting individual  
15 cases was final agency action).

16 Second, legal consequences flow from the Turnback Policy because its active  
17 implementation affects asylum seekers at POEs. *See Aracely, R.*, 319 F. Supp. 3d at  
18 139 (finding a policy amounted to final agency action when Defendants’ actions had  
19 “actual or immediately threatened effects”); *Wagafe*, 2017 WL 2671254, at \*10  
20 (finding final agency action when a policy “affect[ed] the thousands of applicants  
21 whose qualified applications are allegedly indefinitely delayed or denied” pursuant to  
22 the policy). As alleged, the Turnback Policy deprived Individual Plaintiffs of the  
23 opportunity to seek asylum—violating their rights under the INA. (*See* ECF 192-1 at  
24 6–11 (revealing Defendants’ belief that if they succeed in preventing asylum seekers at  
25 POEs from setting foot across the international border pursuant to the Turnback Policy,  
26 CBP officers evade any legal duty to process them).) Defying the Congressional  
27 command to process asylum seekers, *supra* Section II, Defendants force them to  
28 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.<sup>12</sup> 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*,

<sup>12</sup> (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).)

1 594 F.2d 195, 197 (9th Cir. 1979)). Defendants in this case do not “hold”  
 2 applications for admission, unlike the agency in *Beshir v. Holder*. 10 F. Supp. 3d  
 3 165, 178–79 (D.D.C. 2014). Being told to “wait” has no bearing on whether an  
 4 asylum seeker is permitted to present herself at a POE in a “future yet distinct  
 5 administrative process.” *Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*,  
 6 543 F.3d 586, 593 (9th Cir. 2008); *see also Hosseini v. Johnson*, 826 F.3d 354, 362  
 7 (6th Cir. 2016) (noting that an applicant’s ability to “reapply . . . as often as he  
 8 wants” did not make denial of an application nonfinal). And each turnback reflects  
 9 a “conscious” and “deliberate decision” to limit access to the asylum process at  
 10 POEs. *ONRC Action*, 150 F.3d at 1137. (*E.g.*, SAC ¶¶ 1, 3, 8, 48–84.)

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

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

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

24 <sup>13</sup> *See Azam Ahmed, Migrants’ Despair Is Growing at U.S. Border. So Are*  
 25 *Smugglers’ Profits*, N.Y. Times (Jan. 6, 2019), [https://www.nytimes.com/2019/01/](https://www.nytimes.com/2019/01/06/world/americas/mexico-migrants-smugglers.html)  
 26 [06/world/americas/mexico-migrants-smugglers.html](https://www.nytimes.com/2019/01/06/world/americas/mexico-migrants-smugglers.html) (“As a result of this metering,  
 27 migrants are now waiting on the Mexican side of the border for weeks and months  
 28 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.”).

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

12 **1. Both the Turnback Policy and Individual Turnbacks**  
 13 **Exceed Defendants’ Authority and Occur Without**  
 14 **Observance of Statutorily Required Procedures.**

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

22 <sup>14</sup> Because the INA mandates that Defendants process asylum seekers at POEs,  
 23 claims that Defendants fail to do so are reviewable, and not “committed to agency  
 24 discretion by law,” because the statutory scheme is “not ‘drawn so that a court  
 25 would have no meaningful standard against which to judge’” Defendants’ conduct.  
 26 *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370–72 (2018)  
 27 (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)); *see also Regents of the Univ.*  
 28 *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).

<sup>15</sup> 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,



1 Furthermore, the Turnback Policy and individual turnbacks are *ultra vires* of  
 2 Defendants’ statutory authority because, as discussed in Section III.B.2, they result in  
 3 widespread denials of access to the asylum process. Under traditional tools of statutory  
 4 interpretation, Secretary Nielsen’s authority to “perform such other acts as [she] deems  
 5 necessary for carrying out” her authority to enforce the INA, (ECF 192-1 at 12  
 6 (quoting 8 U.S.C. § 1103(a)(3)), and to operate POEs, 6 U.S.C. § 202, simply cannot  
 7 include authority to contravene more specific provisions of the INA requiring the  
 8 processing of asylum seekers at POEs.<sup>16</sup> *Supra* Section II. Specific statutes control  
 9 over general ones. *See BNSF Ry. Co. v. Cal. Dep’t of Tax & Fee Admin.*, 904 F.3d  
 10 755, 766 (9th Cir. 2018). Defendants’ specific statutory obligation to inspect and  
 11 process asylum seekers—part of a directive “prescrib[ing] the terms and conditions  
 12 upon which [noncitizens] may come to this country” of the type “entrusted exclusively  
 13 to Congress,” *Kleindienst v. Mandel*, 408 U.S. 753, 766–67 (1972) (citations  
 14 omitted)—limits any general authority Defendants may have to control the flow of  
 15 travelers at the border and precludes Defendants from transforming that narrow  
 16 authority into a broader attempt to delay, deny and subvert the Congressionally  
 17 mandated asylum process. *See Ramirez*, 310 F. Supp. 3d at 20–22 (noting agency  
 18 conduct may be unlawful where a plaintiff identifies specific statutory provisions that  
 19 “clearly rein[ ] in the agency’s discretion” and “argue[s] that the agency ha[s] failed to  
 20 act in accordance with that mandate,” as Plaintiffs do here). A decision to radically  
 21 change this country’s asylum law at the border must be made by Congress, not by an

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23 which also violates § 706(2). *See Morton v. Ruiz*, 415 U.S. 199, 235 (1974)  
 24 (“Where the rights of individuals are affected, it is incumbent upon agencies to  
 25 follow their own procedures.”); *United States v. 1996 Freightliner Fld. Tractor*  
 26 *VIN 1FU YDXYB0TP822291*, 634 F.3d 1113, 1116 & n.9 (9th Cir. 2011) (“[T]he  
 27 government is bound by the regulations it imposes on itself.”).

28 <sup>16</sup> *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)).

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

4 Moreover, the cases Defendants cite regarding CBP’s general authority to  
5 search travelers, or to exclude them pursuant to a Congressional delegation of authority  
6 in times of war or international strife, do not address the specific statutory scheme  
7 related to asylum seekers.<sup>17</sup> In all of these cases, agency officials are carrying out a  
8 discretionary function in accordance with Congressional design, but Congress  
9 determined that asylum seekers should be treated differently. As the legacy  
10 Immigration and Naturalization Service (INS) explained in implementing final  
11 regulations under the 1980 Refugee Act, the “uniform asylum policy” driving the Act  
12 was “[a] fundamental belief that the granting of *asylum is inherently a humanitarian*  
13 *act distinct from the normal operation and administration of the immigration process.*”  
14 Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed.  
15 Reg. 30674-01, 30675 (July 27, 1990) (to be codified at 8 CFR Parts 3, 103, 208, 236,  
16 242, and 253) (emphasis added). Providing access to the asylum process is a non-  
17 discretionary mandate, unlike the ultimate decision to grant or deny asylum. The  
18 agency cannot seek to displace Congressional policy through an administrative re-  
19 write of the INA.<sup>18</sup>

20  
21 <sup>17</sup> *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272–75 (1973)  
22 (recognizing a limited power to stop travelers crossing a border in order to conduct  
23 routine searches of their belongings); *Carroll v. United States*, 267 U.S. 132, 154  
24 (1925) (similar); *United States ex. rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542–  
25 44 (1950) (discussing the Attorney General’s ability to exclude noncitizens in light  
26 of national security concerns in wartime pursuant to a Congressional grant of  
27 authority); *Shaughnessy v. United States ex. rel. Mezei*, 345 U.S. 206, 210–11  
28 (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.)

<sup>18</sup> 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*

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

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

16 Courts must ensure an agency has not “relied on factors which Congress has  
 17 not intended it to consider, . . . [or] offered an explanation for its decision that runs  
 18 counter to the evidence before the agency, or is so implausible that it could not be  
 19 ascribed to a difference in view or the product of agency expertise.” *San Luis &*  
 20 *Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994–95 (9th Cir. 2014)  
 21 (quoting *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*,  
 22 463 U.S. 29, 43 (1983)).<sup>20</sup>

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

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

28 <sup>20</sup> 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



1 Here, Plaintiffs plausibly allege that the Turnback Policy is motivated by  
 2 deterrence (SAC ¶¶ 4–6, 48, 61, 66, 72–73, 76–78, 109, 111, 274), which is not a  
 3 factor that Congress intended the agency to consider when processing asylum  
 4 seekers at POEs. Even if some measure of delay in processing asylum seekers at  
 5 POEs might be lawful under certain types of exigent circumstances not present  
 6 here, that is not the principal factor driving turnbacks. *See Aracely R.*, 319 F. Supp.  
 7 3d at 154 (finding plaintiffs’ challenge to a policy that took deterrence into account  
 8 when making parole determinations showed a likelihood of success on the merits  
 9 by “demonstrat[ing] the incompatibility of the deterrence policy and [applicable  
 10 law]”); *R.I.L-R*, 80 F. Supp. 3d at 174–76 (similar); *cf. Am. Baptist Churches v.*  
 11 *Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991) (“[F]oreign policy and border  
 12 enforcement considerations are not relevant to the determination of whether an  
 13 applicant for asylum has a well-founded fear of persecution[.]”).

14 In addition, the Court must accept as true Plaintiffs’ allegations that lack of  
 15 capacity is an unsubstantiated excuse that runs counter to the evidence before the  
 16 agency, despite Defendants’ self-serving statements to the contrary. (*See, e.g.*,  
 17 SAC ¶¶ 3, 72, 76–78 (alleging the “capacity” excuse is false).<sup>21</sup>) Defendants’  
 18 mischaracterization of Plaintiffs’ argument as seeking “entry upon demand, at any  
 19 point in time, regardless of whether the port has the capacity,” (ECF 192-1 at 1), is

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

28 <sup>21</sup> *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”).

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

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

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

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

22 <sup>22</sup> The TRAC factors are: (1) whether the agency’s timeline is governed by a “rule  
 23 of reason”; (2) whether “Congress has provided a timetable or other indication of the  
 24 speed with which it expects the agency to proceed in the enabling statute”; (3) & (5)  
 25 (usually considered together) the “nature and extent of the interests prejudiced by the  
 26 delay,” with delays “that might be reasonable in the sphere of economic regulation  
 27 [being] less tolerable than when human health and welfare are at stake”; (4) “the effect  
 28 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)).

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

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

#### 11 **IV. PLAINTIFFS STATE DUE PROCESS CLAIMS, EVEN IF THEY** 12 **WERE IN MEXICO WHEN TURNED BACK.**

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

18 <sup>23</sup> In addition to the dispositive nature of bad faith in *TRAC* analysis, bad faith is  
19 also a basis to determine that an agency acted unlawfully under § 706(2)(A). *Simmons*  
20 *v. Smith*, 888 F.3d 994, 1001 (8th Cir. 2018); *see Styrene Info. & Research Ctr., Inc. v.*  
21 *Sebelius*, 944 F. Supp. 2d 71 (D.D.C. 2013) (explaining that under § 706(2)(A), “the  
22 reasonableness of the agency’s actions is judged in accordance with its stated  
23 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 <sup>24</sup> Though bad faith is dispositive in this case, Plaintiffs also have strong,  
25 uniformly applicable allegations on all other *TRAC* factors: (1) Delays in  
26 processing are arbitrary and based on a scheme to flout the mandatory duty to  
27 process rather than on a rule of reason; (2) the statutory structure and legislative  
28 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.

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

9 Specifically, in *Boumediene*—a critical decision that Defendants largely elide—  
10 the Supreme Court announced that, in assessing noncitizens’ extraterritorial  
11 constitutional rights, a court should no longer apply the “formalistic,” “rigid and  
12 abstract rule” that Defendants urge here; rather courts should examine the ““particular  
13 circumstances, the practical necessities, and the possible alternatives which Congress  
14 had before it’ and, *in particular*, whether judicial enforcement of the provision would  
15 be ‘impracticable and anomalous.’” 553 U.S. at 759, 762 (quoting *Reid v. Covert*, 354  
16 U.S. 1, 74–75 (1957) (Harlan, J., concurring)) (emphasis added). In short, “questions  
17 of extraterritoriality turn on objective factors and practical concerns, not formalism.”  
18 *Id.* at 764; *see also Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983, 995 (9th Cir.  
19 2012) (explaining “the Supreme Court has held . . . that the border of the United States  
20 is not a clear line that separates aliens who may bring constitutional challenges from  
21 those who may not,” and collecting cases).<sup>25</sup>

22 <sup>25</sup> The *Boumediene* Court examined various practical concerns, including  
23 whether it would be “impracticable and anomalous” to apply the Suspension  
24 Clause to Guantanamo detainees, but it never discussed the “voluntary  
25 connections” test from *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990),  
26 that Defendants now press this Court to apply. (ECF 192-1 at 20–21.) Given  
27 *Boumediene*, it is not possible that, as Defendants argue, the “voluntary  
28 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.

1 Defendants make no reference to the “impracticable and anomalous” test  
2 *Boumediene* applied or the functional approach it mandated. But there would be  
3 nothing “impracticable [or] anomalous” in applying elementary due process  
4 protections at the U.S. border. *See Rodriguez*, 899 F.3d at 731 (holding that the Fourth  
5 Amendment applies to cross-border shooting because, “unlike the American agents in  
6 [*United States v.*] *Verdugo-Urquidez*, [494 U.S. 259 (1990),] who acted on Mexican  
7 soil, Swartz acted on American soil”). Furthermore, *Verdugo-Urquidez*, upon which  
8 Defendants so heavily rely, says nothing about routine CBP operations in the  
9 immediate vicinity of the border. Unlike the U.S. Drug Enforcement Agency’s one-  
10 time search of a criminal suspect’s residences in Mexican cities, *Verdugo-Urquidez*,  
11 494 U.S. at 262, to which it would indeed be “impractical and anomalous” to apply  
12 constitutional due process, Plaintiffs here urge the court to require CBP officers who  
13 routinely enforce statutes “pertain[ing] to activity at or near international borders,”  
14 *Villanueva*, 408 F.3d at 199, to comply with due process in the enforcement of those  
15 statutes. Plaintiffs’ constitutional claims rest squarely within the Supreme Court’s  
16 longstanding command that “[i]n the enforcement of [Congress’s] policies [pertaining  
17 to the entry of aliens], the Executive Branch . . . must respect the procedural safeguards  
18 of due process.” *Mandel*, 408 U.S. at 766–67 (quoting *Galvan v. Press*, 347 U.S. 522,  
19 531 (1954)).

20 In addition, the “particular circumstances, the practical necessities, and the  
21 possible alternatives which Congress had before it” illustrate that there are no  
22 functional challenges to applying basic due process to interactions between U.S.  
23 officials and Individual Plaintiffs seeking entry who might be just steps away from  
24 the U.S. border. *Boumediene*, 553 U.S. at 759. First, the “particular circumstances”  
25 of the Individual Plaintiffs’ situation are those of U.S. officials standing on U.S.  
26 soil implementing U.S. policy to deny entry to noncitizens just steps from the U.S.  
27 border. Second, “the practical necessities” involve the creation of a dangerous band  
28

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

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

10 **V. THE COURT MAY REVIEW PLAINTIFFS’ INA AND DUE  
 PROCESS CLAIMS INDEPENDENTLY OF THE APA.**

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

16 A claim that an agency acted *ultra vires* of statutory authority or  
 17 unconstitutionally is actionable separately from the APA through so-called  
 18 “nonstatutory review.” *See R.I. Dep’t of Env’tl. Mgmt. v. United States*, 304 F.3d  
 19 31, 42 (1st Cir. 2002); *Clinton v. Babbitt*, 180 F.3d 1081, 1087 (9th Cir. 1999)  
 20 (recognizing nonstatutory review); *Olivas v. Whitford*, No. 14cv1434-WQH-BLM,  
 21 2015 WL 867350, at\*4–6 (S.D. Cal. Mar. 2, 2015) (allowing a nonstatutory review  
 22 action seeking non-monetary relief from government officials allegedly violating  
 23 the plaintiff’s constitutional rights under the general grant of subject matter  
 24 jurisdiction found in 28 U.S.C. § 1331, and concluding Congress waived sovereign  
 25 immunity in 5 U.S.C. § 702). Nonstatutory review is available when plaintiffs have

26 \_\_\_\_\_  
 27 <sup>26</sup> This issue was not squarely addressed in the briefing on Defendants’ first  
 28 motion to dismiss, given that Defendants did not specifically move to dismiss  
 Plaintiffs’ INA or constitutional claims on this basis.



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

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

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

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

25 Defendants’ understanding of Plaintiffs’ ATS claims is deeply confused. (*See*  
 26 ECF 192-1 at 22–25.) Plaintiffs do not seek to directly enforce U.S. treaty obligations  
 27 in this Court. Instead, as they allege in Count Five, they seek to enforce the *jus cogens*  
 28 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

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

7 The duty of *non-refoulement* has achieved the status of a *jus cogens* norm—  
 8 *i.e.* “an elite subset of . . . customary international law” from which no derogation  
 9 is ever permitted, *Siderman de Blake v. Rep. of Argentina*, 965 F.2d 699, 714-15  
 10 (9th Cir. 1992)—and satisfies this *Sosa* requirement, as Plaintiffs have alleged.  
 11 (SAC ¶¶ 234, 296.)<sup>28</sup> Other than remarking that *refoulement* is not as egregious a  
 12 human rights violation as torture, (ECF 192-1 at 25), (while ignoring that  
 13 numerous Plaintiffs *would* face torture if returned to their home countries or forced  
 14 to remain in Mexico), Defendants make *no* arguments to the contrary and have  
 15 waived their opportunity to do so.

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

22 <sup>27</sup> “[T]he APA’s unqualified waiver of sovereign immunity supplies a waiver  
 23 for the [nonmonetary] ATS claims asserted in this case.” (ECF 166 at 31.) It does  
 24 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.

25 <sup>28</sup> To determine whether a norm of customary international law has attained *jus*  
 26 *cogens* status, courts look to ““the works of jurists,”” ““the general usage and  
 27 practice of nations,”” and judicial decisions on international law, and must in  
 28 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)).

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

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

24 Relying on an inaccurate characterization of the SAC, Defendants assert that  
25 Individual Plaintiffs cannot enforce the duty of *non-refoulement* through their ATS  
26 claim if CBP officers turned them back when they were still on Mexican territory.  
27 Citing to a lengthy section of *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155,  
28 180–87 (1993), Defendants’ only argument on that point is that the United States

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

5 In *Sale*, the Court held that the *non-refoulement* provision in Article 33 of  
6 the Refugee Convention and the since-abrogated INA § 243(h)(1), 8 U.S.C.  
7 § 1253(h)(1), did not apply to the Coast Guard’s interdiction and forced  
8 repatriation of Haitian refugees on the high seas. 509 U.S. at 159. *Sale* is  
9 unambiguously limited to government action undertaken in international waters,  
10 not government actions at the U.S.-Mexico border. *Sale* does not analyze the ATS  
11 or customary international law, and the Court’s discussion of the Refugee  
12 Convention, upon which Defendants rely, is explicitly focused on the context of  
13 the high seas. *Id.* at 177 (questioning refugee rights of noncitizens “beyond the  
14 territorial waters of the United States”); *id.* at 187 (concluding Article 33 does not  
15 “apply to aliens interdicted on the high seas”). Because the *Sale* Court was focused  
16 on a very different geographic context, its discussion of U.S. conduct at the border  
17 is imprecise and inapposite to the questions before this Court.

18 Any understanding of the duty of *non-refoulement* that permits Defendants’  
19 challenged conduct at the U.S.-Mexico border would completely undermine this  
20 binding *jus cogens* norm, by allowing countries to militarize their borders and  
21 prevent anyone from entering or leaving a territory, including refugees and asylum  
22 seekers. Accordingly, all Plaintiffs have stated a cognizable claim under the ATS,  
23 which authorizes the declaratory and injunctive relief Plaintiffs seek. *See Inst. of*  
24 *Cetacean Research v. Sea Shepherd Conservation Soc’y*, 725 F.3d 940, 944–45  
25 (9th Cir. 2013).

## 26 **VII. THIS CASE DOES NOT PRESENT A POLITICAL QUESTION.**

27 The political question doctrine (“PQD”) is a “narrow exception” to the  
28 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

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

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

16 Plaintiffs do not question the wisdom of any diplomatic decisionmaking  
17 between the United States and Mexico, and Defendants do not identify a particularly  
18 sensitive political or discretionary inter-governmental decision that is in play or would  
19 be jeopardized by adjudication of Plaintiffs’ claims. Instead, Plaintiffs challenge the  
20 legality of Defendants’ Turnback Policy and individual turnbacks. *See El-Shifa*  
21 *Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010)  
22 (distinguishing claims that question whether military action was “wise” as  
23 nonjusticiable “policy choice” committed to executive discretion, from claims  
24 “presenting purely legal issues such as whether the government had legal authority to  
25

---

26 <sup>29</sup> Indeed, in the fifty years since *Baker v. Carr*, 369 U.S. 186 (1962), and  
27 despite numerous invocations, the Supreme Court has ordered a case dismissed on  
28 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)).

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

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

23 Specifically, Plaintiffs’ policy-related allegations attribute illegality squarely to  
24 U.S. officials, including Defendants McAleenan and Nielsen and various POE  
25 officials—and seek to enjoin their nondiscretionary unlawful conduct. (*See* SAC ¶¶ 51,  
26 55–57, 60, 65, 68–71, 74–76, 78.) Plaintiffs’ allegations regarding expert and NGO  
27 reports similarly attribute the Turnback Policy directly to U.S. officials. (SAC ¶¶ 107–  
28 15.) Like the Plaintiffs in the original Complaint, each of the new Plaintiffs added to



1 the SAC attributes illegal conduct to CBP personnel. (SAC ¶¶ 154–56 (Roberto Doe),  
2 162, 166–67 (Maria Doe), 174 (Úrsula and Juan Doe), 181 (Victoria Doe), 185, 188  
3 (Bianca Doe), 193 (Emiliana Doe), 199 (César Doe).) And each of Plaintiffs’ various  
4 causes of action challenges the illegality of Defendants’ conduct. (SAC ¶¶ 247–52  
5 (attributing conduct challenged in Count One directly to Defendants, independent of  
6 Mexican “cooperation”), 258–65 (same for Count Two), 272–78 (same for Count  
7 Three), 287–91 (same for Count Four), 295–301 (same for Count Five).) Plaintiffs do  
8 not ask the Court to enjoin Mexican officials’ conduct.

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

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

#### 19 **VIII. AL OTRO LADO STATES COGNIZABLE CLAIMS.**

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

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

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

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

13 Defendants argue for dismissal of Abigail, Beatrice and Carolina Doe’s APA  
14 § 706(1) claims because they withdrew their applications for admission, despite the  
15 fact that CBP coerced them into doing so. While conceding that a noncitizen’s  
16 decision to withdraw an application for admission must be voluntary, (ECF 192-1  
17 at 30 n.10), Defendants maintain these Plaintiffs’ allegedly coerced withdrawals  
18 terminated Defendants’ obligation to process them, (ECF 192-1 at 29–30).  
19 However, this Court previously held that these Plaintiffs stated § 706(1) claims  
20 based on their alleged denial of access to the U.S. asylum process. (ECF 166 at  
21 43.)<sup>30</sup>

22  
23  
24  
25  
26 <sup>30</sup> Plaintiffs respectfully disagree with and preserve for appeal the Court’s  
27 conclusion that it cannot compel relief under § 706(1) based on Defendants’  
28 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.

Dated: February 14, 2019

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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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**Responses and Replies**[3:17-cv-02366-BAS-KSC Al Otro Lado, Inc. et al v. Nielsen, et al](#)

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Abigail Doe  
Beatrice Doe  
Bianca Doe  
Carolina Doe  
Cesar Doe  
Dinora Doe  
Emiliana Doe  
Ingrid Doe  
Jose Doe  
Juan Doe  
Maria Doe  
Roberto Doe  
Victoria Doe  
Ursula Doe

**Document Number:** [210](#)**Docket Text:**

**RESPONSE in Opposition re [192] MOTION to Dismiss for Failure to State a Claim filed by Al Otro Lado, Inc., Abigail Doe, Beatrice Doe, Bianca Doe, Carolina Doe, Cesar Doe, Dinora Doe, Emiliana Doe, Ingrid Doe, Jose Doe, Juan Doe, Maria Doe, Roberto Doe, Victoria Doe, Ursula Doe. (Abascal, Manuel)**

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