

1 MAYER BROWN LLP
 2 Matthew H. Marmolejo (CA Bar No. 242964)
 3 *mmarmolejo@mayerbrown.com*
 350 S. Grand Avenue
 25th Floor
 Los Angeles, CA 90071-1503
 4 Ori Lev (DC Bar No. 452565)
 (*pro hac vice*)
 5 *olev@mayerbrown.com*
 Stephen M. Medlock (VA Bar No. 78819)
 6 (*pro hac vice*)
smedlock@mayerbrown.com
 7 1999 K Street, N.W.
 Washington, D.C. 20006
 8 Telephone: +1.202.263.3000
 Facsimile: +1.202.263.3300

9
 10 SOUTHERN POVERTY LAW CENTER
 Melissa Crow (DC Bar No. 453487)
 (*pro hac vice*)
 11 *melissa.crow@splcenter.org*
 1101 17th Street, N.W., Suite 705
 12 Washington, D.C. 20036
 Telephone: +1.202.355.4471
 13 Facsimile: +1.404.221.5857

14 *Additional counsel listed on next page*
 15 *Attorneys for Plaintiffs*

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

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

19 Plaintiffs,

20 v.

21 Chad F. Wolf,¹ *et al.*,

22 Defendants.

Case No.: 17-cv-02366-BAS-KSC

**PLAINTIFFS' MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT OF THEIR MOTION
 FOR SUMMARY JUDGMENT**

REDACTED PUBLIC VERSION

Special Briefing Schedule Ordered (*See*
 Dkt. 518)

**NO ORAL ARGUMENT UNLESS
 REQUESTED BY THE COURT**

27 ¹ Acting Secretary Wolf is automatically substituted for former Acting Secretary
 28 McAleenan pursuant to Fed. R. Civ. P. 25(d).

1 CENTER FOR CONSTITUTIONAL RIGHTS

Baher Azmy (NY Bar No. 2860740) (*pro hac vice*)

2 *bazmy@ccrjustice.org*

3 Ghita Schwarz (NY Bar No. 3030087) (*pro hac vice*)

gschwarz@ccrjustice.org

4 Angelo Guisado (NY Bar No. 5182688) (*pro hac vice*)

aguisado@ccrjustice.org

5 666 Broadway, 7th Floor

New York, NY 10012

6 Telephone: +1.212.614.6464

7 Facsimile: +1.212.614.6499

8 SOUTHERN POVERTY LAW CENTER

Sarah Rich (GA Bar No. 281985) (*pro hac vice*)

9 *sarah.rich@splcenter.org*

Rebecca Cassler (MN Bar No. 0398309) (*pro hac vice*)

10 *rebecca.cassler@splcenter.org*

150 E. Ponce de Leon Ave., Suite 340

11 Decatur, GA 30030

12 Telephone: +1.404.521.6700

Facsimile: +1.404.221.5857

13 AMERICAN IMMIGRATION COUNCIL

14 Karolina Walters (DC Bar No. 1049113) (*pro hac vice*)

kwalters@immcouncil.org

15 1331 G St. NW, Suite 200

16 Washington, D.C. 20005

Telephone: +1.202.507.7523

17 Facsimile: +1.202.742.5619

18

19

20

21

22

23

24

25

26

27

28

TABLE OF CONTENTS

Page

1 I. INTRODUCTION 1

2 II. THE UNDISPUTED FACTS..... 4

3 A. Overview of Defendants’ Unlawful Conduct 4

4 B. Defendants Adopt the Turnback Policy 7

5 C. Defendants Implement the Turnback Policy Border-Wide..... 9

6 D. Defendants Knew that the Turnback Policy Violated the Law..... 11

7 E. Defendants Memorialize Aspects of the Turnback Policy..... 12

8 F. Defendants Begin Using “Operational Capacity” As a Metric..... 14

9 G. Defendants Harmed the Class and Al Otro Lado..... 16

10 III. LEGAL STANDARD 18

11 IV. ARGUMENT 18

12 A. The Turnback Policy Violates the APA and INA..... 18

13 B. The Turnback Policy Violates the Due Process Clause..... 31

14 C. The Turnback Policy Violates the ATS 33

15 D. The Court Should Enter A Permanent Injunction..... 36

16 E. The Court Should Enter A Declaratory Judgment 38

17 V. CONCLUSION 39

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

FEDERAL CASES

Al Otro Lado v. Wolf,
952 F.3d 999 (9th Cir. 2020)..... 22, 24

Allstate Ins. Co. v. Farmers Ins. Exch.,
2008 WL 11508663 (S.D. Cal. 2008) 19

Aracely, R. v. Nielsen,
319 F. Supp. 3d 110 (D.D.C. 2018) 30

Bennett v. Spear,
520 U.S. 154 (1997) 20, 21

Bostock v. Clayton Cnty., Ga.,
140 S. Ct. 1731 (2020) 25

California v. Trump,
963 F.3d 926 (9th Cir. 2020)..... 39

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 19

County of Sacramento v. Lewis,
523 U.S. 833 (1998) 32, 33

Dep’t of Commerce v. New York,
139 S. Ct. 2551 (2019) 26

DHS v. Regents of the Univ. of Calif.,
140 S. Ct. 1891 (2020) 27, 29

E. Bay Sanctuary Covenant v. Trump,
349 F. Supp. 3d 838 (N.D. Cal. 2018) 37

eBay Inc. v. MercExchange LLC,
547 U.S. 388 (2006) 37

EBSC v. Barr,
964 F.3d 832 (9th Cir. 2020)..... 26, 37

1 *EBSC v. Trump*,
 2 932 F.3d 742 (9th Cir. 2018)..... 24

3 *EBSC v. Trump*,
 4 950 F.3d 1242 (9th Cir. 2020)..... 31, 32

5 *GEICO v. Dizol*,
 6 133 F.3d 1220 (9th Cir. 1998)..... 39

7 *Goldberg v. Kelly*,
 8 397 U.S. 254 (1970) 33

9 *Graham v. FEMA*,
 10 149 F.3d 997 (9th Cir. 1998)..... 32

11 *Hansen v. United States*,
 12 7 F.3d 137 (9th Cir. 1993)..... 19

13 *Hernandez v. Sessions*,
 14 872 F.3d 976 (9th Cir. 2017)..... 37

15 *I.N.S. v. Stevic*,
 16 467 U.S. 407 (1984) 34

17 *Innovation Law Lab v. Wolf*,
 18 951 F.3d 1073 (9th Cir. 2020)..... 35

19 *Kleindienst v. Mandel*,
 20 408 U.S. 753 (1972) 25, 32

21 *LaDuke v. Nelson*,
 22 762 F.2d 1318 (9th Cir. 1985)..... 37, 38

23 *League of Women Voters of U.S. v. Newby*,
 24 838 F.3d 1 (D.C. Cir. 2016)..... 38

25 *Lujan v. Nat’l Wildlife Federation*,
 26 497 U.S. 871 (1990) 21

27 *Lyng v. Payne*,
 28 476 U.S. 926 (1986) 24

Marincas v. Lewis,
 92 F.3d 195 (3d Cir. 1996)..... 33

1 *McGraw-Edison Co. v. Preformed Line Products Co.*,
 2 362 F.2d 339 (9th Cir. 1966)..... 4, 39

3 *Meachum v. Fano*,
 4 427 U.S. 215 (1976) 32

5 *Munyua v. United States*,
 6 2005 WL 43960 (N.D. Cal. 2005)..... 4

7 *Navajo Nation v. Dep’t of the Interior*,
 8 876 F.3d 1144 (9th Cir. 2017)..... 19

9 *Nken v. Holder*,
 10 556 U.S. 418 (2009) 38

11 *Norton v. S. Utah Wilderness All.*,
 12 542 U.S. 55 (2004) 22

13 *ONRC Action v. Bureau of Land Mgmt.*,
 14 150 F.3d 1132 (9th Cir. 1998)..... 20

15 *Orantes-Hernandez v. Thornburgh*,
 16 919 F.2d 549 (9th Cir. 1990)..... 36

17 *Perales v. Reno*,
 18 48 F.3d 1305 (2d Cir. 1995)..... 32

19 *Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep’t of*
 20 *Health & Human Servs.*,
 21 946 F.3d 1100 (9th Cir. 2020)..... 22, 23, 25

22 *Principal Life Ins. Co. v. Robinson*,
 23 394 F.3d 665 (9th Cir. 2005)..... 39

24 *R.I.L-R v. Johnson*,
 25 80 F. Supp. 3d 164 (D.D.C. 2015) 20, 31

26 *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*,
 27 566 U.S. 639 (2012) 26

28 *San Luis & Delta-Mendota Water Auth. v. Locke*,
 776 F.3d 971 (9th Cir. 2014)..... 26, 30

1 *Siderman de Blake v. Rep. of Arg.*,
 2 965 F.2d 699 (9th Cir. 1992)..... 34

3 *Sierra Club v. Trump*,
 4 963 F.3d 874 (9th Cir. 2020)..... 37, 38

5 *Sosa v. Alvarez-Machain*,
 6 542 U.S. 692 (2004) 34

7 *Superintendent v. Hill*,
 8 472 U.S. 445 (1985) 33

9 *Tripoli Rocketry Ass’n, Inc. v. ATF*,
 10 437 F.3d 75 (D.C. Cir. 2006) 26, 27, 28, 29

11 *Util. Air Regulatory Grp. v. E.P.A.*,
 12 573 U.S. 302 (2014) 24

13 *Wagafe v. Trump*,
 14 2017 WL 2671254 (W.D. Wash. 2017) 20, 21

15 *Walters v. Reno*,
 16 145 F.3d 1032 (9th Cir. 1998)..... 37

17 **OTHER CASES**

18 *Abdolkhani & Karimnia v. Turkey*,
 19 App. No. 30471/08 (Eur. Ct. H.R., Sep. 22, 2009) 34

20 *Hirsi Jamaa and Others v. Italy*,
 21 App. No. 27765/09 (Eur. Ct. H.R., Feb. 23, 2012) 34, 35, 36

22 *Ilias v. Hungary*,
 23 App. No. 47287/15 (Eur. Ct. H.R. Mar. 14, 2017)..... 34

24 *M.S.S. v. Belgium and Greece*,
 25 App. No. 30696/09 (Eur. Ct. H.R., Jan. 21, 2011)..... 34

26 *T.I. v. United Kingdom*,
 27 App. No. 43844/98 (Eur. Ct. H.R., Mar. 7, 2000)..... 36

28

1 **FEDERAL STATUTES**

2 5 U.S.C.

3 § 704 19

4 § 706(1)..... 2, 22, 24, 25

5 § 706(1), (2)(A), (C)..... 19

6 § 706(2)..... 2, 22, 24, 25

7 § 706(2)(A), (C)..... 22, 24, 26

8 8 U.S.C.

9 §§ 1158(a)(1) 22

10 § 1225 22, 24, 31, 32

11 § 1225(a)(3) 4, 22

12 § 1225(b)(1)..... 4

13 § 1225(b)(1)(a)(ii) 22

14 §§ 1225(b)(2)..... 4

15 § 1229(a)(1) 28

16 28 U.S.C.

17 § 1350 34

18 § 2201(a)..... 39

19 **OTHER AUTHORITIES**

20 8 C.F.R. § 235.3(b)(4) 22

21 Elyssa Pachico and Maureen Meyer, *One Year After U.S.-Mexico*

22 *Migration Deal, a Widespread Humanitarian Disaster*, WOLA

23 (Jun. 6, 2020) 36

24 Fed. R. Civ. P. 23(b)(2) 37

25 Fed. R. Civ. P. 30(b)(6) 23

26 Fed. R. Civ. P. 56(c) 19

27 H.R. Conf. Rep. No. 104-828, at 209 (1996) 31

28 U.N. High Comm’r for Refugees, *Note on International Protection* 34, 35

1 **I. INTRODUCTION**

2 Every day at ports of entry (“POEs”) on the U.S.-Mexico border, U.S.
3 Customs and Border Protection (“CBP”) officers inspect thousands of people in
4 vehicles in the order that those vehicles arrive at POEs. Until 2016, CBP officers
5 also inspected thousands of pedestrians who traveled to POEs in the order that those
6 pedestrians arrived at POEs. In May 2016, everything changed. Starting at the San
7 Ysidro POE, CBP officers began turning asylum seekers—and only asylum
8 seekers—back to Mexico, telling them that if they wanted to be inspected and
9 processed—actions required by statute—they needed to return to the POE “later.”
10 Later that year, Defendants decided to expand this turnback policy to other POEs
11 along the southern border, instead of doing what they have always done—finding
12 solutions that enable them to inspect and process asylum seekers as they arrive at
13 POEs.

14 Initially, Defendants did not put the turnback policy in writing, keeping it in
15 a self-admitted gray area that CBP used to justify turning back asylum seekers by
16 various means. Then, in the spring of 2018, CBP and the U.S. Department of
17 Homeland Security (“DHS”) issued memos memorializing aspects of the turnback
18 policy—referred to as “metering” or “queue management.” As Defendants drafted
19 these memos, they explicitly contemplated turning back hundreds of asylum seekers
20 at POEs each day pursuant to the memos, and disregarded obvious signs that a
21 humanitarian disaster in Mexico would result. Then, they denied POEs permission
22 to inspect and process asylum seekers more quickly.

23 The turnback policy is based on a lie. CBP told asylum seekers that POEs
24 were “at capacity” when the POEs were actually well below capacity. Even in the
25 rare cases where the capacity of a POE was close to 100% utilized, inspecting and
26 processing asylum seekers had minimal or no impact on other POE operations. As a
27 result, the “capacity excuse was a lie” that “was obvious to everybody” that
28

1 implemented it at POEs. Ex. 1 at 100:25-101:6.² Moreover, Defendants “lack[ed]
2 candor to the public [by not] stating the true facts that [CBP is] . . . blocking asylum
3 to persons and families in order to block the flow of asylum applicants.” Ex. 2 at
4 132. Meanwhile, behind the scenes, CBP officials admitted that the turnback policy
5 broke the law. Ex. 2 (“[CBP] [r]epresentatives acknowledged that [CBP’s] unilateral
6 work policies broke . . . Federal immigration rules and Laws”); Ex. 3 at 125:2-15.

7 The turnback policy violates the Immigration and Nationality Act (“INA”),
8 the Administrative Procedure Act (“APA”), the Due Process Clause of the Fifth
9 Amendment, and the Alien Tort Statute (“ATS”) for several reasons. *First*, as this
10 Court has already recognized, turnbacks amount to unlawful withholding of a
11 discrete mandatory duty to inspect and process asylum seekers in violation of APA
12 § 706(1). *Second*, turnbacks are at odds with the statutory scheme governing POEs
13 in violation of APA § 706(2). *Third*, overwhelming and undisputed evidence shows
14 that Defendants’ stated justification for the turnback policy is a pretext, their real
15 motivations are unlawful, and the policy is otherwise arbitrary and capricious in
16 violation of the APA. *Fourth*, since the turnback policy violates the statutory
17 procedure for inspecting and processing asylum seekers and otherwise represents an
18 arbitrary deprivation of a statutory entitlement, the policy violates the Due Process
19 Clause. *Fifth*, the turnback policy violates the ATS because it violates the specific,
20 universal, and obligatory norm of *non-refoulement*.

21 Defendants claim that they turned back asylum seekers to maintain the
22 “operational capacities” of POEs. *See* Dkt. 283 at ¶ 7. This argument fails for two
23 reasons. *First*, turnbacks are unlawful regardless of Defendants’ justification for
24 them. *Second*, even if Defendants’ justification were theoretically relevant, it is
25 undisputed that Defendants never defined the term “operational capacity,” do not
26 track “operational capacity,” cannot calculate the “operational capacity” of any POE,

27 _____
28 ² “Ex.” refers to the exhibits to the concurrently filed Declaration of Stephen M. Medlock.

1 and cannot link the decision to turn back asylum seekers to particular changes in
2 “operational capacity.” Since Defendants cannot define, track or calculate
3 “operational capacity”—or link it to the decision to turn back asylum seekers—it is
4 not, in fact, a justification for their conduct.

5 Because Plaintiffs succeed on the merits, a permanent injunction is warranted.
6 **First**, Plaintiffs have suffered irreparable injuries. Class members have been killed,
7 raped, and seriously injured after Defendants turned them back to Mexico. In
8 addition, class members’ loss of the right to seek asylum constitutes a loss of
9 statutory and constitutional rights that courts recognize as irreparable harm.
10 Similarly, Al Otro Lado suffered irreparable harm when it was forced to radically
11 change its operations in order to account for the turnback policy. **Second**, there is no
12 adequate remedy at law. Neither a declaratory judgment nor monetary damages
13 could adequately ensure access to the asylum process or prevent the harm that results
14 from class members being turned back at the U.S. border and left stranded in
15 dangerous border towns in Mexico. **Third**, the balance of hardships tips decisively
16 in Plaintiffs’ favor. Plaintiffs only ask that asylum seekers be treated the same as
17 others who approach POEs, consistent with Defendants’ longstanding practices. Any
18 asserted administrative burden on Defendants cannot outweigh the risk of
19 persecution, serious injury, and death that class members face when turned back.
20 **Fourth**, there is a strong public interest in Executive Branch agencies following the
21 plain language of the INA and complying with international law. There is no public
22 interest in violating the law. Because there is no genuine factual dispute concerning
23 the permanent injunction factors, Plaintiffs request that the Court enter a permanent
24 injunction prohibiting all forms of turnbacks and requiring Defendants to inspect
25 asylum seekers as they arrive at Class A POEs on the U.S.-Mexico border.

26 Furthermore, since the undisputed facts show that Defendants broke the law,
27 this Court should enter a declaratory judgment that the turnback policy violates the
28 INA, the APA, class members’ procedural due process rights under the Fifth

1 Amendment, and the ATS. *See McGraw-Edison Co. v. Preformed Line Products*
2 *Co.*, 362 F.2d 339, 342 (9th Cir. 1966) (declaratory relief is appropriate regardless
3 of “whether . . . further relief is . . . sought”).

4 **II. THE UNDISPUTED FACTS**

5 **A. Overview of Defendants’ Unlawful Conduct**

6 There is no cap on the number of asylum seekers who may arrive in the U.S.
7 in a particular time period. Dkt. 260 at 4:24-5:2 (“there aren’t limits on the number
8 of people who can seek asylum.”). When a person without entry documents is
9 arriving at a POE and asserts a fear of return to her home country or an intention to
10 seek asylum, CBP must inspect her, *see* 8 U.S.C. § 1225(a)(3), and process her—
11 either refer the asylum seeker for an interview with an asylum officer, *see* 8 U.S.C.
12 § 1225(b)(1), or place the asylum seeker into removal proceedings, which allows her
13 to pursue asylum in immigration court, *see* 8 U.S.C. §§ 1225(b)(2), 1229a. CBP’s
14 statutory duty to inspect and process arriving asylum seekers is “not discretionary.”
15 *Munyua v. United States*, 2005 WL 43960, at *6 (N.D. Cal. 2005).

16 In 2016, Defendants departed from this congressionally-mandated process
17 and implemented a policy to turn back asylum seekers who were in the process of
18 arriving at POEs on the U.S.-Mexico border. *See* Ex. 1 at 46:12-21; Ex. 3 at 55:8-
19 15. The policy was first implemented at the San Ysidro POE, the largest POE on the
20 U.S.-Mexico border. By the end of 2016, it had spread to other major POEs. Shortly
21 thereafter, it was implemented at every Class A POE on the U.S.-Mexico border.³

22 Initially, CBP management decided [REDACTED]—
23 a practice that CBP uses when [REDACTED] Ex. 5
24 at 366 (CBP kept turnbacks “[REDACTED]
25 [REDACTED]”); Ex. 6 (head of CBP’s Office of Field Operations (“OFO”) stating that
26 he was “[REDACTED]” but “[REDACTED]

27
28 ³ A Class A POE is open to all travelers, including asylum seekers. Ex. 4 at 75:18-76:8.

1 [REDACTED]). This [REDACTED] meant that,
2 initially, CBP turned back asylum seekers from POEs using a variety of tactics. CBP
3 officers lied to some, Ex. 1 at 99:25-101:6; Ex. 3 at 145:3-7; coerced some to
4 withdraw their applications for admission, Ex. 7 at 611 (permitting the use of
5 “[REDACTED]
6 [REDACTED]”); and used physical force to turn back others, Ex. 8 at
7 045-046. Although the methods varied, the common result was clear: turning back
8 asylum seekers to Mexico without processing them for asylum.⁴

9 Over time, Defendants formalized these practices into what is known as
10 “metering” or “queue management.”⁵ When a POE is metering, “a non-citizen
11 without proper travel documents [who] arrives at the border, . . . will be told that the
12 port is at capacity and they should return to be processed later.” Ex. 4 at 171:7-13.
13 Despite the formal documentation, CBP has no plan in place for asylum seekers to
14 “return to be processed later.” *Id.* While metering, CBP often stations officers near
15 the physical border line between the U.S. and Mexico and attempts to physically
16 block those being metered from setting foot on U.S. soil. *Id.*⁶ Initially, class members
17

18 ⁴ CBP’s treatment of certain class representatives is illustrative of the disparate
19 means CBP employed initially to turn back asylum seekers. *See, e.g.*, Dkt. 390-11 at
20 ¶¶ 15-19 (Plaintiff Abigail Doe was forced to sign a document withdrawing her
21 asylum claim and returned from the U.S. to Mexico); Dkt. 390-12 at ¶¶ 9-21
22 (Beatrice Doe was told she “had no right” to be in the U.S., was forced to withdraw
23 her application for admission, and was returned from the U.S. to Mexico); Dkt. 390-
24 13 at ¶¶ 18-26 (Carolina Doe was told she “would not receive asylum” and that she
25 would be separated from her daughter and was then forced to withdraw her asylum
26 claim before she was returned from the U.S. to Mexico); Dkt. 390-14 at ¶¶ 8-19
27 (Dinora Doe was told “Central Americans did not understand that there was no
28 asylum for us” and was told that she would be separated from her daughter if she
attempted to seek asylum in the U.S.); Dkt. 390-15 at ¶¶ 13, 17-18 (Ingrid Doe was
told that “asylum had ended” and that “there was a new law in the United States that
meant no asylum” before she was turned back from the U.S. to Mexico).

⁵ “Metering” and “queue management” are synonyms. Ex. 4 at 176:18-22; Ex. 9 at
102:21-103:2; Ex. 10 at 43:2-4.

⁶ *See, e.g.*, Dkt. 390-103 at ¶¶ 5-8 (Plaintiff Juan Doe was turned back after
requesting protection at the middle of a bridge leading to a POE by two American
officials who said that he “could not pass,” “the port was closed,” and that he had to
“wait [his] turn”); Dkt. 390-104 at ¶¶ 5-6 (same for Ursula Doe).

1 remained in a line at the border, for days or even weeks, waiting to be processed.
2 *See, e.g.*, Ex. 10 at 152:16-153:8 (initially [REDACTED]); Ex. 11 at 298
3 (“[REDACTED]”). This resulted in a growing
4 humanitarian crisis in Mexico. *See, e.g.*, Ex. 12 at 742 (UNHCR reporting [REDACTED]
5 [REDACTED]). CBP
6 officers met with their Mexican counterparts to make arrangements to limit the flow
7 of asylum seekers to the U.S. border. *See* Ex. 13 at 607 (“[REDACTED]
8 [REDACTED]
9 [REDACTED]”); Ex. 14 at 123:21-124:20. Subsequently, a
10 new system arose in which asylum seekers placed their names on waitlists in Mexico
11 in order to be inspected at a POE, and when a particular POE decided to inspect
12 more asylum seekers, CBP would direct its Mexican counterparts to bring a certain
13 number of asylum seekers to the POE for processing.⁷ *See, e.g.*, Ex. 15 at 966 (“[REDACTED]
14 [REDACTED]
15 [REDACTED]”); Ex. 16 at 140:1-16 (“If [Mexican immigration] brings
16 them over, we’re going to take them in, if we’ve called [Mexican immigration] to
17 bring over some.”).

18 Importantly, CBP concedes that asylum seekers approaching the U.S.-Mexico
19 border are “attempting to enter the United States at a [POE]” when they are turned
20 back. Ex. 17 at 201:22-202:3. CBP also admits that it has turned back asylum seekers
21 who were standing on U.S. soil. *See* Ex. 4 at 171:14-172:10; Ex. 3 at 101:21-102:10;
22 Ex. 1 at 96:11-97:18; Ex. 10 at 93:1-94:18; Ex. 18 (recording of turnback where an
23 asylum seeker was told to “go back to Mexico.”); Ex. 19 at 2.

24 Defendants’ justification for the turnback policy—a purported lack of
25

26 ⁷ *See, e.g.*, Dkt. 390-100 at ¶¶ 8-9, 14 (Plaintiff Bianca Doe put herself on a waitlist
27 maintained by Mexican authorities who were restricting people from approaching
28 the POE and was turned back by CBP officers who told her that the POE was “full”);
Dkt 390-105 at ¶¶ 8-12 (a CBP officer told Plaintiff Emiliana Doe that “everywhere
was full and they could not accept any more people” and she put her name on a
waitlist).

1 “operational capacity”—is a pretext. CBP kept daily records of POE capacities,
2 which show that POEs generally operated well below 100% capacity. Moreover,
3 POEs almost never reported that the number of asylum seekers at the POEs had [REDACTED]
4 [REDACTED]. See Ex. 20 at ¶¶ 22, 101-23; Ex. 21; Ex. 22; Ex. 23; Ex.
5 24; Ex. 25. In the few instances of high numbers of asylum seekers arriving at POEs,
6 Defendants could have operated in line with their historical practice and inspect and
7 process asylum seekers as they arrived, utilizing established contingency plans
8 created specifically for that purpose. Instead, Defendants turned asylum seekers back
9 to Mexico.

10 **B. Defendants Adopt the Turnback Policy**

11 In early 2016, CBP undertook a construction project that cut the San Ysidro
12 POE’s detention capacity for asylum seekers from approximately [REDACTED] to [REDACTED] Ex. 26
13 at 002; Ex. 27 at 574-75 (noting that [REDACTED]
14 [REDACTED]
15 [REDACTED]).

16 That spring, the San Ysidro POE saw an increase in the number of asylum
17 seekers seeking entry. Like all POEs, San Ysidro had well-worn plans for dealing
18 with it. See, e.g., Ex 28 (Southwest Border contingency plan); Ex. 29 (San Ysidro
19 POE activated its overflow contingency plan on March 25, 2016); Ex. 30 (Laredo
20 Field Office contingency plan); Ex. 31 (Eagle Pass contingency plan); Ex. 32
21 (Brownsville contingency plan). Indeed, despite the decrease in capacity due to the
22 construction project, until May 2016, [REDACTED]
23 [REDACTED]
24 [REDACTED]. Ex. 33 at 444 (“[REDACTED]
25 [REDACTED]”). On May 26, 2016, San Ysidro POE
26 leadership wrote to CBP headquarters [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]. Ex. 34 at 338-39; Ex. 35; Ex. 36 at 640 (May 27, 2016 report
2 listing “[REDACTED]” taken “[REDACTED]” at San Ysidro).
3 Notably, at that time the leadership of the San Ysidro POE did not [REDACTED]
4 [REDACTED]. Ex. 37
5 at 023; Ex. 38 at 099.

6 It was not until the San Ysidro POE received media inquiries about asylum
7 seekers at the port that CBP decided to abandon its existing contingency plans and
8 began turning back asylum seekers instead. By May 26, 2016, CBP’s San Diego
9 Field Office⁸ “[REDACTED]
10 [REDACTED].” Ex. 39 at 741. On the same day, the offices of Senator
11 Barbara Boxer and Representative Susan Davis asked questions about the asylum
12 seekers at the San Ysidro POE. Ex. 40 at 870. In response to those inquiries, Sidney
13 Aki, the Port Director of the San Ysidro POE, wrote, “[REDACTED]
14 [REDACTED].” Ex. 41 at 552.

15 The next day, the San Ysidro POE began turning back asylum seekers that
16 were in the process of arriving at the POE and preventing them from crossing the
17 international boundary. *See* Ex. 42 (“[REDACTED]
18 [REDACTED]”); Ex. 43 (“[REDACTED]”); Ex. 44 (“[REDACTED]
19 [REDACTED]”); Ex. 45 (instructing CBP officers “[REDACTED]
20 [REDACTED]”). However, San Ysidro POE leadership agreed that “[REDACTED]
21 [REDACTED]” to inspect a few asylum seekers “[REDACTED].”
22 Ex. 46. By the end of May 2016, CBP was [REDACTED]
23 [REDACTED]
24 [REDACTED]. Ex. 11 at 298.

25 But senior leadership at CBP was becoming increasingly impatient with
26 asylum seekers being released into the U.S. rather than being turned back to Mexico.

27 _____
28 ⁸ CBP’s Office of Field Operations has four field offices on the U.S.-Mexico border:
San Diego, Tucson, El Paso, and Laredo.

1 Then-Deputy Commissioner of CBP, Kevin McAleenan, reacted to news that
2 asylum seekers [REDACTED], “[REDACTED]
3 [REDACTED]
4 [REDACTED].” Ex. 47. Mr. McAleenan also expressed his
5 frustration that “[REDACTED]
6 [REDACTED].” *Id.* Defendants would later expand the turnback policy
7 border-wide in the fall of 2016, with McAleenan playing a key role.

8 **C. Defendants Implement the Turnback Policy Border-Wide**

9 In the fall of 2016, Defendants again diverged from their historical practice
10 and Congressional mandates. They began turning back asylum seekers at the
11 Calexico West POE, in addition to the San Ysidro POE. *See* Ex. 48 at 086; Ex. 49 at
12 715, 718. They did so despite knowing that the turnback policy had created a
13 [REDACTED] in Tijuana, Mexico, and that there were already [REDACTED]
14 [REDACTED]. *See, e.g.*, Ex. 50 at 746; Ex. 51 at
15 438 (UNHCR urging CBP to “[REDACTED]”);
16 Ex. 52 (DHS’s Office of Civil Rights and Civil Liberties “[REDACTED]
17 [REDACTED]
18 [REDACTED]” starting
19 in July 2016); Ex. 53 at 294 (House Judiciary Committee [REDACTED]).

20 But by October 2016, Defendants had made plans to find a way to inspect and
21 process asylum seekers arriving at POEs, instead of ignoring their statutory duty and
22 turning back asylum seekers at POEs. On October 16, 2016, then-DHS Secretary Jeh
23 Johnson and then-CBP Commissioner Gil Kerlikowske “[REDACTED]
24 [REDACTED].” Ex. 54 at 340. On
25 October 30, 2016, Commissioner Kerlikowske directed CBP “[REDACTED]
26 [REDACTED]
27 [REDACTED].” Ex. 55 at 175. In addition to the
28 processing facilities in [REDACTED], Defendants began examining ways

1 to build other temporary processing facilities and expand detention capacity. On
2 October 31, 2016, the Commissioner of CBP and the DHS Secretary “[REDACTED]”
3 [REDACTED]
4 [REDACTED].”⁹ *Id.* at 173. In particular, FEMA had identified
5 [REDACTED]
6 [REDACTED]. Ex. 56 at 316; Ex. 57 at 577-78 (“[REDACTED]
7 [REDACTED]” were “[REDACTED]”); Ex.
8 58 (“[REDACTED]
9 [REDACTED]”).

10 On November 2, DHS explained that it [REDACTED]
11 [REDACTED]
12 [REDACTED]. Ex. 59. DHS also directed CBP “[REDACTED]
13 [REDACTED]
14 [REDACTED].” Ex. 60.

15 Within days of that meeting, DHS outlined [REDACTED]
16 [REDACTED]. Ex. 61. Then, CBP held
17 an “[REDACTED]” with the management of OFO’s San Diego Field
18 Office concerning [REDACTED]. Ex. 62.

19 On November 9, 2016, Donald Trump won the 2016 presidential election. Ex.
20 63 at 1; Ex. 64 at 114:20-115:2. Within hours, CBP [REDACTED]
21 [REDACTED]. Ex. 65 at 879; Ex. 66. At a
22 meeting the next day, then-Deputy Commissioner McAleenan proposed “[REDACTED]
23 [REDACTED]
24 [REDACTED].” Ex. 67 at 936. Shortly
25 after the meeting, then-DHS Secretary Johnson approved [REDACTED]
26 [REDACTED]. *Id.*; *see also* Ex. 68 at 880.

27
28 ⁹ “FMUA” refers to family units. “UAC” refers to unaccompanied minors.

1 Todd Owen told McAleenan that he was “[REDACTED].” Ex. 6.
2 However, Mr. Owen explained that he “[REDACTED]
3 [REDACTED].” *Id.*; see also Ex. 69 at 935 (“[REDACTED]
4 [REDACTED].”). Although CBP decided [REDACTED]
5 [REDACTED], each field office on the U.S.-Mexico
6 border gave similar directions concerning turnbacks at POEs. William Brooks,
7 Director of Field Operations for Tucson, instructed the port directors to, “[REDACTED]
8 [REDACTED]
9 [REDACTED].” Ex. 70; see also Ex. 13 at 607 (similar, Laredo Field
10 Office); Ex. 71 at 496 (similar, El Paso Field Office). Finally, on November 15,
11 2016, CBP leadership [REDACTED]. Ex. 72
12 at 939. Thus, within a week of the 2016 presidential election, Defendants largely
13 abandoned their Congressionally-mandated duty of inspecting and processing
14 asylum seekers who were in the process of arriving at POEs, electing instead to
15 expand turnbacks.
16
17

18 **D. Defendants Knew that the Turnback Policy Violated the Law**

19 Defendants implemented the turnback policy, despite acknowledging that it
20 broke the law. In some cases, asylum seekers standing on U.S. soil were returned to
21 Mexico. See Ex. 73 at Resp. 7; Ex. 74 at 450 (El Paso Field Office officials reported
22 to CBP headquarters that “[REDACTED]
23 [REDACTED]”). A CBP officer at the San Ysidro POE [REDACTED]
24 [REDACTED]. Ex. 8 at 045-046. At another POE, a CBP officer
25 “[REDACTED].” Ex.
26 75 at 272. At the Hidalgo POE, “[REDACTED]” from the
27 secondary inspection area to reduce the number of asylum seekers processed at the
28 port. Ex. 3 at 157:15-18; see also Ex. 76 at 113; Ex. 14 at 96:17-99:6 (Nogales POE

1 [REDACTED]).

2 In the Laredo Field Office, multiple CBP officers observed asylum seekers
3 being returned from U.S. territory to Mexico without being processed. Ex. 77 at 136.
4 The CBP officers who witnessed these turnbacks summarized them in emails sent to
5 Chapter 149 of the National Treasury Employees Union (“NTEU”).¹⁰ See, e.g., Ex.
6 78 at 139-40. NTEU Chapter 149 sent a letter to the director of the Pharr POE, to
7 invoke a Step 1 grievance concerning “the Agency . . . unilaterally implement[ing]
8 a policy that prevents and/or blocks CBP Officers . . . from processing political
9 asylum seekers.” Ex. 79 at 142-43. During a grievance meeting with representatives
10 of the NTEU, CBP “*acknowledged that*” the turnback policy “*broke . . . Federal*
11 *immigration rules and Laws.*” Ex. 2 at 0132 (emphasis added). Although CBP
12 officials would freely state that the turnback policy violated the law in conversations,
13 they refused to say so in writing. Ex. 3 at 125:17-21. Eventually, NTEU Chapter 149
14 asked then-CBP Commissioner McAleenan to provide the legal authority to support
15 CBP’s “instructions to return individuals who enter the U.S. and request asylum back
16 to Mexico without” being processed. Ex. 76 at 110.

17 **E. Defendants Memorialize Aspects of the Turnback Policy**

18 In 2018,¹¹ Defendants memorialized aspects of the turnback policy in writing.
19 On April 23, 2018, “[REDACTED]
20 [REDACTED].” Ex. 80 at 784. On
21 April 24, 2018, CBP Commissioner McAleenan directed his deputies to “[REDACTED]
22 [REDACTED].” Ex. 81 at 778. Then, on April 27, 2018,
23 CBP issued its metering guidance memorandum, which was distributed to the four
24 Directors of Field Operations who oversee the operations of all POEs on the U.S.-
25

26 ¹⁰ The NTEU represents CBP officers in the Laredo Field Office.

27 ¹¹ In 2017, as the number of asylum seekers arriving at POEs on the U.S.-Mexico
28 border declined precipitously, see Dkt. 390-91 at ¶¶ 5, 8, CBP continued to turn back
asylum seekers arriving at those POEs, see Ex. 18 (April 2017 recording of turnback
where an asylum seeker was told to “go back to Mexico.”), Ex. 17 at 307:8-308:8.

1 Mexico border. Ex. 82. Under the metering policy, Directors of Field Operations are
2 permitted to “meter the flow of travelers at the land border” between the U.S. and
3 Mexico. *Id.* When “metering” is in place, CBP officers tell “waiting travelers that
4 processing at the port of entry is currently at capacity and CBP is permitting travelers
5 to enter the port once there is sufficient space and resources to process them.” *Id.*

6 Although the policy was supposed to address “[REDACTED],” Ex. 83 at 332,
7 there was no appreciable surge in asylum seekers in April 2018. For example, at the
8 San Ysidro POE, on April 24, 2018, [REDACTED]
9 [REDACTED]. Ex. 84. On April 27-28, 2018, the port
10 still had [REDACTED]. Ex. 85 at 719-720; Ex. 86 at 722-23; Ex. 87 at
11 759. On April 29, 2018, San Diego Director of Field Operations, Pete Flores, wrote
12 to Kevin McAleenan that “[REDACTED]”
13 POE. Ex. 88 at 694. Ultimately, the April 2018 migrant caravan largely fizzled.
14 Mexican migration authorities “[REDACTED]” as soon as it “[REDACTED]
15 [REDACTED]” to “[REDACTED].” Ex. 89.¹²

16 Because the low numbers of caravan members at the border could not justify
17 border-wide turnbacks, DHS began writing guidance on turning back asylum seekers
18 to permit turnbacks to occur outside of “surge events.” In late May 2018, DHS
19 Secretary Nielsen began considering a “prioritization-based queue management”
20 approach that would allow port directors to turn back asylum seekers, purportedly
21 as a matter of “discretion,” on the basis of amorphous considerations related to port
22 capacity and resources. During a May 24, 2018 meeting, DHS Secretary Nielsen

23
24 ¹² Even though the turnback policy would later create a queue of asylum seekers in
25 Tijuana, Mexico much larger than the number of asylum seekers who might
26 approach the port on a typical day, CBP privately acknowledged that [REDACTED]. For example, in its normal
27 posture, the San Ysidro POE can process approximately [REDACTED] asylum cases per day.
28 Ex. 90 at 246; Ex. 91 at 676 (CBP could have cleared the queue existing on
November 9, 2018 in “[a]pproximately 11 days”). Even with no additional resources,
the San Ysidro POE estimated that [REDACTED] Ex. 92 at 964.

1 “ [REDACTED]

2 [REDACTED]

3 [REDACTED]?” Ex. 93 at 317. In response, OFO’s San Diego Field Office indicated that [REDACTED]

4 [REDACTED]

5 [REDACTED] s. *Id.* at 316. OFO’s

6 El Paso Field Office reported that [REDACTED]

7 [REDACTED] Ex. 94 at 575. The Tucson Field Office said that it

8 could [REDACTED]. Ex. 95. Synthesizing this information,

9 Todd Owen reported to CBP Commissioner McAleenan that [REDACTED]

10 [REDACTED]

11 [REDACTED] Ex. 96. However, he warned that this policy would result in “[REDACTED]

12 [REDACTED]

13 [REDACTED].” *Id.* [REDACTED]

14 [REDACTED]. Ex. 97. On June 5,

15 2018, Defendants adopted the prioritization-based queue management policy. Ex. 98

16 at 294. The policy directs POEs to focus on other missions, such as inspecting

17 incoming food and other cargo, instead of processing asylum seekers. *Id.* at 296.

18 **F. Defendants Begin Using “Operational Capacity” As a Metric**

19 At the same time, CBP began using a new metric to justify its turnbacks of

20 asylum seekers. While the “[REDACTED]” for implementing the April 2018

21 metering policy was “detention capacity” (*i.e.*, the number of persons who can be

22 held at a POE, Ex. 17 at 158:4-7), in June 2018, CBP began using “operational

23 capacity” as its stated metric to justify turning back asylum seekers. Ex. 99 at 864.

24 This change was significant. Detention capacity is a known, quantifiable number

25 that CBP regularly tracks. *See* Ex. 4 at 105:11-106:14; Ex. 10 at 185:9-20. On the

26 other hand, operational capacity has no definition and is not tracked by CBP. Ex. 10

27 at 74:11-76:15, 189:8-191:6. Defendants thus shifted from the measurable metric of

28 detention capacity to an unmeasurable and pretextual metric of operational capacity,

1 in order to “[REDACTED].” Ex. 100 at 207:7-14.

2 “Operational capacity,” as Defendants use the term, is essentially a fiction.
3 [REDACTED]—after the
4 turnback policy was already in effect and this litigation was filed. Ex. 100 at 161:8-
5 10. The distinction between detention capacity and operational capacity is not
6 memorialized in any statute, regulation, guidance, memorandum, or official
7 document. Ex. 17 at 68:8-71:24; Ex. 100 at 161:20-162:12. [REDACTED]
8 [REDACTED]
9 [REDACTED]. Ex. 17 at 102:13-111:11; *see also* Ex. 101. In fact, the term
10 “operational capacity” has no concrete definition. Ex. 17 at 73:6-11, 110:24-111:11.
11 CBP never even wrote down the factors that a port director should consider when
12 determining a POE’s operational capacity. *Id.* at 111:13-112:13; Ex. 14 at 292:13-
13 15. CBP did not track operational capacity at any of its ports. Ex. 102 at 66:10-25.
14 CBP has no way of reconstructing what the operational capacity of a POE would
15 have been at any given time. Ex. 17 at 129:7-14; Ex. 14 at 106:20-107:7. In the end,
16 operational capacity is what the port director says it is, without any reference to a
17 port’s actual holding space. Ex. 100 at 181:22-182:4; *see also* Ex. 14 at 140:19-21
18 (“[REDACTED]
19 [REDACTED].”); Ex. 103 at 57:2-20.

20 The reason that Defendants changed the metric they used to justify metering
21 is no secret. According to CBP’s daily capacity figures, POEs routinely operated
22 below capacity. *See* Ex. 20 at ¶¶ 22, 101-23. Contemporaneous reports also show
23 that the number of asylum seekers detained at POEs [REDACTED]
24 [REDACTED]. *See* Exs. 14-15, 17-19. Once CBP enabled port directors to ignore
25 the actual capacity of their POEs, [REDACTED]
26 [REDACTED]. *See, e.g.*, Ex. 12 at 742 (San Ysidro POE had a “[REDACTED]
27 [REDACTED]”); Ex. 104 ([REDACTED]
28 [REDACTED]”); Ex. 105 (CBP sent guidance about “[REDACTED]

1 [REDACTED]”).

2 As the turnback policy was rolled out border-wide, POEs tracked [REDACTED]
3 [REDACTED]. *See*,
4 *e.g.*, Ex. 106 at 089 (“[REDACTED]
5 [REDACTED]”); Ex. 107 at 2 (internal CBP study
6 analyzing whether [REDACTED]); Ex. 108
7 (“[REDACTED]”).

8 Defendants refused to implement plans that could have considerably increased
9 the capacity of POEs to process asylum seekers. For instance, in November 2018,
10 Pete Flores, the Director of Field Operations for OFO’s San Diego Field Office,
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]. Ex.
14 109; Ex. 110. DHS Secretary Nielsen [REDACTED]
15 [REDACTED] Ex. 111.

16 CBP also considered whether [REDACTED]
17 [REDACTED]
18 [REDACTED]. Ex. 112. However, [REDACTED]
19 [REDACTED] *Id.*

20 **G. Defendants Harmed the Class and Al Otro Lado**

21 The turnback policy seriously harmed asylum seekers, returning them to
22 Mexican border cities that Defendants knew were dangerous. *See* Ex. 96 (“[REDACTED]
23 [REDACTED]
24 [REDACTED]”); Ex. 100 at 202:24-203:5; Ex. 50 at 746 (report
25 indicating that turnbacks were “[REDACTED]” in Tijuana). In
26 response to “the needs of particularly vulnerable migrants who ha[d] been metered[,
27 s]pecifically those who are in imminent danger of harm or death in Tijuana,”
28 Plaintiff Al Otro Lado, as the only organization that offered comprehensive,

1 emergency services to migrants in Tijuana, found itself “constantly having to pull
2 resources from [its] other offices” to address those needs. Ex. 113 at 92:12-96:4. The
3 need to provide services in Tijuana to asylum seekers who had been turned back
4 strained Al Otro Lado’s resources and frustrated its other missions, including its
5 deportee program and medical-legal program. *Id.* at 153:3-154:23.

6 Moreover, turnbacks were responsible for the deaths of asylum seekers. Ex.
7 113 at 161:25-162:9 (discussing murders of and assaults on unaccompanied minors
8 who were turned back). For example, on June 23, 2019, CBP officers turned back
9 Oscar Alberto Martinez Ramirez, his wife, and their 23-month-old daughter, Valeria,
10 when they attempted to enter the U.S. at the Brownsville POE. Ex. 114 at 139; *see*
11 *also* Ex. 115 at 64. There was no reason to turn the family back; the Brownsville
12 POE was operating at only █% capacity that day. Ex. 115 at 64. After aid workers
13 in Matamoros told Oscar there were hundreds of people in front of him waiting to
14 be processed at the Brownsville POE, *id.*, Oscar waded into the Rio Grande River
15 near the Brownsville POE with his daughter on his back. *Id.* The rapid current swept
16 Oscar off his feet and pulled him and Valeria under. Ex. 115 at 139. They drowned.
17 *Id.* When their bodies washed up along the U.S. side of the riverbank, Valeria’s hand
18 was wrapped around her father’s shoulders. *Id.*



1 Ex. 116.

2 Defendants take no responsibility for the harm they have caused. When Todd
3 Owen was asked, “Do you take responsibility for instances where the metering
4 policy was implemented in ways that broke the law?”, he answered, “I do not take
5 responsibility for the 30,000 officers that work under me.” Ex. 10 at 239:22-240:6.
6 When asked whether he takes responsibility for asylum seekers staying in squalid
7 conditions at migrant shelters in Mexico as a result of his turnback policy, Mr. Owen
8 answered, “No.” *Id.* at 289:14-17. When asked whether he took any responsibility
9 for parents who were sleeping on the street in Mexico with toddlers in temperatures
10 over 100 degrees as a result of the turnback policy, Mr. Owen answered, “No.” *Id.*
11 at 291:15-20. And finally, when he was asked whether he took any responsibility for
12 the death of Oscar Alberto Martinez Ramirez and his two-year-old daughter, Mr.
13 Owen answered, “No.” *Id.* at 292:13-21.

14 **III. LEGAL STANDARD**

15 Summary judgment should be granted where the moving party demonstrates
16 there “is no genuine issue as to any material fact and [it] is entitled to judgment as a
17 matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R.
18 Civ. P. 56(c)). Upon such a showing, the burden shifts to the nonmoving party to
19 “come forth with specific facts to show that a genuine issue of material fact exists.”
20 *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993). On cross-motions for
21 summary judgment, a court “must consider each motion separately ‘on its own
22 merits’ to determine whether any genuine issue of material fact exists.” *Allstate Ins.*
23 *Co. v. Farmers Ins. Exch.*, 2008 WL 11508663, *3 (S.D. Cal. 2008).

24 **IV. ARGUMENT**

25 **A. The Turnback Policy Violates the APA and INA**

26 Section 706 of the APA directs courts to “compel agency action unlawfully
27 withheld” and to “hold unlawful and set aside agency action” that is “not in
28 accordance with law,” “in excess of statutory jurisdiction, authority, or limitations,”

1 or otherwise “arbitrary, capricious [or] an abuse of discretion.” 5 U.S.C. § 706(1),
2 (2)(A), (C). The turnback policy is a final agency action that is unlawful and must
3 be set aside under those standards. *First*, as this Court recognized, the policy violates
4 the specific mandates in the INA governing how Defendants must treat arriving
5 noncitizens at POEs. Similarly, each instance when a class member is turned back
6 amounts to the unlawful withholding of agency action. *Second*, as this Court
7 likewise recognized, the policy violates the statutory scheme Congress created to
8 ensure access to the asylum process for noncitizens at POEs. *Third*, the policy is
9 arbitrary, capricious, and an abuse of discretion because Defendants’ stated
10 justification is a pretext, the real reasons for the policy are unlawful, and the policy
11 is at odds with congressional intent.

12 **a. The turnback policy is a final agency action**

13 The APA permits judicial review over agency actions that are “final.” 5 U.S.C.
14 § 704; *Navajo Nation v. Dep’t of the Interior*, 876 F.3d 1144, 1171 (9th Cir. 2017).
15 Agency action is “final” when (1) it “mark[s] the ‘consummation’ of the agency’s
16 decisionmaking process” and (2) as a result of the action, “‘rights or obligations have
17 been determined,’ or ... ‘legal consequences will flow.’” *Bennett v. Spear*, 520 U.S.
18 154, 177-78 (1997). The turnback policy, under which CBP officers at POEs along
19 the U.S.-Mexico border restrict the flow of asylum seekers by turning them back to
20 Mexico, fulfills both requirements. *See* Dkt. 280 at 49-54 (concluding Plaintiffs’
21 allegations, which the evidence now substantiates, satisfy the *Bennett* test).

22 The turnback policy satisfies the finality test’s first prong because it reflects a
23 “conscious” and “deliberate decision” by Defendants, *ONRC Action v. Bureau of*
24 *Land Mgmt.*, 150 F.3d 1132, 1137 (9th Cir. 1998), and is “an active program
25 implemented by the agency.” *Wagafe v. Trump*, 2017 WL 2671254, at *10 (W.D.
26 Wash. 2017); *see R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015) (an
27 implemented policy directing an ongoing practice affecting individual cases is final
28 agency action).

1 Defendants first began turning back asylum seekers at the San Ysidro POE in
2 May 2016. In the fall of 2016, Defendants expanded the turnback policy to other
3 POEs along the U.S.-Mexico border. Both decisions amounted to “conscious” and
4 “deliberate” choices by Defendants to reject their standard contingency plans and
5 pursue a different option. *See supra* at 9-12, 13-15; Ex. 110; Ex. 111; Ex. 112; Ex.
6 65 at 879; Ex. 66; Ex. 67 at 936; *ONRC Action*, 150 F.3d at 1137. Defendants
7 previously had plans to utilize temporary facilities near POEs to fulfill their
8 congressionally-mandated duty to inspect and process asylum seekers, yet they
9 abdicated this duty following the 2016 election by expanding the turnback policy.
10 *See supra* at 9-12; Ex. 54 at 340; Ex. 55 at 173; Ex. 67 at 936. On the instruction of
11 the DHS Secretary and the CBP Commissioner, OFO leadership instructed the
12 Directors of Field Operations overseeing POEs along the southern border to
13 coordinate with Mexican government officials to begin metering. *See supra* at 11;
14 Ex. 67 at 936.

15 Then, in April and June 2018, Defendants memorialized aspects of the
16 turnback policy in formal guidance documents. *See supra* at 12-14; Ex. 85; Ex. 98
17 at 294. CBP also disseminated instructions to POEs requiring them to meter asylum
18 seekers, assign staff to “limit line” positions to prevent asylum seekers from entering
19 U.S. territory, and avoid surpassing an arbitrary cap on POEs’ detention capacity.
20 *See, e.g.*, Ex. 14 at 74:2-8; Ex. 117 (“holding at the line will soon become the norm
21 so all along the SW border need to act the same so the NGOs don’t try to play one
22 port against the other.”). The implementation of the policy has been confirmed by
23 high-level government officials, as well as CBP officers with firsthand experience
24 implementing it. *See supra* at 9-16; Ex. 1 at 100:25-101:6; Ex. 2 at 132. Defendants’
25 top-down, calculated efforts to restrict the flow of asylum seekers leaves no doubt
26 that it “mark[s] the ‘consummation’ of the agency’s decisionmaking process.”
27 *Bennett*, 520 U.S. at 177-78.

28 With respect to the second prong, legal consequences flow from the turnback

1 policy because it instructs CBP officers to reject asylum seekers at POEs and deny
2 them access to the asylum process, in contravention of their mandatory statutory
3 duties. Asylum seekers are forced to wait in dangerous Mexican border towns, where
4 they risk grave harm or even death. *See infra* at 16-18. Many are ultimately deprived
5 of any ability to access the asylum process at a POE as a result of the policy. *See,*
6 *e.g.*, Dkt. 390-75 at ¶ 6 (Roberto Doe was turned back from Hidalgo POE); Dkt.
7 390-97 at ¶¶ 6-7 (Roberto Doe was subsequently deported from Mexico). These
8 “actual or immediately threatened effect[s]” satisfy the finality test’s second prong.
9 *Lujan v. Nat’l Wildlife Federation*, 497 U.S. 871, 894 (1990); *Wagafe*, 2017 WL
10 2671254, at *10 (action was final when policy resulted in “thousands of . . . qualified
11 applications [being] allegedly indefinitely delayed or denied”).

12 **b. The policy directs CBP officers to unlawfully withhold a**
13 **discrete, mandatory ministerial action**

14 Congress has spoken clearly about what Defendants are required to do when
15 noncitizens come to POEs—inspect them when they arrive and allow those seeking
16 asylum to access the asylum process. *See* 8 U.S.C. §§ 1158(a)(1), 1225(a)(1), (3),
17 and (b)(1)(A)(ii). Because Defendants have a discrete mandatory duty to inspect and
18 refer asylum seekers arriving at POEs, *see* Dkt. 280 at 31-46; 8 U.S.C. § 1225, each
19 turnback amounts to the unlawful withholding of mandatory agency action. 5 U.S.C.
20 § 706(1). Moreover, the turnback policy—which is an overarching agency policy
21 directing this unlawful withholding of mandatory action—is “not in accordance with
22 law” and is “in excess of statutory jurisdiction, authority, or limitations.” *Id.* §
23 706(2)(A), (C).

24 Section 706(1) of the APA requires a court to “compel agency action
25 unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). Agency actions
26 that are “legally required,” *i.e.*, that are “ministerial or non-discretionary,” are
27 subject to § 706(1), and courts may compel them as in a mandamus action. *Norton*
28 *v. S. Utah Wilderness All.*, 542 U.S. 55, 63-64 (2004). Section 706(2) of the APA

1 directs the court to “hold unlawful and set aside agency action,” 5 U.S.C. §
2 706(2)(A), (C), that is “contrary to clear congressional intent” or “inconsistent with
3 the statutory mandate,” or that “frustrate[s] the policy that Congress sought to
4 implement.” *Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep’t of*
5 *Health & Human Servs.*, 946 F.3d 1100, 1112 (9th Cir. 2020) (quotations omitted).

6 This Court previously concluded that “the mandatory duties to inspect all
7 aliens and refer certain aliens seeking asylum are discrete actions for which this
8 Court can compel Section 706(1) relief under 8 U.S.C. § 1225(a)(3), 8 U.S.C.
9 § 1225(b)(1)(a)(ii), and 8 C.F.R. § 235.3(b)(4).” Dkt. 280 at 31. Defendants’ duty to
10 inspect and refer applies to those “who are in the process of arriving in the United
11 States,” including those who may not yet have set foot across the physical border.
12 Dkt. 280 at 46. The Ninth Circuit found this analysis “sound and persuasive.” *Al*
13 *Otro Lado v. Wolf*, 952 F.3d 999, 1011-12 (9th Cir. 2020). The Court’s prior
14 conclusion stems directly from a straightforward interpretation of sections 1158 and
15 1225 of the INA, aided by traditional canons of statutory construction and
16 Defendants’ own regulations. *See* Dkt. 280 at 31-46. Similarly, the turnback
17 policy—a policy to evade those mandatory duties—is “contrary to clear
18 congressional intent” and “inconsistent with the statutory mandate,” and would
19 “frustrate the policy that Congress sought to implement.” *Planned Parenthood*, 946
20 F.3d at 1112.

21 Summary judgment is warranted on Plaintiffs’ 706(1) and 706(2) claims
22 because it is undisputed that Defendants have a policy of turning back asylum
23 seekers and refusing to inspect and process them when they are arriving at POEs
24 along the U.S.-Mexico border, and that they do so to individual asylum seekers. As
25 CBP’s Rule 30(b)(6) witness, Randy Howe, conceded:

26 Q. Is it the case currently that when a port is engaged in metering,
27 when a noncitizen without proper travel documents arrives at the
28 border, they will be told that the port is at capacity and they

1 should return to be processed later?

2 A. Yes.

3 Ex. 4 at 171:7-13; Ex. 17 at 201:22-202:3. A second Rule 30(b)(6) witness, Mariza
4 Marin, admitted that asylum seekers approaching POEs are attempting to enter the
5 United States:

6 Q. Okay. In your experience[], are asylum seekers who are at the
7 border between the United States and Mexico attempting to enter
8 the United States at a port of entry?

9 A. Yes.

10 Ex. 17 at 201:22-202:3 (objection omitted).¹³ Thus, Defendants have admitted that
11 it is their policy to turn back asylum seekers who are in the process of arriving in the
12 United States. Dkt. 280 at 31-46; *see also Al Otro Lado*, 952 F.3d at 1012.¹⁴

13 Defendants also turned back to Mexico asylum seekers who were standing *on*
14 *U.S. soil*. *See, e.g.*, Ex. 1 at 97:14-18; Ex. 3 at 61:13-16; Ex. 73 at Resp. 7; Ex. 74
15 at 450; Ex. 8 at 045-046; Ex. 14 at 141:6-142:23; Ex. 102 at 205:16-206:11. No
16 statutory analysis of the term “arriving in” is required to determine that CBP broke
17 the law by turning back asylum seekers *who were already on U.S. soil*.

18 Plaintiffs are thus entitled to an order compelling Defendants to comply with
19 their mandatory, ministerial inspection and processing duties set out in § 1225. *See*
20 5 U.S.C. § 706(1). Furthermore, it is undisputed that it is agency policy to withhold
21 these mandatory actions, and therefore the Court should set aside the policy because
22 it is incompatible with applicable law. *See id.* § 706(2)(A), (C).

23
24
25 ¹³ A third CBP witness testified that when CBP tells an asylum seeker to wait in
26 Mexico because the POE is “at current capacity,” “there’s no guarantee” “ever
implied” that “at some point in the future, [the asylum seeker] might be processed.”
Ex. 14 at 234:25-235:20.

27 ¹⁴ To the extent the turnback policy purports to grant POEs discretion to turn back
28 asylum seekers, *see e.g.* Ex. 98, the policy is unlawful because, as the Court has
stated, the duty to inspect and process asylum seekers is mandatory. *See* Dkt. 280
at 29.

c. The policy contravenes Congress’ unambiguous statutory scheme and exceeds Defendants’ authority

Even if CBP’s ministerial duties to inspect and process were not triggered until an asylum seeker steps onto U.S. soil, summary judgment is still warranted on Plaintiffs’ § 706(2) claim because the turnback policy contravenes Congress’ statutory scheme governing inspection at POEs and exceeds Defendants’ statutory authority. “[A]n agency’s power is no greater than that delegated to it by Congress.” *Lyng v. Payne*, 476 U.S. 926, 937 (1986); *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 328 (2014) (“[A] core administrative-law principle [is] that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.”). In particular, agencies lack authority to “abandon” a “detailed scheme” established by Congress if they think it is not working well. *EBSC v. Trump*, 932 F.3d 742, 774 (9th Cir. 2018). Because Congress designed a “statutory scheme” by which all noncitizens are to be inspected at POEs and asylum seekers must be referred for credible fear interviews, Dkt. 280 at 62, Defendants have no authority to turn back any noncitizens at POEs, much less single out asylum seekers for such treatment. *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1747 (2020) (when Congress makes a “broad rule” and includes no exceptions, the rule applies and no “tacit exception” may be inferred).¹⁵

Since 2016, it has been Defendants’ policy to turn back asylum seekers at POEs. *See, e.g., supra* at 7-14; Ex. 4 at 171:7-13; Ex. 10 at 102:21-103:22; Ex. 93 at 317; Ex. 94 at 575; Ex. 95; Ex. 96. Asylum seekers are turned back when they are

¹⁵ Even if the Court were to reject its prior conclusion that Defendants’ duties to inspect and refer attach to individual asylum seekers in the process of arriving in the United States at a POE who may not have stepped across the international border, the Court could still “hold unlawful and set aside” Defendants’ *policy* to turn back such asylum seekers. 5 U.S.C. § 706(2). Any such policy runs counter to the statutory scheme, and thus is “contrary to clear congressional intent” and “inconsistent with the statutory mandate” of inspecting all noncitizens at POEs and referring all asylum seekers for credible fear interviews, even if asylum seekers whom the government prevents from accessing U.S. territory cannot enforce those duties via a § 706(1) claim. *Planned Parenthood*, 946 F.3d at 1112.

1 “attempting to enter the United States at a [POE].” Ex. 17 at 201:22-202:3. CBP
2 officers at POEs physically block those perceived to be asylum seekers—and only
3 asylum seekers—from crossing the border, and tell them “that the port is at capacity
4 and they should return to be processed later.” Ex. 4 at 171:7-13; Ex. 14 at 232:8-15
5 (acknowledging that “officers staffing the limit line are directed to prevent migrants
6 from crossing [the] international boundary,” “because once they do cross the
7 boundary, then they have to be processed”).

8 The formulation of policies “prescrib[ing] the terms and conditions upon
9 which [noncitizens] may come to this country” “is entrusted exclusively to
10 Congress,” not the executive. *Kleindienst v. Mandel*, 408 U.S. 753, 766-67 (1972);
11 *see also* Dkt. 280 at 23 (“[O]ver no conceivable subject is the legislative power of
12 Congress more complete than it is over the admission of [noncitizens].”). Here,
13 Defendants claim that they have the power to selectively screen out asylum seekers
14 and deny them processing. The logical result of Defendants’ argument is that they
15 would have sole authority to end asylum for noncitizens arriving at POEs, without
16 any involvement by Congress—an interpretation of the INA that plainly conflicts
17 with Congress’ statutory scheme. *See* 5 U.S.C. § 706(2)(A), (C).¹⁶

18 Defendants may not usurp Congress’ role in this way. Because Congress
19 never authorized Defendants to turn back any noncitizens at POEs, and in fact
20 created a statutory scheme that “specifically addresse[s]” how Defendants must treat
21 individuals who are coming to POEs to seek asylum, *EBSC v. Barr*, 964 F.3d 832,
22 848 (9th Cir. 2020), the turnback policy is “not in accordance with law” and is “in
23 excess of statutory . . . authority,” 5 U.S.C. § 706(2)(A), (C).

24
25
26 ¹⁶ CBP’s general power to operate POEs does not include authority to contravene
27 more specific provisions of the INA. “[I]t is a commonplace of statutory construction
28 that the specific governs the general,” particularly where “Congress has enacted a
comprehensive scheme and has deliberately targeted specific problems with specific
solutions.” *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645
(2012) (citations omitted).

1 **d. The Turnback Policy is arbitrary and capricious**

2 In addition to the turnback policy’s categorical incompatibility with the INA,
3 the policy is also illegal under APA § 706(2)(A) because it is “arbitrary, capricious,
4 [and] an abuse of discretion” for a number of reasons, each of which provides an
5 independent basis to grant Plaintiffs’ motion.

6 **i. The Turnback Policy Is Based On Pretext**

7 It is arbitrary and capricious for an agency to “offer[] an explanation for its
8 decision that runs counter to the evidence before the agency, or is so implausible that
9 it could not be ascribed to a difference in view or the product of agency expertise.”
10 *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014)
11 (citation omitted). “[A]gencies [must] offer genuine justifications for important
12 decisions.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019). An
13 agency is due no deference when the explanation provided for its action “lacks any
14 coherence.” *Tripoli Rocketry Ass’n, Inc. v. ATF*, 437 F.3d 75, 77 (D.C. Cir. 2006).
15 Courts must not “simply accept whatever conclusion an agency proffers merely
16 because the conclusion reflects the agency’s judgment.” *Id.* “[R]easoned
17 decisionmaking” is required. *Id.* Similarly, an agency action cannot survive APA
18 review if it is supported only by post hoc rationalizations. *DHS v. Regents of the*
19 *Univ. of Calif.*, 140 S. Ct. 1891, 1907-09 (2020).

20 The undisputed evidence shows that Defendants’ stated justification for the
21 turnback policy—a “lack of capacity” at POEs, Dkt. 283 ¶ 7—is pretextual. CBP’s
22 own daily internal statistics capturing “capacity” show that POEs generally operated
23 well below 100% during the policy’s implementation and that the number of asylum
24 seekers at POEs [REDACTED]. See Ex. 20 at ¶¶ 22, 101-23;
25 Ex. 21; Ex. 22; Ex. 23 Ex. 24; Ex. 25. Indeed, a CBP officer at the Tecate POE
26 testified that this “capacity excuse” is a lie:

27 Q. And when [your supervisors] said the port was at capacity, you
28 knew that was a lie, right?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- A. Yes.
- Q. And it would have been obvious to those supervisors that it was a lie as well, correct?
- A. Correct.
- Q. In fact, it was obvious to everybody that was implementing the policy at [the] Tecate [POE] that the capacity excuse was a lie, right?
- A. Correct.

Ex. 1 at 100:22-101:6. Meanwhile, CBP “[REDACTED]”
 [REDACTED]
 [REDACTED].” Ex. 118 at 93:4-12. At the Hidalgo POE, CBP “[REDACTED]”
 [REDACTED]” from the port’s secondary inspection area, “[REDACTED]”
 [REDACTED].” Ex. 3 at 157:15-18. A CBP officer from the Laredo Field Office testified that there was no justification for metering because CBP could process asylum seekers in the order that they came to a POE without resorting to turnbacks. *Id.* at 71:9-16. Finally, prior to issuing the prioritization-based queue management guidance, then-DHS Secretary Nielsen [REDACTED]
 [REDACTED]
 [REDACTED]. *Supra* at 13-14.

If there really were capacity issues, Defendants have long had contingency plans ready to obviate any genuine need to turn back asylum seekers. Yet Defendants have repeatedly [REDACTED]
 [REDACTED]. *See, e.g.*, Ex. 65 at 879; Ex. 66; Ex. 14 at 156:12-157:22; *supra* at 10-11. Moreover, Defendants have always had the power to release asylum seekers from POEs rather than waiting for ICE to pick up and transfer them to a detention facility. *See, e.g.*, Ex. 119 at 545 (DHS Secretary Johnson [REDACTED] in fall 2016 [REDACTED])

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

[REDACTED].¹⁷ [REDACTED]
[REDACTED]
[REDACTED]. *See, e.g.*,
Ex. 3 at 157:15-18; Ex. 14 at 96:17-99:6.

In June 2018—well after this litigation began—CBP began using “operational capacity,” as opposed to “detention capacity,” as its justification for turnbacks. *See supra* at 14-16. The new metric, “operational capacity,” has no definition and is not—and has never been—tracked, and it is impossible to reconstruct a port’s operational capacity. *See supra* at 14-15. “Operational capacity” means w [REDACTED]
[REDACTED]
[REDACTED]. Ex. 100 at 181:22-182:4; *see also* Ex. 14 at 140:19-21. “Operational capacity” as a reason for turning back asylum seekers “lacks any coherence,” and is anything but a “concrete standard.” *Tripoli Rocketry*, 437 F.3d at 77. Defendants have offered no contemporaneous data or documents to support an “operational capacity” defense. *Id.* Reliance on the “operational capacity” concept demonstrates a lack of “reasoned decisionmaking” and is therefore arbitrary and capricious. *Id.*

The shift to “operational capacity” simply resulted in [REDACTED] “[REDACTED]
[REDACTED].” Ex. 100 at 207:7-14. Around the same time, Defendants issued the prioritization-based queue management memo. *See* Ex. 98 at 294. The memo purports to give port directors “discretion” not to inspect and process asylum seekers at all.¹⁸ *Id.* at 296 (“Field leaders have the discretion to allocate resources and staffing dedicated to any areas of enforcement and trade facilitation not covered by the

¹⁷ “NTA” refers to a “notice to appear,” which institutes removal proceedings in immigration court. *See* 8 U.S.C. § 1229(a)(1).

¹⁸ While the June 2018 memo on its face grants POEs discretion to meter asylum seekers or not, CBP subsequently directed POEs to undertake metering. *See e.g.* Ex. 14 at 93:2-24 (

[REDACTED]
[REDACTED]).

1 [specified] priorities and queue management process based on the availability of
2 resources and holding capacity at the local port level.”). The combination of
3 “operational capacity” and “prioritization-based queue management” meant that
4 POEs could rely on CBP’s explicit policies to justify not inspecting and processing
5 any asylum seekers at all, independent of the actual availability of processing or
6 detention capacity at a given POE. Indeed, after June 2018, POEs set [REDACTED]

7 [REDACTED].
8 *See supra* at 15-16.

9 Defendants’ sole stated rationale for the turnback policy—that they lacked
10 “capacity” to inspect and process asylum seekers—has always been pretextual.
11 When CBP officers told asylum seekers at POEs that they could not be processed
12 due to lack of “capacity” under the turnback policy, these were “obvious” “lies” in
13 violation of APA § 706(2)(A). Ex. 1 at 99:19-101:2. As a whistleblower testified,
14 metering is “a solution in search of a problem.” *Id.* at 153:24-154:1. This is textbook
15 arbitrary and capricious action. *See DHS*, 140 S. Ct. at 1907-09 (post hoc
16 rationalization violates § 706(2)(A)).

17 **ii. The True Motivations for Metering Are Unlawful**

18 Defendants needed to fabricate a seemingly legitimate excuse to turn back
19 asylum seekers from POEs because their true motivations—limiting access to the
20 asylum process, deterring asylum seekers from seeking protection in the U.S., and
21 evading a statutory command—are arbitrary and capricious and an abuse of
22 discretion. It is a violation of § 706(2)(A) for an agency to “rel[y] on factors which
23 Congress has not intended it to consider.” *Locke*, 776 F.3d at 994 (citation omitted).

24 A desire to limit access to the asylum process at POEs for its own sake is not
25 a legitimate basis for the turnback policy. *See Dkt.* 280 at 63 (explaining that unlike
26 the statutory numerical limit on refugee admissions, the INA does not cap the
27 number of people who may access the asylum process at ports, and a “*de facto*
28 numerical limit” would be “unlawful”). The undisputed facts are that Defendants

1 nonetheless proceeded with the turnback policy in pursuit of this purpose. *See, e.g.*,
2 Ex. 47 (McAleenan, who ultimately proposed the turnback policy, [REDACTED]
3 [REDACTED]
4 [REDACTED]); Ex. 96 (prior to implementing prioritization-based queue
5 management, CBP leadership [REDACTED]
6 [REDACTED]).

7 In addition, deterring lawful migration is not a proper basis for the turnback
8 policy, yet deterrence has always been at the core of the policy. In fall 2016, CBP
9 put out a call for proposals “[REDACTED]
10 [REDACTED].” Ex. 57 at 577-578. In November of that year, McAleenan proposed
11 [REDACTED]. Ex. 67 at 936; Ex. 68 at 880.
12 After the turnback policy’s adoption, Defendants sought to determine whether [REDACTED]
13 [REDACTED]. *See, e.g.*,
14 Ex. 109 at 2. As this Court has correctly observed, “there is no room for deterrence
15 under the scheme Congress has enacted.” Dkt. 280 at 65; *see also Locke*, 776 F.3d
16 at 994; *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 154 (D.D.C. 2018) (finding
17 challenge to a policy that took deterrence into account showed a likelihood of
18 success on the merits by “demonstrat[ing] the incompatibility of the deterrence
19 policy and [applicable law]”); *R.I.L-R*, 80 F. Supp. 3d at 174–76 (similar).

20 **iii. The Policy Amounts to an Arbitrary and Capricious**
21 **Interpretation of the INA**

22 Even if the Court were to conclude that the INA’s text is ambiguous as to
23 whether turnbacks could be permissible in some form and even if, contrary to the
24 evidence, Defendants adopted the turnback policy for a legitimate reason, the fact
25 that the policy turns asylum seekers back to danger *en masse* nevertheless amounts
26 to an arbitrary and capricious interpretation of § 1225 because it is “inconsistent with
27 clearly expressed congressional intent,” *EBSC v. Trump*, 950 F.3d 1242, 1273 (9th
28 Cir. 2020).

1 The turnback policy has resulted in a humanitarian crisis across the border in
2 contravention of the INA and the humanitarian principles Congress sought to
3 enshrine in it. *See* Ex. 51 at 746. Under the policy, Defendants have forced thousands
4 of asylum seekers to wait in dangerous border towns where they risk physical harm
5 or death. *See, e.g.*, Ex. 96 at 009; Ex. 100 at 202:24-203:5; Ex. 51 at 746. And
6 Defendants are well aware of the dangers asylum seekers face in Mexico. *See, e.g.*,
7 Ex. 14 at 97:4-99:5 (CBP is aware of S [REDACTED]
8 [REDACTED]
9 [REDACTED]). But in enacting § 1225, Congress adopted inspection and processing
10 requirements that ensure that despite CBP’s general ability to perform summary
11 expedited removal, those with claims for humanitarian protection have the ability to
12 seek asylum *before* they are summarily sent back to Mexico. *See* H.R. Conf. Rep.
13 No. 104-828, at 209 (1996) (noting the purposes of § 1225 are to “expedite the
14 removal from the [U.S.] of aliens who indisputably have no authorization to be
15 admitted” while concurrently providing individuals in that category who claim
16 asylum to have that claim “promptly assessed”). Thus, Congress intended processing
17 of asylum seekers—and only asylum seekers—instead of expedited removal, to
18 avert the harm such individuals might face if summarily removed. The human toll
19 of the turnback policy evinces an abject failure to consider Congress’s guiding
20 concern in crafting the relevant portions of § 1225—preventing just such harm.
21 Thus, in the context of the current dangers asylum seekers face in Mexico, the
22 turnback policy is “inconsistent with clearly expressed congressional intent,” *EBSC*
23 *v. Trump*, 950 F.3d at 1273.

24 **B. The Turnback Policy Violates the Due Process Clause**

25 As this Court has already held and as Defendants concede, Plaintiffs have
26 Fifth Amendment due process rights that are coextensive with their statutory rights
27 under the INA. Dkt. 280 at 70, 76; *see also Meachum v. Fano*, 427 U.S. 215, 226
28 (1976) (minimum due process rights attach to statutory rights); *Graham v. FEMA*,

1 149 F.3d 997, 1001 & n.2 (9th Cir. 1998). “In the enforcement of [congressional
2 immigration] policies, the Executive Branch of the Government must respect the
3 procedural safeguards of due process.” *Kleindienst v. Mandel*, 408 U.S. 753, 767
4 (1972) (quotation omitted). Congress “has plainly established procedural protections
5 for” class members, requiring that they “shall” be inspected and processed for
6 asylum at POEs pursuant to § 1225 of the INA. Dkt. 280 at 76-77; *cf. Perales v.*
7 *Reno*, 48 F.3d 1305, 1314 (2d Cir. 1995) (Congress’s use of word “shall” in IRCA
8 gives rise to statutory entitlements which are subject to due process protections).
9 This is so even if the Court concludes that Plaintiffs have not met all the technical
10 requirements necessary to succeed on their APA claims. Dkt. 280 at 67 n.13, 68.
11 Accordingly, Plaintiffs have proven a due process violation on this basis alone.

12 In addition, the government’s policy to categorically deny class members their
13 statutorily mandated entitlement to the asylum scheme also constitutes a violation of
14 fundamental due process principles. At its core, due process is a “protection of the
15 individual against arbitrary action of government,” *County of Sacramento v. Lewis*,
16 523 U.S. 833, 845 (1998), and its procedural component protects against “denial of
17 fundamental procedural fairness.” *Id.* at 845-46. In applying procedural due process,
18 courts are to prevent an “arbitrary deprivation” of rights “without threatening
19 institutional interests or imposing undue administrative burdens.” *Superintendent v.*
20 *Hill*, 472 U.S. 445, 455 (1985). Due process is “flexible and depend[s] on a balancing
21 of the interests affected by the relevant government action.” *Id.* at 454.

22 The undisputed facts show that the turnback policy violates this due process
23 requirement. The weight of the procedural right at stake here is enormous: Plaintiffs’
24 statutorily-enshrined right to seek protection from persecution for themselves and
25 their families. *See Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970) (potential for
26 grave consequences necessitates maximum procedural due process protections); Ex.
27 20 at ¶ 86 (“[T]here are . . . cases of turn-backs and metering that have led to an
28 effective end to asylum seekers’ claims, and even their lives.”); *cf. Marinacas v.*

1 *Lewis*, 92 F.3d 195, 203 (3d Cir. 1996) (“The basic procedural rights Congress
2 intended to provide asylum applicants . . . are particularly important because an
3 applicant erroneously denied asylum could be subject to death or persecution if
4 forced to return to his or her home country.”). Further, it is self-evident that in a
5 system of separation of powers, the executive branch is not free to ignore statutorily
6 mandated procedures by claiming that they impose a “burden.” Defendants need
7 only return to inspecting and processing asylum seekers in accordance with the
8 statutorily required procedure, as Defendants were doing before the turnback
9 policy. Where individual interest in the mandatory, life-saving protections of a
10 statute is so grave, and the government’s actual—as opposed to manufactured and
11 pretextual (*see supra* at 26-29)—burden to abide by the statute is negligible,
12 Defendants’ willful and arbitrary decision to deny individuals access to those
13 statutory protections violates fundamental due process principles.

14 **C. The Turnback Policy Violates the ATS**

15 As this Court recognized, the ATS allows noncitizens to seek redress for a
16 “violation of the law of nations,” 28 U.S.C. § 1350, that is “specific, universal, and
17 obligatory.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (quotation omitted);
18 Dkt. 280 at 80. The duty of *non-refoulement* has achieved the status of a *jus cogens*
19 norm—*i.e.* “an elite subset of . . . customary international law” from which no
20 derogation is ever permitted. *Siderman de Blake v. Rep. of Arg.*, 965 F.2d 699, 714-
21 15 (9th Cir. 1992). Plaintiffs have previously summarized the international law
22 authorities recognizing *non-refoulement* as a *jus cogens* norm, *see* Dkt. 210 at 27-
23 30, a point which Defendants “concede[d].” Dkt. 280, at 82. That should be
24 sufficient to meet the *Sosa* standard and authorize jurisdiction under the ATS. *Id.*

25 The duty of *non-refoulement* forbids a government from returning or
26 expelling an individual to a country where he or she has a well-founded fear of
27 persecution, torture, or other harm, whether it is the individual’s home country or
28 another country, *see I.N.S. v. Stevic*, 467 U.S. 407, 417 & n.20 (1984) (referencing

1 obligations under 1951 Refugee Convention), and it “encompass[es] any measure .
2 . . . which could have the effect of returning an asylum-seeker or refugee to the
3 frontiers of territories where his or her life or freedom would be threatened[.]” U.N.
4 High Comm’r for Refugees, *Note on International Protection*, ¶ 16 (citing Refugee
5 Convention, art. 33(1)). As interpreted by the European Court of Human Rights, the
6 principle of *non-refoulement* “essentially means that States must refrain from
7 returning a person (directly or indirectly) to a place where he or she could face a real
8 risk of being subjected to torture or to inhuman[e] or degrading treatment.”¹⁹

9 The Turnback Policy violates the duty of *non-refoulement*—and thus the
10 ATS—on multiple grounds. First, Defendants have *refouled* class members to
11 Mexico where they fear persecution or other harm, and Defendants “knew or should
12 have known” of those likely risks. *Hirsi Jamaa and Others v. Italy*, App. No.
13 27765/09 ¶¶ 131, 156 (Eur. Ct. H.R., Feb. 23, 2012). Three of the Plaintiffs—
14 Abigail, Beatrice, and Carolina—are Mexican nationals who claimed fear of
15 persecution in Mexico—the country to which they were *refouled*. See Dkt. 390-11
16 at ¶¶ 18-20; 390-12 at ¶¶ 26-27; 390-13 at ¶¶ 28-31. Many other class members
17 stated a substantial fear of harm in Mexico. See, e.g., Dkts. 390-11, 390-12, 390-13,
18 390-14, 390-15, 390-16, 390-73, 390-74, 390-75, 390-76, 390-77, 390-78, 390-79,
19 390-80, 390-81, 390-82, 390-83, 390-85.

20 Further, Defendants knew that class members were at risk of such harms in
21 Mexico. Other Executive agencies had stated the risks publicly. Many border towns
22 are so dangerous the Department of State prohibits U.S. government employees from
23 traveling there, of which this Court may take judicial notice. Dkt. 216 at 10, n.32;
24 see also Ex. 14 at 97:4-99:5 (CBP is aware of State Department’s travel advisories

25 ¹⁹ *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09 ¶ 34 (Eur. Ct. H.R., Feb. 23,
26 2012), available at shorturl.at/nEHNQ. Numerous courts are in accord. See, e.g.,
27 *Ilias v. Hungary*, App. No. 47287/15 ¶ 98, 244 (Eur. Ct. H.R. Mar. 14, 2017)
28 available at shorturl.at/aizK2; *M.S.S. v. Belgium and Greece*, App. No. 30696/09 ¶
(Eur. Ct. H.R., Jan. 21, 2011) available at shorturl.at/yKWY7; *Abdolkhani &*
Karimnia v. Turkey, App. No. 30471/08, ¶ 88 (Eur. Ct. H.R., Sep. 22, 2009),
available at shorturl.at/dyTU8.

1 for Mexican border states). Plaintiffs also have presented undisputed evidence that
2 non-Mexican asylum seekers are at particular risk of harm in Mexico after CBP
3 *refoulement*. Although these class members do not claim persecution from Mexico,
4 this showing is not required under *non-refoulement* doctrine if Plaintiffs otherwise
5 show that their “life or freedom would be threatened,” UNHCR, *Note on*
6 *International Protection*, ¶ 16, or that they have a substantial fear of “inhuman[e]
7 treatment.” *See supra* note 18. Migrants marooned on the Mexican side of the border
8 await a full panoply of dangers, including “disappearances, kidnappings, rape[,]”
9 sexual and labor exploitation,” and worse. Dkt. 104-C at 16; *see Innovation Law Lab*
10 *v. Wolf*, 951 F.3d 1073, 1078 (9th Cir. 2020) (discussing danger). It has been
11 described as a “human rights catastrophe,” Dkt. 293-34 at 1, and overwhelming
12 evidence corroborates the existence of these threats. *See, e.g.*, Ex. 20 at ¶¶ 83-86.
13 Defendants are or should be fully aware of the peril the turnback policy places on its
14 targets, and have thus violated their duty of *non-refoulement* by implementing it.
15 *See, e.g.*, Ex. 100 at 201:1-203:5.

16 Finally, the Turnback Policy subjects asylum-seekers to impermissible chain
17 *refoulement*—that is, the risk that CBP’s expulsion of migrants to Mexico will lead
18 to Mexican-initiated deportation.²⁰ Mexico—whose asylum system has been
19 described as on “the brink of collapse”²¹—has continually violated migrants’ rights.
20 To wit, when CBP turned back Plaintiff Roberto Doe in October 2018, it specifically
21 instructed Mexican immigration officials to remove him from the bridge, and
22 Roberto was later deported from Mexico. Dkt. 390-75 at ¶ 4, 9, 390-97 at ¶¶ 6-7.
23 Plaintiff Cesar Doe would have suffered the same fate were it not for the timely
24 intervention of an attorney who thwarted his deportation twelve days into his

25 _____
26 ²⁰ *See, e.g., Hirsi Jamaa and Others v. Italy*, App. No. 27765/09 (Eur. Ct. H.R., Feb.
27 23, 2012) (Italy violated *non-refoulement* when it refused to consider whether Libya
28 would onwardly deport asylum seekers); *T.I. v. United Kingdom*, App. No.
43844/98, ¶ 2 (Eur. Ct. H.R., Mar. 7, 2000) available at shorturl.at/iHK68 (same).

²¹ Elyssa Pachico and Maureen Meyer, *One Year After U.S.-Mexico Migration Deal, a Widespread Humanitarian Disaster*, WOLA (Jun. 6, 2020).

1 Mexican-ordered detention. Dkt. 390-101 at ¶¶ 8-9. CBP’s cooperation with
2 Mexican immigration authorities jeopardizes hundreds—if not thousands—of
3 individuals’ legitimate claims to asylum through the *chain refoulement* process. *See,*
4 *e.g.*, Dkt. 293-47 at ¶¶ 11-16; 293-46 at ¶¶ 39-46.

5 **C. The Court Should Enter A Permanent Injunction**

6 The relief Plaintiffs seek is simple: for Defendants to cease treating asylum
7 seekers differently from all other people arriving at POEs on foot or by vehicle. Prior
8 to instituting the Turnback Policy, the government inspected those seeking access to
9 the asylum process just like everybody else; that is, in the order in which they
10 approached the POE. Defendants’ self-generated “operational capacity” constraints
11 have created an unlawful and untenable situation at the U.S.-Mexico border and
12 absent injunctive relief, Defendants’ “past and present misconduct indicates a strong
13 likelihood of future violations.” *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549,
14 564 (9th Cir. 1990). “The Supreme Court has repeatedly upheld the appropriateness
15 of federal injunctive relief to combat [such] a ‘pattern’ of illicit law enforcement
16 behavior.” *LaDuke v. Nelson*, 762 F.2d 1318, 1324 (9th Cir. 1985).

17 Because they have succeeded on the merits of their claims, *see supra* 20-37,
18 Plaintiffs’ ability to satisfy the remaining factors warranting permanent injunctive
19 relief is uncontroversial. “A permanent injunction is appropriate when: (1) a plaintiff
20 will suffer an irreparable injury absent injunction, (2) remedies available at law are
21 inadequate, (3) the balance of hardships between the parties supports an equitable
22 remedy, and (4) the public interest would not be disserved.” *Sierra Club v. Trump*,
23 963 F.3d 874, 895 (9th Cir. 2020) (citing *eBay Inc. v. MercExchange LLC*, 547 U.S.
24 388, 391 (2006)).

25 **First**, as discussed *supra* 16-18, the statutory, constitutional, and international
26 law violations Defendants commit through implementation of the turnback policy
27 put asylum seekers in grave danger in Mexico and deny them access to the U.S.
28

1 asylum process. These violations constitute irreparable harm. *See E. Bay Sanctuary*
2 *Covenant v. Trump*, 349 F. Supp. 3d 838, 864 (N.D. Cal. 2018) (loss of the right to
3 seek asylum constitutes irreparable harm); *Hernandez v. Sessions*, 872 F.3d 976, 994
4 (9th Cir. 2017) (“the deprivation of constitutional rights ‘unquestionably constitutes
5 irreparable injury’”) (citation omitted). Moreover, the “ongoing harms to [Plaintiff
6 Al Otro Lado’s] organizational missions” also constitute irreparable harm. *E. Bay*
7 *Sanctuary Covenant v. Barr*, 964 F.3d at 854 (citation omitted).

8 **Second**, injunctive relief is appropriate because the turnback policy strands
9 class members in border towns where they face grave harm while waiting
10 indefinitely to seek asylum in the U.S., *see supra* 16-18, and there “are no legal
11 remedies available that would adequately compensate the class members” for this
12 type of harm. *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998) (there is “no
13 way to calculate the value of such a constitutional deprivation or the damages that
14 result from erroneous deportation”) (citation omitted). Moreover, where, as here, a
15 court has certified a class action under Rule 23(b)(2), Dkt. 513 at 18, the Rule
16 “literally permits only class applications for injunctive or declaratory relief.”
17 *LaDuke*, 762 F.2d at 1330.

18 **Third** and **Fourth**, the balance of the hardships and the public interest weigh
19 in Plaintiffs’ favor. “When the government is a party to the case, the court should
20 consider the balance of hardships and public interest factors together.” *Sierra Club*,
21 963 F.3d at 895 (citation omitted). Even if Defendants suffer some hardship by
22 processing more asylum seekers, that harm is far outweighed by denying class
23 members access to the U.S. asylum process. On the one hand, processing and
24 inspecting asylum seekers is *CBP’s job*. Asking an agency to do its job is not a
25 hardship. Defendants inspected asylum seekers as they approached a POE without
26 resorting to turnbacks before 2016, *see Ex. 3* at 71:9-16, and continue to do so for
27 individuals who approach a POE with travel documents and for vehicular traffic, *Ex.*
28 *118* at 24:17-25:13. There is no reason why CBP cannot return to inspecting and

1 processing even high numbers of asylum seekers. Ex. 3 at 71:9-16. On the other
2 hand, any hardships the government faces pale in comparison to the denial of
3 statutory rights and the grave risk of persecution, torture, and death that class
4 members will face absent an injunction. *See supra* at 16-18.

5 Complying with an injunction should not be difficult. Defendants have [REDACTED]
6 [REDACTED] Ex. 120 at
7 270 (“ [REDACTED]
8 [REDACTED]”). Moreover, the Supreme Court has recognized that
9 “preventing aliens from being wrongfully removed, particularly to countries where
10 they are likely to face substantial harm,” is “of course” in the public interest. *Nken*
11 *v. Holder*, 556 U.S. 418, 436 (2009); *see also League of Women Voters of U.S. v.*
12 *Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (“There is generally no public interest in the
13 perpetuation of unlawful agency action.”). Turning back Mexican class members to
14 their country of origin and stranding non-Mexican class members in Mexico
15 constitutes an unlawful denial of access to the U.S. asylum process. Defendants have
16 sought to do through policy what they cannot do by law: deny those in need of
17 protection access to the U.S. asylum process. Therefore, the Court should enter an
18 injunction that permanently enjoins all forms of turnbacks and requires Defendants
19 to inspect and process asylum seekers as they arrive at Class A POEs on the U.S.-
20 Mexico border.

21 **E. The Court Should Enter A Declaratory Judgment**

22 In addition to a injunctive relief, the Court should also enter a declaratory
23 judgment that Defendants have violated the APA, Fifth Amendment, and ATS.
24 “[A]ny court of the United States . . . may declare the rights and other legal relations
25 of any interested party seeking such declaration, whether or not further relief is or
26 could be sought.” 28 U.S.C. § 2201(a); *see also McGraw-Edison Co.*, 362 F.2d at
27 342 (declaratory relief is appropriate in addition to other forms of relief). Here,
28 Plaintiffs seek a declaratory judgment that “will serve a useful purpose in clarifying

1 the legal relations at issue,” *GEICO v. Dizol*, 133 F.3d 1220, 1225 n.5 (9th Cir.
2 1998), namely adjudicating whether the turnback policy broke the law. Because
3 Plaintiffs have shown via undisputed facts that Defendants’ conduct was unlawful,
4 this Court should enter a declaratory judgment that Defendants violated the APA,
5 Fifth Amendment, and ATS. *See California v. Trump*, 963 F.3d 926, 949 (9th Cir.
6 2020) (affirming summary judgment entering a declaratory judgment where the
7 undisputed facts showed that the Government broke the law).

8 **V. CONCLUSION**

9 For the foregoing reasons, Plaintiffs are entitled to summary judgment,
10 declaratory relief, and a permanent injunction.

11 Dated: September 4, 2020

MAYER BROWN LLP
Matthew H. Marmolejo
Ori Lev
Stephen M. Medlock

SOUTHERN POVERTY LAW
CENTER
Melissa Crow
Sarah Rich
Rebecca Cassler

CENTER FOR CONSTITUTIONAL
RIGHTS
Baher Azmy
Ghita Schwarz
Angelo Guisado

AMERICAN IMMIGRATION
COUNCIL
Karolina Walters

By: /s/ Stephen M. Medlock
Stephen M. Medlock

Attorneys for Plaintiffs

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all counsel via the Court’s CM/ECF system.

Dated: September 4, 2020

MAYER BROWN LLP

By /s/ Stephen M. Medlock