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

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

Plaintiffs,

v.

ALEJANDRO MAYORKAS, Secretary,  
U.S. Department of Homeland Security,  
in his official capacity; TROY A.  
MILLER, Acting Commissioner, U.S.  
Customs and Border Protection, in his  
official capacity; WILLIAM A.  
FERRERA, Executive Assistant  
Commissioner, Office of Field  
Operations, U.S. Customs and Border  
Protection, in his official capacity,

Defendants.<sup>1</sup>

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

**ORDER:**

- (1) GRANTING IN PART AND DENYING IN PART PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT (ECF No. 535);**
- (2) GRANTING IN PART AND DENYING IN PART DEFENDANTS’ CROSS-MOTION FOR SUMMARY JUDGMENT (ECF No. 563); AND**
- (3) REQUIRING SUPPLEMENTAL BRIEFING**

This action challenges the lawfulness of the Government’s practice of systematically denying asylum seekers access to the asylum process at ports of entry (“POEs”) along the U.S.-Mexico border. Plaintiffs allege that in violation of existing statutory, constitutional, and international law, Customs and Border Protection (“CBP”) officers do not inspect

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<sup>1</sup> Because all Defendants are sued in their official capacities, the successors for these public offices are automatically substituted as Defendants per Fed. R. Civ. P. 25(d).

1 asylum seekers when they arrive at POEs and refer them for asylum interviews but instead  
 2 turn them back to Mexico on the basis that the ports are “at capacity[.]”<sup>2,3</sup> (Second Am.  
 3 Compl. (“SAC”) ¶ 13, ECF No. 189.)

4 Now before the Court are the parties’ respective summary judgment motions. (Pls.’  
 5 Mot. for Summ. J. (“Pls.’ MSJ”), ECF No. 535; Defs.’ Cross-Mot. for Summ. J. and Opp’n  
 6 to Pls.’ Mot. for Summ. J. (“Defs.’ MSJ”), ECF No. 563.) For the reasons stated below,  
 7 the Court **GRANTS IN PART AND DENIES IN PART** Plaintiffs’ Motion for Summary  
 8 Judgment and **GRANTS IN PART AND DENIES IN PART** Defendants’ Cross-Motion  
 9 for Summary Judgment.

## 10 STATEMENT OF FACTS

### 11 I. Factual Background<sup>4</sup>

#### 12 A. Overview of CBP

13 CBP, a component agency of the Department of Homeland Security (“DHS”), is  
 14 tasked with monitoring the flow of people and goods across United States borders. (JSUF  
 15 ¶ 1.) The Office of Field Operations (“OFO”), a division of CBP, is responsible for the  
 16 management of operations at POEs in the United States. (JSUF ¶ 4.) OFO operates various  
 17 different classes of POEs. (JSUF ¶ 5.) Relevant here is a “Class A” land POE, designated  
 18 for all aliens. (*Id.*) Class A POEs on the U.S.-Mexico border include, among others: San  
 19 Ysidro, Otay Mesa, Calexico, Nogales, El Paso, Laredo, Hidalgo, and Brownsville. (JSUF  
 20

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21 <sup>2</sup> Plaintiffs in this case include Al Otro Lado and the above-captioned individuals on behalf of a  
 22 class of “all noncitizens who seek or will seek to access the U.S. asylum process by presenting themselves  
 23 at a Class A [POE] on the U.S.-Mexico border, and were or will be denied access to the U.S. asylum  
 24 process by or at the instruction of [CBP] officials on or after January 1, 2016.” (ECF No. 513.) The Court  
 25 also certified a subclass consisting of “all noncitizens who were or will be denied access to the U.S. asylum  
 26 process at a Class A POE on the U.S.-Mexico border as a result of Defendants’ metering policy on or after  
 27 January 1, 2016.” (*Id.*)

<sup>3</sup> This practice of turning back asylum seekers at POEs is alternatively referred to as “metering”  
 26 or “queue management.”

<sup>4</sup> The parties filed a lengthy joint statement of undisputed facts (“JSUF”) in support of their  
 27 respective summary judgment motions. For the sake of brevity, the Court includes an abridged version to  
 28 provide an overview of the events since 2016 precipitating this litigation and relevant to this Order. The  
 complete joint statement is available on the docket. (*See* ECF No 619.)

1 ¶ 8.) These POEs are overseen by four regional field offices: San Diego, Tucson, El Paso,  
2 and Laredo. (JSUF ¶ 7.)

3 **B. First Use of Metering in 2016**

4 Before metering was implemented in 2016, migrants seeking asylum who lacked  
5 documents for lawful entry would queue between the limit line<sup>5</sup> at a POE and the primary  
6 inspection booths to wait until there was sufficient space for their intake. (JSUF ¶ 49.)

7 Beginning in February 2016, CBP saw an increase in the number of inadmissible  
8 Haitian nationals seeking admission at San Diego POEs. (JSUF ¶ 31.) CBP had both  
9 border-wide and port-specific “contingency plans” in place for the purpose of responding  
10 to such “mass migration events.” (JSUF ¶¶ 28–29, 191.) In response to the increase in  
11 Haitian migration in 2016, the San Ysidro POE converted spaces to create more temporary  
12 holding rooms, increased its staffing, and took other measures to increase capacity  
13 consistent with the contingency plans in place. (JSUF ¶¶ 35–39, 40–41, 44–47, 55–58.)  
14 No contingency plan includes metering or queue management as a tactic for managing port  
15 capacity constraints during a period of high-volume arrivals. (*Id.*) However, in 2016, San  
16 Ysidro port officials began to stop migrants at the limit line outside the POE to prevent  
17 them from entering the port building and coordinated with the Government of Mexico to  
18 “meter” asylum seekers at the San Diego POEs “due to facility and processing constraints.”  
19 (JSUF ¶¶ 66–69, 70, 86–87.)

20 The high volume of migration continued into the fall of 2016, spread east, and  
21 included more family units (“FAMUs”) and unaccompanied alien children (“UAC”) in  
22 addition to the Haitian nationals. (JSUF ¶ 76.) Ports reported challenges with managing  
23 the number of people in custody. (JSUF ¶¶ 94–95, 105–07.) CBP officials were informed  
24 that their counterparts in Mexico were under pressure for assisting with processing of  
25

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26 <sup>5</sup> The Court understands the “limit line” to be an area at or near the U.S.-Mexico border where  
27 CBP officers stand “to control the flow of undocumented aliens entering CBP ports for processing.” (*See*  
28 “CBP Has Taken Steps to Limit Processing of Undocumented Aliens at Ports of Entry,” Office of  
Inspector General (Oct. 27, 2020) (“OIG Report”) at 4, Ex. 1 to Decl. of Stephen Medlock in supp. of  
Pls.’ Reply, ECF No. 610-2.)

1 asylum seekers because of the “local humanitarian crisis” developing in border towns.  
2 (JSUF ¶ 81.) After Hurricane Matthew struck in October 2016, the number of arrivals  
3 increased. (JSUF ¶¶ 96–97.) DHS, with the assistance of MCAT,<sup>6</sup> developed a multi-  
4 phased plan to “address the surge of migration along the Southwest border,” including  
5 constructing “soft-sided holding facilities” to increase capacity. (JSUF ¶¶ 116, 121–22,  
6 125–26, 128.)

7 The presidential election was held on November 8, 2016. (JSUF ¶ 133.) On  
8 November 9, 2016, some soft-sided facilities were put on hold. (JSUF ¶¶ 134, 151.)  
9 Shortly after, then-CBP Deputy Commissioner Kevin McAleenan attended a meeting at  
10 DHS where he discussed increasing “efforts to meter arrivals of non-UAC, non-Mexican  
11 CF [credible fear] cases mid-bridge.” (JSUF ¶ 140.) Then-DHS Secretary Jeh Johnson  
12 approved the proposal to increase metering on November 10, 2016. (JSUF ¶ 141.) Soft-  
13 sided facilities were ultimately scrapped or put on stand-by. (JSUF ¶¶ 134, 151, 170–71.)

14 Metering was then adopted by POEs, although the way in which it was implemented  
15 varied. (JSUF ¶¶ 142–44.) At some ports, officers were stationed too far from the limit  
16 line and consequently turned back asylum seekers on U.S. soil. (JSUF ¶¶ 157, 159, 160,  
17 162–63, 166–67.) There were also differences in approach, with some ports verbally  
18 providing “return” appointments to asylum seekers while others advised them only “to  
19 come back at a later time.” (JSUF ¶¶ 164–65.) Officials at Laredo noticed that the so-  
20 called “turnbacks” were having a strong enough deterrent effect that constant metering was  
21 not necessary. (JSUF ¶ 165.)

22 The levels of migration ebbed and flowed in the following 16 months. In December  
23 2016, the number of inadmissible arrivals presenting at POEs on the southwest border  
24 decreased. (JSUF ¶ 168.) In a 2017 report, the Office of the Inspector General (“OIG”)

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25  
26 <sup>6</sup> In October 2016, the CBP Commissioner established a Migrant Crisis Action Team (“MCAT”),  
27 which was composed of various CBP and DHS components and headed by Border Patrol’s Deputy Chief.  
28 (JSUF ¶¶ 117–18.) The MCAT reported on DHS-coordinated plans “for addressing the surge of migration  
along the Southwest border.” (JSUF ¶ 120.)

1 stated that the “surge of migrants arriving on the Southwest border in 2016” “abruptly,  
 2 drastically, and unexpectedly ended” in January 2017. (JSUF ¶ 169.) Nonetheless, some  
 3 ports continued to meter in December 2017. (JSUF ¶¶ 193–98.) In 2018, the migration  
 4 numbers again began to increase and peaked in the spring. (JSUF ¶ 199.) However, a  
 5 “migrant caravan” reportedly making its way from Guatemala quickly dwindled and did  
 6 not have an impact on port operations. (JSUF ¶¶ 206–12, 214–17, 223, 227.) One CBP  
 7 officer in 2018 noted that metering “deterred [other than Mexican] traffic.” (JSUF ¶ 235.)

### 8 **C. The Memorialization of Metering/Queue Management**

9 On April 27, 2018, the then-Executive Assistant Commissioner of the OFO, Todd  
 10 Owen, issued a memorandum with the subject line “Metering Guidance to the Directors of  
 11 Field Operations [‘DFOs’] overseeing operations at POEs on the U.S.-Mexico border.”  
 12 (JSUF ¶ 228.) In the memorandum, Owen wrote, in part:

13 When necessary or appropriate to facilitate orderly processing and maintain  
 14 the security of the port and safe and sanitary conditions for the traveling  
 15 public, DFOs may elect to meter the flow of travelers at the land border to  
 16 take into account the port’s processing capacity. Depending on port  
 17 configuration and operating conditions, DFOs may establish and operate  
 18 physical access controls at the borderline, including as close to the U.S.-  
 19 Mexico border as operationally feasible. DFOs may not create a line  
 20 specifically for asylum-seekers only, but could, for instance, create lines based  
 21 on legitimate operational needs, such as lines for those with appropriate travel  
 22 documents and those without such documents.

23 Ports should inform the waiting travelers that processing at the port is  
 24 currently at capacity and CBP is permitting travelers to enter the port once  
 25 there is sufficient space and resources to process them. At no point may an  
 26 officer discourage a traveler from waiting to be processed, claiming fear of  
 27 return, or seeking any other protection. . . . Once a traveler is in the United  
 28 States, he or she must be fully processed.

(*Id.*; see also “Metering Guidance,” Ex. 82 to Decl. of Stephen Medlock in supp. of Pls.’  
 MSJ (“Medlock Decl.”), ECF No. 535-84.) The guidance was disseminated to other  
 executives as “processing guidance for surge events.” (JSUF ¶ 230.)

1 In May 2018, DHS made its position on metering publicly known. The DHS  
2 Secretary at the time, Kirstjen Nielsen, publicly stated: “We are ‘metering,’ which means  
3 that if we don’t have the resources to let them in on a particular day, they are going to have  
4 to come back.” (JSUF ¶ 238.) Around this time, CBP officials responded to DHS’s  
5 requests for information regarding the number of people likely to be turned away under a  
6 full implementation of the metering policy. (JSUF ¶¶ 239–43.)

7 Shortly thereafter, in June 2018, Nielsen issued a “Prioritization-Based Queue  
8 Management” (“PBQM”) memorandum to the CBP Commissioner. (JSUF ¶ 244; *see also*  
9 “Prioritization-Based Queue Management,” Ex. 3 to Decl. of Alexander Halaska in supp.  
10 of Defs.’ MSJ, ECF No. 563-5.) In the memorandum, Nielsen explained that  
11 apprehensions between POEs and arrivals at POEs of inadmissible migrants “continue to  
12 rise,” but “CBP’s resources remain strained along the Southwest Border.” (*Id.*)  
13 Specifically, she noted that inadmissible arrivals at POEs require additional processing  
14 because they lack documents, which “delays the flow of legitimate trade and travel” and  
15 “draws resources away from CBP’s fundamental responsibilities.” (*Id.*) Nielsen sought to  
16 refocus CBP “on its primary mission: to protect the American public from dangerous  
17 people and materials while enhancing our economic competitiveness through facilitating  
18 legitimate trade and travel.” (*Id.*)

19 To this end, she directed the CBP Commissioner to “initiate a 30-day pilot program  
20 to prioritize staffing and operations in accordance with the following order of priority at all  
21 Southwest border ports of entry:” (1) national security efforts, (2) counter-narcotics  
22 operations, (3) economic security, and (4) trade and travel facilitation. (*Id.*) The PBQM  
23 memorandum further explains how these priorities function practically: Nielsen further  
24 granted DFOs the discretion to “establish and operate physical access controls at the  
25 borderline, including as close to the U.S.-Mexico border as operationally feasible.” (JSUF  
26 ¶ 245.) Thus, according to Nielsen, ports could process asylum seekers to the extent their  
27 capacity would allow “without negatively impacting their other responsibilities” under this  
28 priority-based regime. (JSUF ¶ 247.) Port officials subsequently began to use “operational

1 capacity” instead of “detention capacity” to determine when to employ metering at their  
2 respective POEs. (JSUF ¶ 50.) CBP has not officially defined the term “operational  
3 capacity” in its written policy and procedure documents. (JSUF ¶ 251.)

4 Additional metering guidance was issued by CBP in 2019 and 2020, reiterating the  
5 objectives in the PBQM memorandum. (JSUF ¶¶ 263–65.) The 2020 guidance cautioned  
6 immigration officers not to “discourage any traveler from waiting to be processed, claiming  
7 fear of return, or seeking any other protection.” (JSUF ¶ 265.) Port officials were also  
8 informed that if they “determine that, due to a particular port’s operating conditions, it is  
9 not operationally feasible to safely process” inadmissible arrivals at the port, these  
10 individuals could “be encouraged to initiate their processing and entry at another port that  
11 is better positioned to process” them. (*Id.*) However, the guidance made clear that “[o]nce  
12 a traveler is in the United States, he or she must be inspected and processed, and may not  
13 be directed to return to Mexico.” (*Id.*)

## 14 **II. Statutory and Regulatory Framework**

15 Two statutory provisions in the Immigration and Nationality Act (“INA”) are  
16 implicated in this case. The first, 8 U.S.C. § 1158(a)(1), provides:

17 Any alien who is physically present in the United States or who arrives in the  
18 United States (whether or not at a designated port of arrival and including an  
19 alien who is brought to the United States after having been interdicted in  
20 international or United States waters), irrespective of such alien’s status, may  
apply for asylum in accordance with this section or . . . section 1225(b) . . . .”

21 Section 1225 concerns the process of “inspection.” This section requires immigration  
22 officials to inspect all applicants for admission to the United States. 8 U.S.C. §  
23 1225(a)(1)(3); *see also* 8 C.F.R. § 235.1(a) (“Application to lawfully enter the United  
24 States shall be made in person to an immigration officer at a U.S. port-of-entry when the  
25 port is open for inspection . . . .”). Applicants for admission are noncitizens “present in the  
26 United States who have not been admitted” or those “who arrive[] in the United States.” 8  
27 U.S.C. § 1225(a)(1).  
28

1 Section 1225(b) establishes the specific procedure by which immigration officials  
 2 must conduct this inspection. 8 U.S.C. § 1225(b)(1)(A). Officers are required to order all  
 3 noncitizens determined to be “inadmissible” removed without further hearing or review—  
 4 a process known as “expedited removal”—“unless the alien indicates either an intention to  
 5 apply for asylum under section 1158 of this title or a fear of persecution.” 8 U.S.C.  
 6 § 1225(b)(1)(A)(i). Once an applicant for admission indicates either of the above, “the  
 7 officer shall refer the alien for an interview by an asylum officer under subparagraph (B).”  
 8 8 U.S.C. § 1225(b)(1)(A)(ii).<sup>7</sup> Subparagraph (B) elaborates on the interview process and  
 9 events following the credible fear determination. *See* 8 U.S.C. § 1225(b)(1)(B)(i)–(iii).

## 10 LEGAL STANDARD

### 11 I. Summary Judgment

12 “A party may move for summary judgment, identifying each claim or defense—or  
 13 the part of each claim or defense—on which summary judgment is sought.” Fed. R. Civ.  
 14 P. 56(a). Summary judgment is appropriate under Rule 56(c) where the moving party  
 15 demonstrates the absence of a genuine issue of material fact and entitlement to judgment  
 16 as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322  
 17 (1986). A fact is material when, under the governing substantive law, it could affect the  
 18 outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute  
 19 about a material fact is genuine if “the evidence is such that a reasonable jury could return  
 20 a verdict for the nonmoving party.” *Id.* at 248.

21 When cross-motions for summary judgment are filed by the parties, as here, “[e]ach  
 22 motion must be considered on its own merits.” *Fair Hous. Council of Riverside Cty., Inc.*  
 23 *v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001). In other words, a court must review  
 24 the evidence submitted in support of each cross-motion, *id.*, and “giv[e] the nonmoving  
 25 party in each instance the benefit of all reasonable inferences,” *A.C.L.U. of Nevada v. City*  
 26 *of Las Vegas*, 466 F.3d 784, 791 (9th Cir. 2006). Further, even where neither party disputes

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27  
 28 <sup>7</sup> The Court refers to the asylum provision in § 1158(a)(1) and the specific actions listed in  
 § 1225(a)(1)(3) and § 1225(b)(1)(A)(i)–(ii) as the “inspection and referral duties.”



1 issues of material fact, the court is still required to analyze the record to determine whether  
2 disputed issues of material fact are present. *United States v. Fred A. Arnold, Inc.*, 573 F.2d  
3 605, 606 (9th Cir. 1978); *see also Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1037  
4 n.5 (9th Cir. 2000) (“[T]he district court is responsible for determining whether the  
5 requirements of [Rule 56] are met, whether or not the parties believe that they are.”).

6 Summary judgment can turn on factual issues or legal questions. “Where a case  
7 turns on a mixed question of law and fact and . . . the only disputes relate to the legal  
8 significance of undisputed facts, the controversy collapses into a question of law suitable  
9 to disposition on summary judgment.” *Blue Lake Rancheria v. United States*, 653 F.3d  
10 1112, 1115 (9th Cir. 2011) (quotations omitted); *see also Johnson v. Allstate Ins. Co.*, 126  
11 Wash. App. 510, 515 (2005) (questions of law include the interpretation of contracts,  
12 statutes, “and other writings”), *cited with approval in Campidoglio LLC v. Wells Fargo &*  
13 *Co.*, 870 F.3d 963, 973 (9th Cir. 2017).

## 14 **II. Administrative Procedure Act**

15 The Administrative Procedure Act (“APA”) generally limits the scope of judicial  
16 review to the administrative record. 5 U.S.C. § 706 (directing the court to “review the  
17 whole record or those parts of it cited by a party”); *see, e.g., GB Int’l v. Crandall*, 403 F.  
18 Supp. 3d 927, 931 (W.D. Wash. 2019) (“[T]he Court reviews the evidence included in the  
19 administrative record to determine whether, as a matter of law, the evidence permitted the  
20 agency to make the decision it did.” (citing *Nw. Motorcycle Ass’n v. U.S. Dep’t Agric.*, 18  
21 F.3d 1468, 1471–72 (9th Cir. 1994) and *Occidental Eng’g Co. v. I.N.S.*, 753 F.2d 766, 769–  
22 70 (9th Cir. 1985))), *aff’d sub nom. GB Int’l, Inc. v. Crandall*, 851 F. App’x 689 (9th Cir.  
23 2021).

24 The parties did not designate an administrative record in this action. However,  
25 because this Court’s evaluation of the APA claims is limited to Plaintiffs’ contention that  
26 Defendants failed to act under § 706(1), an administrative record is not necessary here. *See*  
27 *San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 886 (9th Cir. 2002) (“[W]hen a court  
28 considers a claim that an agency has failed to act in violation of a legal obligation, review

1 is not limited to the record as it existed at any single point in time, because there is no final  
2 agency action to demarcate the limits of the record.” (quoting *Friends of the Clearwater v.*  
3 *Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000)); *Cherokee Nation v. United States Dep’t of*  
4 *the Interior*, No. 19-CV-2154-TNM-ZMF, 2021 WL 1209205, at \*6 (D.D.C. Mar. 31,  
5 2021) (“Review under [§ 706(1)] is not limited to the administrative record.”); *see also*  
6 *Consejo de Desarrollo Economico de Mexicali, AC v. United States*, 438 F. Supp. 2d 1207,  
7 1221 (D. Nev. 2006) (refusing to limit its review to the administrative record when  
8 evaluating a § 706(1) claim, instead considering “materials submitted by Plaintiffs as they  
9 relate to the present matter”), *rev’d on other grounds*, 482 F.3d 1157 (9th Cir. 2007).

10 Accordingly, when evaluating the APA claims in this case, the Court considers all  
11 materials submitted by the parties.

## 12 ANALYSIS

13 Plaintiffs move for summary judgment on all claims in this case, arguing that  
14 Defendants’ act of turning back asylum seekers at POEs violates the INA, the APA, the  
15 Fifth Amendment to the United States Constitution, and the Alien Tort Statute (“ATS”).  
16 Defendants move for summary judgment on the basis that turning back class members does  
17 not violate their statutory duties of inspection and referral and is therefore lawful under the  
18 Constitution. They further argue that metering does not violate the duty of non-  
19 refolement and that, even where the Court finds it does, various factors counsel against this  
20 Court’s recognition of a cause of action under the ATS. (*Id.*)

21 The Court confronts two threshold questions on summary judgment: (1) whether, as  
22 a matter of law, Defendants’ metering policy satisfies their inspection and referral duties  
23 under the INA; and (2) if it does, whether the record evinces any genuine issues of material  
24 fact as to whether Defendants’ decision to turn back asylum seekers at POEs was pretextual  
25 such that it is unlawful under the APA. In addition, the Court determines whether  
26 turnbacks violate due process and the ATS. The Court states below its conclusions as to  
27 each claim.

1 **I. Immigration and Nationality Act**

2 Plaintiffs' first claim for relief alleges that Defendants have violated their inspection  
3 and referral duties under the INA by turning back asylum seekers at POEs and thereby  
4 denying them the statutorily prescribed access to the asylum process. (SAC ¶¶ 244–52.)  
5 They request as relief a judicial determination of their rights under these provisions. (*Id.*  
6 ¶¶ 253–55.) Defendants move for summary judgment against this claim on the basis that  
7 the INA provides no private right of action allowing for standalone claims, leaving  
8 Plaintiffs to seek enforcement of its provisions only through the APA. (Mem. of P. & A.  
9 in supp. of Defs.' MSJ ("Defs.' Mem. of P. & A.") at 31–32, ECF No. 563-1.) Plaintiffs  
10 do not argue that the INA creates a private right of action but instead contend that this  
11 Court can, under its inherent authority, issue equitable relief even in the absence of a  
12 statutory cause of action. (Pls.' Opp'n to Defs.' MSJ ("Pls.' Opp'n") at 24–25, ECF No.  
13 585.)

14 "[S]ection 706 of the APA functions as a default judicial review standard" for  
15 decisions made by administrative agencies. *Ninilchik Traditional Council v. United States*,  
16 227 F.3d 1186, 1194 (9th Cir. 2000) (construing *Dickinson v. Zurko*, 527 U.S. 150, 154–  
17 55 (1999)). Some courts have understood the APA to displace traditional equitable  
18 authority to set aside ultra vires actions taken by the executive branch while others have  
19 found that this inherent power persists. *Compare Eagle Tr. Fund v. U.S. Postal Serv.*, 365  
20 F. Supp. 3d 57, 65–66 (D.D.C. 2019) (finding that no "pre-APA equitable review" of  
21 agency action was available because the APA was "a catch-all cause of action for plaintiffs  
22 who seek to challenge agency decisionmaking where none otherwise exists"), *aff'd*, 811 F.  
23 App'x 669 (D.C. Cir. 2020), *with Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988)  
24 (finding that notwithstanding the APA, courts still maintain judicial authority to review  
25 ultra vires actions taken by the executive).

26 Recently, in a set of related cases, the Ninth Circuit has expressed support for the  
27 view that ultra vires claims independent of the APA are viable. *See California v. Trump*,  
28 963 F.3d 926, 941 n.12 (9th Cir. 2020) (finding that an equitable ultra vires cause of action

1 and APA cause of action can proceed separately, but declining to address the ultra vires  
2 claims because the plaintiffs sought “the same scope of relief” under both and prevailed  
3 under the APA), *cert. granted sub nom. Trump v. Sierra Club*, 141 S. Ct. 618 (2020); *see*  
4 *also Sierra Club v. Trump*, 963 F.3d 874, 890–92 (9th Cir. 2020) (citing *Dart* to support  
5 holding that the Sierra Club could assert an equitable ultra vires cause of action to hold  
6 unconstitutional an agency’s conduct), *majority op. vacated sub nom., Biden v. Sierra*  
7 *Club*, \_\_ U.S. \_\_, \_\_ S. Ct. \_\_, 2021 WL 2742775 (July 2, 2021). However, both decisions  
8 were addressing requests to enjoin ultra vires activities alleged to be unconstitutional,  
9 which the Court does not understand to be the basis of Plaintiffs’ INA claim here.

10 In the context of this case, the Court finds instructive *E. V. v. Robinson*, 906 F.3d  
11 1082 (9th Cir. 2018), which established that ultra vires claims independent of the APA and  
12 of any statutory private right of action can be brought against federal officers on a non-  
13 constitutional and constitutional basis. Specifically, the Ninth Circuit held that these ultra  
14 vires claims are available in “(1) suits alleging that a federal official acted ultra vires of  
15 statutorily delegated authority, and (2) suits alleging that a federal official violated the  
16 Constitution.” *Id.* at 1090 (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337  
17 U.S. 682, 687–89 (1949) (noting that these suits are not considered “suits against the  
18 sovereign” and therefore did not require a waiver of sovereign immunity)).

19 The defendant-appellees in *Robinson* argued that ultra vires claims under *Larson*  
20 were no longer available because they were abrogated by the APA’s express waiver of  
21 sovereign immunity.<sup>8</sup> *Id.* at 1092. The Ninth Circuit found that while Congress intended  
22 the APA’s sovereign immunity waiver to “replace[] the [*Larson* exceptions] as the  
23 doctrinal basis for a claim for prospective relief” against federal officers, it did not intend  
24 for the APA to eliminate the *Larson* exceptions altogether. *Id.* at 1092–93 (quoting  
25

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26 <sup>8</sup> The APA’s waiver of sovereign immunity states: “An action in a court of the United States  
27 seeking relief other than money damages and stating a claim that an agency or officer or employee thereof  
28 acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor  
relief therein denied on the ground that it is against the United States or that the United States is an  
indispensable party.” 5 U.S.C. § 702.

1 *E.E.O.C. v. Peabody W. Coal Co.*, 610 F.3d 1070, 1085 (9th Cir. 2010)). Thus, the Ninth  
2 Circuit concluded that the APA’s waiver “superseded the *Larson* exceptions only for suits  
3 in which the . . . waiver applies[.]” *Id.* at 1092. Finding the APA waiver did not apply, the  
4 court held that the ultra vires claim was not abrogated by the APA.

5 Here, on summary judgment, neither party argues that the APA’s waiver of  
6 sovereign immunity does not apply to Plaintiffs’ claims. The Court also independently  
7 finds no reason why the APA’s waiver would not apply in this case. Thus, in keeping with  
8 the rule as articulated in *Robinson*, the Court finds that the APA waiver applies to Plaintiffs’  
9 claims and consequently abrogates Plaintiffs’ ultra vires INA claim. *Cf. Jafarzadeh v.*  
10 *Duke*, 270 F. Supp. 3d 296, 311 (D.D.C. 2017) (dismissing plaintiffs’ ultra vires claim for  
11 adjustment of status under the INA because plaintiffs could obtain review under the APA).  
12 Summary judgment in favor of Defendants on this claim is therefore warranted.

## 13 **II. Unlawful Withholding Under the APA (5 U.S.C. § 706(1))**

14 The purpose of the APA is, in part, to provide an avenue for judicial review of  
15 “agency action.” *See* 5 U.S.C. § 702 (“A person suffering legal wrong because of agency  
16 action, or adversely affected or aggrieved by agency action within the meaning of a relevant  
17 statute, is entitled to judicial review thereof.”). Reviewing courts “decide all relevant  
18 questions of law, interpret constitutional and statutory provisions, and determine the  
19 meaning or applicability of the terms of an agency action.” *Id.* § 706. In relevant part,  
20 courts must “compel agency action unlawfully withheld or unreasonably delayed.”  
21 *Id.* § 706(1).

22 Plaintiffs state that summary judgment is warranted on their § 706(1) claims because  
23 Defendants’ undisputed act of turning asylum seekers arriving at POEs back to Mexico  
24 violates their statutorily mandatory duties to inspect and refer asylum seekers. Defendants  
25 argue that, as a matter of law, summary judgment should be granted on Plaintiffs’ § 706(1)  
26 claim because: (1) Plaintiffs have not identified a final or discrete agency action; (2) their  
27 inspection and referral duties under § 1225 are not mandatory ministerial actions as to class  
28

1 members not on U.S. soil,<sup>9</sup> and; (3) in any event, their inspection and referral duties were  
 2 not unlawfully withheld because asylum seekers were still ultimately provided access to  
 3 the process, although it was delayed.

#### 4 **A. Final Agency Action**

5 Defendants move for summary judgment on both APA claims on the basis that no  
 6 final agency action exists (Defs.’ Mem. of P. & A. at 32–34), while the context of Plaintiffs’  
 7 arguments implies that finality only applies to Defendants’ affirmative “Turnback Policy,”  
 8 which is a feature only of the § 706(2) claim. (Pls.’ Mem. of P. & A. in supp. of Pls.’ MSJ  
 9 (“Pls.’ Mem. of P. & A.”) at 20–21, ECF No. 535-1.)

10 Section 704 of the APA limits judicial review to “final agency actions,” a standard  
 11 which “does not easily accommodate an agency’s *failure to act*.” *W. Org. of Res. Councils*  
 12 *v. Zinke*, 892 F.3d 1234, 1247 (D.C. Cir. 2018) (Edwards, J., concurring). There remains  
 13 confusion over whether the finality requirement applies to § 706(1) “failure to act” claims.  
 14 *Id.* However, the Ninth Circuit has given several indications that finality is not a  
 15 consideration when evaluating § 706(1) claims. *See, e.g., Hells Canyon Pres. Council v.*  
 16 *U.S. Forest Serv.*, 593 F.3d 923, 930 (9th Cir. 2010) (stating that plaintiffs were required  
 17 to identify a final agency action for § 706(2) claims but not stating the same for § 706(1)  
 18 claims); *Nw. Env’t Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 681 n.10 (9th Cir.  
 19 2007) (distinguishing between “seek[ing] redress for agency inaction under § 706(1)” and  
 20 “challeng[ing] a final agency action under” § 706(2)); *Indep. Min. Co. v. Babbitt*, 105 F.3d  
 21 502, 511 (9th Cir. 1997) (“Judicial review of an agency’s actions under § 706(1) for alleged  
 22 delay has been deemed an exception to the ‘final agency decision’ requirement.”); *Ecology*  
 23 *Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999) (“Courts have permitted  
 24 jurisdiction under the limited exception to the finality doctrine only when there has been a  
 25 genuine failure to act.”).

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26  
 27  
 28 <sup>9</sup> Defendants conceded at oral argument that turning back asylum seekers on U.S. soil is unlawful.

1           Accordingly, the Court finds no “final agency action” is necessary for Plaintiffs’  
2 § 706(1) claim and rejects Defendants’ arguments as to the same.

3           **B. Discrete Agency Action**

4           A § 706(1) claim “can only proceed where a plaintiff asserts that an agency failed  
5 to take a discrete agency action that it is required to take.” *Norton v. S. Utah Wilderness*  
6 *Alliance* (“*SUWA*”), 542 U.S. 55, 64 (2004); *Hells Canyon Pres. Council*, 593 F.3d at 932.  
7 “This condition precludes attacks that seek broad programmatic improvements of agency  
8 behavior and also precludes judicial review of ‘even discrete agency action that is not  
9 demanded by law.’” *Ramirez v. U.S. Immigr. & Customs Enf’t*, 310 F. Supp. 3d 7, 20  
10 (D.D.C. 2018) (quoting *SUWA*, 542 U.S. at 65); see *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S.  
11 871, 882 (1990) (“[R]espondent cannot seek wholesale improvement of this program by  
12 court decree, rather than in the offices of the Department or the halls of Congress, where  
13 programmatic improvements are normally made.”).

14           Defendants argue that no “discrete” action has been identified here because the  
15 record shows only that the alleged “Turnback Policy” is a “constellation of actions” with  
16 “different factual bases” that do not show “an across-the-board measure to purposefully  
17 restrict access to the asylum process.” (Defs.’ Mem. of P. & A. at 34–35; see also Defs.’  
18 Reply in supp. of MSJ (“Defs.’ Reply”) at 4, ECF No. 611.) Plaintiffs maintain that the  
19 agency practices cited identify a discrete and particularized action by Defendants “to  
20 purposefully restrict access to the asylum process in violation of their statutory  
21 obligations.” (Pls.’ Opp’n at 5–6.)

22           Preliminarily, to the extent the parties make this argument as to the § 706(1) claim,  
23 the Court notes that the parties slightly misconstrue the issue. The discreteness element of  
24 a § 706(1) failure to act claim is intended to identify the contours of the agency duty or  
25 responsibility that has purportedly been withheld or delayed by the agency. Plaintiffs  
26 identify that duty as the inspection of asylum seekers for admissibility when they arrive at  
27 POEs and refer them for credible fear interviews under 8 U.S.C. § 1158(a)(1) and § 1225.  
28 (Pls.’ Mem. of P. & A. at 21.) Defendants have agreed throughout this litigation that these

1 are mandatory duties for which this Court can compel § 706(1) relief and do not raise any  
2 argument on summary judgment to the contrary. *See Al Otro Lado, Inc. v. McAleenan*, 394  
3 F. Supp. 3d 1168, 1196 (S.D. Cal. 2019) (“The parties agree that the mandatory duties to  
4 inspect all aliens and refer certain aliens seeking asylum are discrete actions for which this  
5 Court can compel Section 706(1) relief . . .”).

6 This defeats any argument that the record reflects a “broad programmatic attack” on  
7 agency action that is not permitted under § 706(1). These types of attacks occur when a  
8 plaintiff fails to identify a discrete agency action to which the court should compel  
9 compliance and instead identifies several purported agency “failures” that constitute  
10 violations of the law. *See Lujan*, 497 U.S. at 891 n.2 (finding that “land withdrawal review  
11 program” was not an agency action because it did not identify “some specific order or  
12 regulation” that applied to everyone but instead constituted “a generic challenge to all  
13 aspects” of the program). But Plaintiffs here have identified specific statutory duties to  
14 inspect and refer every applicant for admission who approaches a POE. This is the discrete  
15 agency action Plaintiffs claim Defendants failed to take when they turned class members  
16 back. *See Ramirez*, 310 F. Supp. 3d at 20–21 (“Plaintiffs in this case seek to compel an  
17 agency to take the discrete and concrete action of considering statutorily specified factors  
18 in determining where and how to place [unaccompanied minors] . . . now that they have  
19 aged out of HHS’s care and custody.”); *Meina Xie v. Kerry*, 780 F.3d 405, 408 (D.C. Cir.  
20 2015) (finding discrete agency action where plaintiff “point[ed] to a precise section of the  
21 INA, establishing a specific principle of temporal priority that clearly reins in the agency’s  
22 discretion, and argues that the disparate cut-off dates for various subcategories manifest a  
23 violation of the principle”).

24 Further, the record does not contain a grab bag of miscellaneous CBP practices  
25 which have been merged under an amorphous and broad programmatic umbrella for  
26 purposes of demonstrating multiple and varied failures to act on the part of Defendants.  
27 Rather, the record contains undisputed evidence that in 2016, 2017, and 2018, CBP officers  
28 did not carry out their discrete statutory duties to inspect and refer asylum seekers to start



1 the asylum process once they arrived at POEs; instead, Defendants stationed CBP  
2 personnel at the limit line to “turn away” or “push back” asylum seekers as they reached  
3 POEs.

4 These “turnbacks” involved a combination of CBP officers (1) coordinating with  
5 Mexican immigration officials to “control the flow” of migrants seeking asylum before  
6 they reached the border and (2) affirmatively turning asylum seekers away from the border  
7 when Mexican immigration officials did not control the flow. This second step, which the  
8 Court understands to be the “turnbacks” at issue, involved “placing CBP personnel at the  
9 international line to screen legitimate passengers with entry documents . . . while asking  
10 those that do not have documents and that may otherwise be seeking some sort of benefit  
11 to return to Mexico with a date and time issued by our personnel.” (Nov. 18, 2016 “RE:  
12 Consolidated Weekly highlights” email, Ex. 71 Medlock Decl., ECF No. 535-73 (referring  
13 to port-initiated “push back” of migrants as “self-metering”).)

14 This strategy has been used on-and-off since 2016. The DHS’s own Office of  
15 Inspector General identified that “[s]ince 2016, CBP has used Queue Management at  
16 various times to control the flow of undocumented aliens into ports of entry.” (*See* OIG  
17 Report at 4.) Additionally, in response to the Haitian migrant surge, CBP officials  
18 discussed coordination with Mexican immigration to meter based on POE capacity. (JSUF  
19 ¶¶ 68, 70; AOL-DEF-00023718, Ex. 49 to Medlock Decl., ECF No. 535-51.) During the  
20 same period, CBP officials also instructed officers “to not allow any asylees past the limit  
21 line” and “hold the line to prevent any [migrants] from entering.” (JSUF ¶¶ 68–70, 86–  
22 87.) Similarly, when metering was authorized after the November 2016 election, officers  
23 were instructed to meet with their immigration counterparts in Mexico to discuss  
24 controlling the flow of migrants to POEs and, if Mexican officials did not assist with  
25 metering, Port Directors were authorized “to return the individuals claiming fear without  
26 valid entry documents to Mexico with an alternate date and time to return” if a port  
27 exceeded capacity. (JSUF ¶¶ 141, 149, 155–56, 158 (“[O]ur ports will be pushing migrants  
28 without entry documents back to Mexico to await an appointment to be processed at the

1 POEs.”); Nov. 11, 2016 “Metering Flow” email, Ex. 70 to Medlock Decl., ECF No. 535-  
2 72; Nov. 12, 2016 “Meeting with INM” email, Ex. 13 to Medlock Decl., ECF No. 535-15  
3 (noting that CBP officers are “to meet with [their] INM counterpart and request they  
4 control the flow of aliens to the [POE]” and “[i]f [Mexican immigration] cannot or will not  
5 control the flow, your staff is to provide the alien with a piece of paper identifying a date  
6 and time for an appointment and return them to Mexico”).) At least one CBP official  
7 expressly understood the metering of South and Central American migrants at POEs as an  
8 extension of the previous measure used by CBP concerning Haitian migrants. (*See* JSUF  
9 ¶ 145 (email from CBP official explaining that the metering practices that had been applied  
10 to “Haitians at most locations” was now being extended to South and Central Americans).)  
11 It is also undisputed that turnbacks, including of asylum seekers “on the U.S. side of the  
12 [POE] bridge,” continued in 2017. (JSUF ¶¶ 157, 174–76, 181.)

13 Finally, the 2018 Metering Guidance and PBQM memorandum formally  
14 implemented the same “self-metering” measures by authorizing turnbacks at points nearest  
15 the border. Both documents authorized Directors of Field Operations to “meter the flow  
16 of travelers at the land border” based on capacity by “establish[ing] and operat[ing]  
17 physical access controls at the borderline, including as close to the U.S.-Mexico border as  
18 operationally feasible.” (JSUF ¶¶ 244–45, 228.) Metering continued to be used into 2020  
19 as a part of the PBQM model. (JSUF ¶¶ 263–65.)

20 While the aforementioned circumstances in which CBP turned away asylum seekers  
21 span several years and have “different factual bases,” they all involve CBP “pushing back”  
22 asylum seekers without inspecting and referring them upon arrival. The fact that  
23 Defendants sought to turn back asylum seekers in different contexts does not transform  
24 Plaintiffs’ claim into a programmatic attack. *See Ramirez*, 310 F. Supp. 3d at 21  
25 (“Defendants confuse aggregation of similar, discrete purported injuries—claims that  
26 many people were injured in similar ways by the same type of agency action—for a broad  
27 programmatic attack.”). Thus, it remains undisputed on summary judgment that  
28 Defendants did not inspect and refer class members as they arrived at POEs and instead

1 turned them away. The Court addresses below whether these turnbacks violated the  
 2 statutes at issue. (*See infra* Section II.C.4.) But here, finding no dispute of fact regarding  
 3 the aforementioned evidence, the Court finds a discrete agency action exists for purposes  
 4 of Plaintiffs’ § 706(1) claim.

### 5 C. Mandatory and Ministerial Duties

6 “An agency ‘ministerial act’ for purposes of mandamus relief has been defined as a  
 7 clear, non-discretionary agency obligation to take a specific affirmative action, which  
 8 obligation is positively commanded and so plainly prescribed as to be free from doubt.”  
 9 *Indep. Min. Co.*, 105 F.3d at 508 (quotations omitted). The issue on summary judgment is  
 10 whether Defendants’ duties to inspect and refer class members for asylum upon their arrival  
 11 to a POE are mandatory and ministerial. Specifically, the Court must address to whom and  
 12 when these duties attach.

#### 13 1. Duties attach to class members arriving at POEs but outside the U.S.

14 Defendants reiterate their position that the relevant statutes do not apply to asylum  
 15 seekers who are outside the United States. (Defs.’ Mem. of P. & A. at 37–40.) In support,  
 16 Defendants raise many of the same arguments in their MSJ that they made on dismissal  
 17 regarding the scope of § 1158(a)(1) and the relevant subsections of § 1225 as applied to  
 18 individuals not on U.S. soil. (*Id.* at 38.) As Plaintiffs note, the Court has already conducted  
 19 an extensive analysis of the text of both § 1158(a)(1) and § 1225 to determine their scope  
 20 as they apply to class members who were standing in Mexico, due to metering efforts,  
 21 when they raised their asylum requests with CBP officers at POEs. *See Al Otro Lado*, 394  
 22 F. Supp. 3d at 1198–1205. The Court found that the plain language of both statutes applies  
 23 to migrants who are “in the process of arriving,” which includes “aliens who have not yet  
 24 come into the United States, but who are ‘attempting to’ do so” and may still be physically  
 25 outside the international boundary line at a POE. *Id.* at 1205 (quoting 8 C.F.R. § 1.2).<sup>10</sup>

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26  
 27 <sup>10</sup> The Court also incorporated this conclusion in its preliminary injunction order regarding the  
 28 Asylum Ban. *See Al Otro Lado, Inc. v. McAleenan*, 423 F. Supp. 3d 848, 859 (S.D. Cal. 2019). In  
 denying a motion to stay the injunction, the Ninth Circuit noted that the Court’s statutory analysis “has  
 considerable force” and is “likely correct.” *Al Otro Lado v. Wolf*, 952 F.3d 999, 1011–13 (9th Cir. 2020).

1 This analysis expressly rejected Defendants’ arguments concerning plain meaning and the  
2 presumption against extraterritoriality. *Id.* at 1199–1202.

3 Defendants do not cite to a different factual basis or intervening legal developments  
4 to alter the Court’s previous holding that both statutes mandate inspection and referral for  
5 asylum seekers not standing on U.S. soil at the time they interacted with CBP officers who  
6 turned them back. Thus, the Court abides by its previous conclusion regarding the scope  
7 of the statutes in this case. *See Huynh v. Harasz*, No. 14-CV-02367-LHK, 2016 WL  
8 2757219, at \*21 (N.D. Cal. May 12, 2016) (applying the “law of the case” doctrine to  
9 preclude summary judgment on legal issues previously decided by a court on a motion to  
10 dismiss “[i]f no factual issues have changed between the initial decision and the instant  
11 [summary judgment] motion” (citing *Bollinger v. Oregon*, 172 F. App’x 770, 771 (9th Cir.  
12 2006) (unpublished))).

13 2. Defendants’ statutory scheme argument fails.

14 Defendants also rehash an argument regarding the statutory scheme. They argue  
15 that metering is a “reasonable exercise of CBP’s ‘broad discretion’ to allocate its limited  
16 resources to accomplish its many statutory functions.” (Defs.’ Mem. of P. & A. at 43.)  
17 Defendants argue that metering helps DHS balance the allocation of its limited resources  
18 to its multiple congressionally mandated “mission sets”—including facilitating lawful  
19 trade and travel, carrying out immigration enforcement measures, and interdicting unlawful  
20 entrants and goods—of which processing asylum seekers is only a part. (Defs.’ Mem. of  
21 P. & A. at 41–43 (citing 6 U.S.C. §§ 202, 211(c), 211(g)(3)).) Defendants also repeatedly  
22 state that in 2002, Congress “elevat[ed] . . . DHS’s national-security function over all  
23 others” by making antiterrorism efforts the agency’s “primary mission.” (*Id.* (citing 6  
24 U.S.C. § 111(b)(1)(A), (E).)

25 These statutes do not support Defendants’ arguments. First, the Court again finds  
26 that Defendants’ citations to broad delegations of statutory authority to the DHS Secretary,  
27 CBP Commissioner, and the OFO are insufficient, as a matter of law, to establish that their  
28 ability to meter asylum seekers is “committed to agency discretion by law.” *See Al Othro*

1 *Lado*, 394 F. Supp. 3d at 1210 (“Sections 1158 and 1225 cannot be nullified by general  
2 statutory provisions regarding the Secretary’s authority unless Congress clearly intended  
3 so.”). Defendants’ reliance on additional statutes in their summary judgment motion is  
4 similarly futile, as these provisions still do not provide a basis for agency discretion that  
5 supplants Defendants’ duty to inspect and refer asylum seekers in § 1158(a)(1) and § 1225.

6 As this Court previously found, § 1225 codifies Congress’s specific and detailed  
7 instructions regarding “how immigration officers are to ‘manage the flow’ of arriving  
8 aliens who express to an immigration officer an intention to apply for asylum or a fear of  
9 persecution.” *Id.* at 1210; *see also P.J.E.S. by & through Escobar Francisco v. Wolf*, 502  
10 F. Supp. 3d 492, 542 (D.D.C. 2020) (“[T]he immigration laws cited are clearly part of a  
11 ‘comprehensive scheme [that] has deliberately targeted specific problems with specific  
12 solutions.’” (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639,  
13 645 (2012))). None of the enumerated lists of various responsibilities and missions in 6  
14 U.S.C. § 111, 211(c), 211(g)(3) include any indication that Congress intended to supersede  
15 the duties established by § 1225. *See BNSF Ry. Co. v. Cal. Dep’t of Tax & Fee Admin.*,  
16 904 F.3d 755, 766 (9th Cir. 2018) (“[W]here there is no clear intention otherwise, a specific  
17 statute will not be controlled or nullified by a general one, regardless of the priority of  
18 enactment.” (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445  
19 (1987))). Section 211(c)(8)(A) states that the CBP Commissioner shall “enforce and  
20 administer all immigration laws” including “the inspection, processing, and admissions of  
21 persons who seek to enter or depart the United States.” Similarly, § 211(g)(3)(B) indicates  
22 that OFO is responsible for “conduct[ing] inspections” at POEs to prevent illegal entry and  
23 “carry out other duties and power prescribed by the Commissioner.” Nothing indicates  
24 that these lists are exhaustive or in order of priority such that one duty takes precedence  
25 over another, let alone that they preempt other specific statutory mandates.

26 Indeed, one of the cited provisions includes as a “primary mission” that DHS  
27 “ensure that the functions of the agencies and subdivisions within the Department that are  
28 not related directly to securing the homeland *are not diminished or neglected except by a*

1 *specific explicit Act of Congress.*” 6 U.S.C. § 111(1)(b)(E) (emphasis added). This  
2 language belies Defendants’ entire argument. Rather than signaling that general national  
3 security directives displace more specific processing obligations, § 111(1)(b)(E) preserves  
4 DHS’s other responsibilities absent a specific act of Congress. Defendants cite to no such  
5 act.

6 3. Defendants’ citations to case law are inapposite.

7 Defendants also cite to several cases to support their position that, as a matter of law,  
8 inspection and referral duties are not conferred on asylum seekers physically outside the  
9 United States. (Defs.’ Reply at 9–11.) The Court addresses these cases below and finds  
10 they do not support Defendants’ proposition that inspection and referral under § 1225 is a  
11 discretionary duty.

12 (a) *Sale v. Haitian Centers Council, Inc.*

13 First, Defendants cite to *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993),  
14 for the proposition that certain INA provisions, including § 1158, contemplate that  
15 immigration proceedings can only occur in the United States. In *Sale*, the Supreme Court  
16 addressed the lawfulness of the Coast Guard’s interdiction of vessels on the high seas  
17 illegally transporting passengers from Haiti to the United States, after which the Coast  
18 Guard immediately repatriated passengers to Haiti. *Id.* at 159. Plaintiffs brought suit  
19 challenging the interdiction program as violating § 243(h)(1) of the INA. *Id.* at 166. This  
20 statute prohibited the deportation or return of “any alien . . . to a country if the Attorney  
21 General determines that such alien’s life or freedom would be threatened in such country  
22 on account of race, religion, nationality, membership in a particular social group, or  
23 political opinion.” *Id.* at 170. The Court concluded that the Coast Guard’s actions did not  
24 violate this provision because the statute’s protection did not extend outside the United  
25 States where deportation and exclusion hearings were not authorized. *Id.* at 177.

26 The Court finds *Sale* inapposite. First, § 243(h)(1) no longer exists. This provision  
27 was ultimately repealed by the Illegal Immigration Reform and Immigration Responsibility  
28 Act of 1996 (“IIRIRA” or “1996 amendments”), which also overhauled entirely the

1 deportation and exclusion systems that are referenced in *Sale*. See Omnibus Consolidated  
2 Appropriations Act of 1997, Pub. L. No. 104-208, §§ 307, 309, 110 Stat. 3009, 3009-612  
3 to 3009-614 (1996) (revising § 243 to exclude subparagraph (h)). Thus, the statutory  
4 interpretation in *Sale* is not applicable here.

5 Second, Defendants cite to a footnote in *Sale* that uses § 1158 as an example of  
6 “other provisions of the INA” that “obviously contemplate that such proceedings would be  
7 held in the country[.]” 509 U.S. at 173 n.29. First, the Supreme Court’s citation to  
8 § 1158(a) in *Sale* is purely dicta. The asylum statute serves as an example and is not the  
9 subject of the Court’s holding. Second, the text of § 1158(a) referenced in *Sale* is  
10 significantly different than the current version. The Supreme Court quotes  
11 § 1158(a) as instructing the Attorney General to “establish a procedure for an alien  
12 *physically present in the United States or at a land border or port of entry.*” *Id.* at 161  
13 n.11. The present-day statute—which, again, is the subject of this Court’s prior, extensive  
14 statutory interpretation—states that asylum is available to “any alien who is physically  
15 present in the United States *or who arrives in the United States . . .*” 8 U.S.C. § 1158(a)(1)  
16 (2009) (emphasis added); see Pub. L. No. 104-208, 110 Stat. at 3009-690 (revising § 208  
17 of the INA, codified as 8 U.S.C. § 1158). This is not a trivial distinction. The former  
18 requires physical presence in one of three places: (1) the United States; (2) a land border;  
19 or (3) a POE. The new statute requires either physical presence in the United States or  
20 arrival in the United States, which is not, as Defendants suggest, “just as or more  
21 territorially-focused” than the statute at issue in *Sale*. The Court has already found this  
22 language to cover class members in the process of arriving at a POE but physically outside  
23 the United States. See *Al Otro Lado*, 394 F. Supp. 3d at 1199.

24 Third, as to the presumption of extraterritoriality, *Sale* is distinguishable because,  
25 unlike here, the alleged unlawful conduct of U.S. government actors took place outside of  
26 the territorial United States. In this Court’s previous extraterritoriality analysis, it found §  
27 1158(a)(1) imposed inspection and referral duties on immigration officers via  
28 § 1225(b), and that the conduct relevant to § 1225(b)’s focus—“whether the Court looks

1 at the alleged Turnback Policy or the alleged acts of individual CBP officers standing on  
2 the U.S. side of the international bridge between Mexico and the United States”—occurs  
3 within the United States and therefore involves a permissible domestic application of the  
4 statute. *See id.* at 1202 (citing *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101  
5 (2016)).

6 The Court therefore finds *Sale* inapposite and rejects Defendants’ arguments based  
7 on this case.

8 (b) *DHS v. Thuraissigiam*

9 The second case Defendants cite to support their position is *DHS v. Thuraissigiam*,  
10 \_\_ U.S. \_\_, 140 S. Ct. 1959 (2020), a recent Supreme Court decision that post-dates this  
11 Court’s dismissal order. In *Thuraissigiam*, the respondent asylum seeker filed a habeas  
12 action to challenge his expedited removal order after he entered the United States without  
13 inspection or entry documents. *Id.* at 1967. In relevant part, the respondent asserted that  
14 his due process rights were violated by a jurisdiction-stripping provision of the INA that  
15 precluded judicial review of his allegedly deficient credible fear proceeding. *Id.* at 1981.  
16 In rejecting his claim, the Supreme Court held that because respondent had not “effected  
17 an entry” when he illegally crossed into the United States, he “ha[d] only those rights  
18 regarding admission that Congress has provided by statute.” *Id.* at 1983. In so finding, the  
19 Court cited, as an equivalent example, noncitizens who seek admission at a POE, stating  
20 that “[w]hen an alien arrives at a port of entry . . . the alien is on U. S. soil” but still not  
21 considered to have entered the country. *Id.* at 1982 (quoting *Shaughnessy v. United States*  
22 *ex rel. Mezei*, 345 U.S. 206, 212, 215 (1953)) (other quotations and citations omitted).

23 Defendants argue that this language subverts the Court’s determination that the  
24 scope of “arriving in the United States” at a POE includes those not on U.S. soil. The Court  
25 disagrees. First, as with *Sale*, the language in *Thuraissigiam* is mere dicta. The respondent  
26 in the case was not, in fact, arriving at a POE. This cursory example assumes a usual state  
27 of affairs—which, notably, would have been true for some class members had metering  
28 not been in effect—and does not involve any close readings of the relevant statutes or their



1 applicability under the factual circumstances present here. Second, shortly after making  
2 this statement, the Supreme Court uses more expansive language when referring to the  
3 respondent by stating that “an alien who *tries to enter the country illegally* is treated as an  
4 ‘applicant for admission’” who has also not “effected an entry.” *Id.* at 1983 (citing  
5 § 1225(a)(1)) (emphasis added). The Court could have, but did not, state that the noncitizen  
6 who “enters the country illegally” and is therefore on U.S. soil is an applicant for  
7 admission, but instead extends it to those who “try to enter.” This is incongruent with the  
8 notion that the Court’s earlier language limited “arrival” at a POE to include only those on  
9 U.S. soil and would therefore exclude those “trying to enter” a POE but being obstructed  
10 by U.S. officials at the international boundary line. It makes little sense to use more  
11 expansive language to encompass those seeking to enter unlawfully and not those  
12 attempting to enter lawfully. This would be contrary to DHS implementing regulations,  
13 which the Court previously noted define “arriving aliens” as those “attempting to come  
14 into the United States at a port-of-entry.” 8. C.F.R. § 1.2. It would also defeat the purpose  
15 of the 1996 amendments to the INA. *See Torres v. Barr*, 976 F.3d 918, 928 (9th Cir. 2020)  
16 (explaining that § 1225(a)(1) “ensures that all immigrants who have not been lawfully  
17 admitted, *regardless of their physical presence in the country*, are placed on equal footing  
18 in removal proceedings under the INA—in the position of an ‘applicant for admission’”  
19 (emphasis added)).<sup>11</sup> Thus, the Court does not read the language used by the Supreme  
20 Court in *Thuraissigiam* as a definitive statement about the specific territorial scope of  
21 § 1158.

22       Once again, the Court abides by its prior finding that the statutes at issue apply to  
23 those who may be physically outside the United States but who are in the process of  
24 arriving at a POE. Thus, the Court finds that the duties to inspect and refer contained in  
25 § 1158(a)(1) and § 1225 are mandatory ministerial duties under § 706(1).  
26  
27

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28       <sup>11</sup> The Court discusses this in more depth below. (*See infra* Section II.C.4(b)).

4. Turnbacks unlawfully withhold inspection and referral duties.

Plaintiffs’ position is that, as a matter of law, Defendants’ undisputed act of turning asylum seekers arriving at POEs back to Mexico unlawfully withholds their statutorily mandatory duties to inspect and refer asylum seekers. Defendants argue that they did not, in fact, withhold statutorily mandated duties under § 1158(a)(1) and § 1225 because class members were instructed to return to POEs and later inspected and referred, as reflected in Defendants’ continued processing of asylum seekers throughout the relevant period. (Defs.’ Mem. of P. & A. at 39.) Plaintiffs contend that this still constitutes an unlawful withholding of inspection of referral because “[g]iven the risks of living in Mexican border towns . . . and the extraordinary delays,” turning back asylum seekers deprives them of a guaranteed opportunity to access the asylum process.<sup>12</sup> (Pls.’ Opp’n at 7–8.)

The Ninth Circuit has said that judicial authority to “compel agency action” pursuant to § 706(1) “is carefully circumscribed to situations where an agency has ignored a specific legislative command.” *Hells Canyon Pres. Council*, 593 F.3d at 932; *see also Vietnam Veterans of Am. v. Central Intelligence Agency*, 811 F.3d 1068, 1075–76 (9th Cir. 2016) (“[S]ection 706(1) applies to the situation where a federal agency refuses to act in disregard of its legal duty to act.”). In a § 706(1) context, the Court must apply the two-step analysis in *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to determine the meaning of the statutory language and whether it establishes whether Defendants can

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<sup>12</sup> The parties also appear to dispute whether Plaintiffs raise that immediate inspection and referral of asylum seekers on their first arrival to the port should be compelled as an agency action “unreasonably delayed.” *See In re Ctr. for Auto Safety*, 793 F.2d 1346, 1353 (D.C. Cir. 1986) (noting that a party can also obtain judicial review “of a prolonged agency inaction” under § 706(1)’s “unreasonable delay” prong (quoting *Costle v. Pacific Legal Found.*, 445 U.S. 198, 220 n.14 (1980))). Defendants argue that Plaintiffs have not properly raised the issue in their opening brief; however, Defendants do not move for summary judgment on this claim themselves. (*See* Defs.’ Mem. of P. & A. at 40; Defs.’ Reply in supp. of MSJ at 12, ECF No. 611.) Plaintiffs do not expressly raise this argument but address this issue for the first time in reply to Defendants’ characterization of metering as a delayed agency action. (Pls.’ Reply in supp. of MSJ at 11, ECF No. 610.) For these reasons, the Court does not understand either party to move for summary judgment on this claim and does not address it in this Order. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (“The district court need not consider arguments raised for the first time in a reply brief.”).

1 defer processing asylum seekers after they have arrived at a POE. *See San Francisco*  
2 *Baykeeper*, 297 F.3d at 885–86 (following *Chevron* framework when considering the  
3 EPA’s interpretation of the law it was charged with administering); *see also O.A. v. Trump*,  
4 404 F. Supp. 3d 109, 147 (D.D.C. 2019) (applying *Chevron* even where not explicitly  
5 invoked by the parties because “[t]he judiciary is the final authority on issues of statutory  
6 construction and must reject administrative constructions . . . which are contrary to clear  
7 congressional intent” (quotations omitted)).

8 The *Chevron* analysis “mandates that absent a clear expression of congressional  
9 intent to the contrary, courts should defer to reasonable agency interpretations of  
10 ambiguous statutory language.” *Friends of Cowlitz v. FERC*, 253 F.3d 1161 (9th Cir.  
11 2001); *T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1065–67 (9th Cir. 1997) (“A court  
12 should accept the ‘reasonable’ interpretation of a statute chosen by an administrative  
13 agency except when it is clearly contrary to the intent of Congress.”). This requires courts  
14 to first consider “whether Congress has directly spoken to the precise question at issue. If  
15 the intent of Congress is clear, that is the end of the matter.” *Campos-Hernandez v.*  
16 *Sessions*, 889 F.3d 564, 568 (9th Cir. 2018) (quoting *Chevron*, 467 U.S. at 842). However,  
17 “if the statute is silent or ambiguous with respect to the specific issue, the question for the  
18 court is whether the agency’s answer is based on a permissible construction of the statute.”  
19 *Chevron*, 467 U.S. at 843. The Court understands the specific legal question here to be  
20 whether § 1158(a)(1) and § 1225 permit metering where asylum seekers who were turned  
21 back were ultimately processed for asylum.

22 (a) *Chevron* Step One

23 “To determine whether the statute unambiguously bars an agency interpretation we  
24 apply the normal tools of statutory construction.” *Valenzuela Gallardo v. Lynch*, 818 F.3d  
25 808, 815 (9th Cir. 2016) (quotations omitted). This includes “ask[ing] whether Congress  
26 intended to permit the agency interpretation.” *Id.* at 815–16. If a court “ascertains that  
27 Congress had an intention on the precise question at issue, that intention is the law and  
28 must be given effect.” *Chevron*, 467 U.S. at 843 n.9.

1 “To implement its immigration policy, the Government must be able to decide (1)  
 2 who may enter the country and (2) who may stay here after entering.” *Jennings v.*  
 3 *Rodriguez*, 138 S. Ct. 830, 836 (2018). “That process of decision,” captured in part by 8  
 4 U.S.C. § 1225, “generally begins at the Nation’s borders and ports of entry, where the  
 5 Government must determine whether an alien seeking to enter the country is admissible.”  
 6 *Id.* As the Court previously summarized, § 1225(a) establishes a general inspection duty  
 7 and § 1225(b)(1) sets forth additional specific duties that arise for aliens arriving in the  
 8 United States.

9 With regard to the inspection duty, the statute states that “[a]n alien present in the  
 10 United States who has not been admitted or who arrives in the United States (whether or  
 11 not at a designated port of arrival . . . ) shall be deemed for purposes of this chapter an  
 12 applicant for admission.” *Id.* § 1225(a)(1); *see also* 8 C.F.R. § 1001.1(q) (“The term  
 13 arriving alien means an applicant for admission coming or attempting to come into the  
 14 United States at a port-of-entry.”). All applicants for admission, moreover, “shall be  
 15 inspected by immigration officers.” 8 U.S.C. § 1225(a)(3). With regard to referral, the  
 16 statute requires the following:

17 [i]f an immigration officer determines that an alien . . . who is arriving in the  
 18 United States . . . is inadmissible . . . and the alien indicates either an intention  
 19 to apply for asylum under section 1158 of this title or a fear of persecution,  
 20 the officer shall refer the alien for an interview by an asylum officer under  
 subparagraph (B).

21 *Id.* § 1225(b)(1)(A)(ii). Under a straightforward reading of the statutes, a noncitizen must  
 22 do two things for inspection and referral to be triggered: first, arrive at a POE, which  
 23 prompts inspection (§ 1225(a)(1), (3)) and second, indicate an intention to apply for  
 24 asylum, which prompts referral (§ 1225(b)(1)(A)(ii)). At each stage, once arriving asylum  
 25 seekers satisfy their end of the bargain, immigration officers must satisfy theirs.<sup>13</sup>  
 26

27  
 28 <sup>13</sup> There is no temporal element to this statute, i.e., how much time can elapse between arrival and  
 inspection or inspection and referral. However, because the Court is addressing only unlawful

1 The plain text requires that an asylum seeker “arrives” or “is arriving” in the United  
 2 States to prompt inspection, the first step in this process of decision. “Arrive” is not  
 3 modified or conditioned to contemplate, let alone require, more than one arrival at a POE  
 4 before Defendants’ duties attach. *See, e.g., Matter of F-P-R*, 24 I & N Dec. 681, 683, Int.  
 5 Dec. 3630, 2008 WL 4817462 (BIA 2008) (distinguishing, for purposes of one-year asylum  
 6 application deadline, between “arrival”—“to come to a certain point in the course of travel;  
 7 reach one’s destination” and “to come to a place after traveling,”—and “last arrival” which  
 8 “refer[s] to an alien’s most recent coming or crossing into the United States after having  
 9 traveled from somewhere outside the country”). But the Court acknowledges, as it has  
 10 previously, Congress’s instruction that “[i]n determining the meaning of any Act of  
 11 Congress, unless the context indicates otherwise—words used in the present tense include  
 12 the future as well as the present.” 1 U.S.C. § 1; *see Al Otro Lado*, 394 F. Supp. at 1200  
 13 (noting that this provision of the Dictionary Act has been applied to the INA). The present  
 14 and present progressive use of “arrive,” then, can be understood to encompass both the  
 15 asylum seekers’ present arrival at a POE and any future arrival at a POE.

16 However, construing “arrives” or “is arriving” in this way deprives the word of any  
 17 real meaning. *See Chowdhury v. I.N.S.*, 249 F.3d 970, 973 (9th Cir. 2001) (stating that  
 18 courts must interpret a statute in a way that “giv[es] effect to each word”). If immigration  
 19 officers can forgo inspection upon an asylum seeker’s first arrival and defer this duty to  
 20 some unspecified future arrival without flouting the statute, the first arrival loses legal  
 21 significance. *See Al Otro Lado v. Wolf*, 952 F.3d 999, 1013–14 (9th Cir. 2020) (“It is the  
 22 INA . . . that makes an alien’s first arrival legally significant.”).<sup>14</sup> Moreover, if the statute

23 \_\_\_\_\_  
 24 withholding and not unreasonable delay (*see supra* note 12), the Court does not find this omission  
 25 relevant to its analysis.

26 <sup>14</sup> As such, regulations promulgated after class members were turned back have not applied to  
 27 them because their “first arrival triggered a statutory right to apply for asylum and have that application  
 28 considered” and thus the regulations in question, which were “not in place at the time each class member’s  
 right to apply for asylum attached,” could not apply. *See id.* (regarding “Asylum Eligibility and Procedural  
 Modifications,” 84 Fed. Reg. 33,829 (July 16, 2019)); *see also Al Otro Lado v. Gaynor*, 513 F. Supp. 3d  
 1253, 1260 (S.D. Cal. 2021) (regarding “Asylum Eligibility and Procedural Modification,” 85 Fed. Reg.  
 82,260 (Dec. 17, 2020)).

1 is construed in this way, this would permit Defendants to turn back asylum seekers any  
2 number of times—perhaps indefinitely—without running afoul of their statutory  
3 obligations.

4 The Court finds the plain meaning of the statutory text cuts in favor of a finding that  
5 inspection and referral attach when asylum seekers arrive at a POE the first time.  
6 Nonetheless, out of an abundance of caution, the Court proceeds to the second *Chevron*  
7 step.

8 (b) *Chevron* Step Two

9 Where statutes are silent or ambiguous, the Court “must give effect to an agency’s  
10 reasonable interpretation of a statute, unless the interpretation is inconsistent with clearly  
11 expressed congressional intent.” *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 671  
12 (9th Cir. 2021). “[D]eference is not owed to an agency decision if it construes a statute in  
13 a way that is contrary to congressional intent or frustrates congressional policy.” *CHW W.*  
14 *Bay v. Thompson*, 246 F.3d 1218, 1223 (9th Cir. 2001). Accordingly, the Court next turns  
15 to Congress’s intent in establishing the inspection and referral procedures in § 1225 and  
16 whether metering is consistent with that intent.

17 The INA’s inspection and referral duties were enacted as part of the larger expedited  
18 removal process. *See United States v. Barajas-Alvarado*, 655 F.3d 1077, 1080 n.2 (9th  
19 Cir. 2011) (“Expedited removal proceedings provide a streamlined process by which U.S.  
20 officers can remove aliens who attempt to gain entry to the United States but are not  
21 admissible.” (citing 8 U.S.C. § 1225(b))). This process accelerates secondary inspection  
22 by authorizing immigration officers who find a noncitizen inadmissible after inspection to  
23 order the noncitizen removed “without further hearing or review.” *See Am. Immigr. Laws.*  
24 *Ass’n v. Reno*, 199 F.3d 1352, 1354–55 (D.C. Cir. 2000) (citing 8 U.S.C. §  
25 1225(b)(1)(A)(i)); *see also* H.R. Conf. Rep. No. 104–828, at 209 (1996) (stating that  
26 reforms to secondary inspection were intended to “expedite the removal from the United  
27 States of aliens who indisputably have no authorization to be admitted . . .”). In this way,  
28 IIRIRA sought to deter illegal immigration by “simplify[ing] removal proceedings *while*

1 *protecting credible asylum applicants.” Arciniega-Contreras v. Gonzales*, 138 F. App’x  
2 961, 963 (9th Cir. 2005) (citing H.R. Rep. No. 104–469, pt. 1, at 1 (1996)) (emphasis  
3 added); *see also* H.R. Rep. No. 104–469(I), at 111 (1996) (stating that the purpose behind  
4 IIRIRA was to “*enable the prompt admission of those who are entitled to be admitted, the*  
5 *prompt exclusion or removal of those who are not so entitled, and the clear distinction*  
6 *between these categories*” (emphasis added)). Specifically, the amendments were intended  
7 to eliminate the “anomaly” in which noncitizens who were unlawfully present in the  
8 country were subject to “deportation proceedings,” which afforded them greater procedural  
9 and substantive rights, “while non-citizens who presented themselves at a port of entry for  
10 inspection were subjected to more summary exclusion proceedings” and were therefore “in  
11 a worse position than persons who had crossed the border unlawfully.” *Torres*, 976 F.3d  
12 at 927–28; H.R. Rep. No. 104-469, pt. 1, at 225–29.

13 Under the current metering framework, the right to an asylum determination is more  
14 onerous to an inadmissible individual who seeks to lawfully make a claim at a POE than  
15 to an inadmissible individual who illegally enters the country. A migrant who is  
16 apprehended after unlawfully crossing the border is afforded “the right to a determination  
17 whether he had a significant possibility of establish[ing] eligibility for asylum . . . .”  
18 *Thuraissigiam*, 140 S. Ct. at 1982. Because of metering, migrants who approach POEs to  
19 lawfully request asylum face a far more complicated process. Defendants, by turning away  
20 immigrants at POEs who are lawfully seeking admission into the United States, sending  
21 them to shelters in Mexico, and requiring them to make their way back to the POE at least  
22 a second time to access asylum, create additional, logistical barriers to entry that contravene  
23 the attempt of IIRIRA to put all those not lawfully admitted “on equal footing.” *Id.* (*See*  
24 *OIG Report* at 7, 14 (noting that implementation of queue management in 2018 and  
25 creation of other “barriers to ports of entry” created incentive to cross illegally)

26 This reality is undisputed. In fact, the record is replete with uncontroverted evidence  
27 that Defendants’ interpretation of their inspection and referral duties under the statute  
28 creates multiple logistical hurdles for migrants seeking asylum who have otherwise

1 complied with the statute by “arriving” at a POE and stating that they seek asylum. For  
2 example, the evidence in this case shows that class members, at the instruction of CBP  
3 officers, are required to leave the ports, coordinate with Mexican immigration officials to  
4 put their name on a list (which, evidence shows, itself sometimes required a wait), and  
5 spend additional time in Mexico waiting for their “appointments.” (See JSUF ¶¶ 81, 157–  
6 58, 161, 163, 164, 260; Decl. of Stephanie Leutert (“Leutert Decl.”) ¶¶ 51–52, Ex. 20 to  
7 Medlock Decl., ECF No. 535-22.)<sup>15</sup> The evidence shows that Defendants did not monitor  
8 the list and were not aware how Mexican officials determined who came over from the list.  
9 (Leutert Decl. ¶¶ 52–53; OIG Report at 9 n.22; Dep. of Samuel Cleaves 216:12–217:10;  
10 221:8–10, Ex. 102 to Medlock Decl., ECF No. 535-102.) There is also evidence that the  
11 lists themselves have been subject to fraud and corruption. (Leutert Decl. ¶¶ 53–54.)

12 The failure to inspect and refer as asylum seekers first arrived also creates additional  
13 burdens by requiring that asylum seekers stay in Mexico and make return trips to POEs to  
14 access the process. The risks of waiting in Mexico, often for an extended period of time,  
15 are high. The evidence submitted shows that turnbacks resulted in asylum seekers’ deaths,  
16 assaults, and disappearances after they were returned to Mexico. (Dep. of Erika DaCruz  
17 Pinheiro 161:25–162:9, Ex. 113 to Medlock Decl., ECF No. 535-115; *see also* Dep. of  
18 Frank Longoria 202:24–203:5 (migrants waiting in Mexico for more than a day waiting to  
19 be processed at the Hidalgo POE would be in danger), Ex. 100 to Medlock Decl., ECF No.  
20 535-102.) This is further supported by evidence that turnbacks created humanitarian  
21 issues in border communities and local pressure to remove them. (See May 24, 2018 “RE:  
22 Today’s Meeting – A few items” email (noting that queue management would increase the  
23 number of people waiting in Mexico “and begin to strain local [Mexican] border  
24 communities” as seen with Haitians in Tijuana in 2016), Ex. 96 to Medlock Decl., ECF  
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26 <sup>15</sup> The Court grants Defendants’ Motion to Exclude Stephanie Leutert’s Expert Testimony only as  
27 it pertained to port operations or capacities. Ms. Leutert has directly observed turnbacks at POEs and  
28 personally conducted fieldwork in Mexican border cities with asylum seekers, shelter staff, civil society  
organizations, and Mexican government officials as part of her work. (Leutert Decl. ¶ 6.) She therefore  
has personal knowledge of the steps imposed by metering on asylum seekers.



1 No. 535-98); Sept. 13, 2016 “RE: Haitians arriving in Tijuana” email (Haitian migrants  
2 waiting in Tijuana for appointments were causing a local humanitarian crisis and political  
3 pressure was mounting in Mexico to manage the situation), Ex. 50 to Medlock Decl., ECF  
4 No. 535-52.)

5 As the Court has stated before, “it is entirely possible that there may exist potentially  
6 legitimate factors that prevent CBP officers from immediately discharging the mandatory  
7 duties set forth in 8 U.S.C. § 1158(a)(1) and 8 U.S.C. § 1225.” *Al Otro Lado*, 394 F. Supp.  
8 3d at 1212. There may in fact be times when capacity or resource constraints prevent  
9 Defendants from processing asylum seekers expeditiously. However, it is also true that  
10 because courts “are not at liberty to rewrite the words chosen by Congress,” *United States*  
11 *v. Vargas-Amaya*, 389 F.3d 901, 906 (9th Cir. 2004), the Court cannot find that these  
12 statutory duties are subject to modification or displacement based on Defendants’  
13 assessments. *See O.A.*, 404 F. Supp. 3d at 151 (holding that an executive assessment of a  
14 large-scale arrival of unlawful entrants does not override a statutory mandate permitting all  
15 aliens present in the United States to apply for asylum). As stated by the Ninth Circuit,  
16 “[w]here Congress itself has significantly limited executive discretion by establishing a  
17 detailed scheme that the Executive must follow in [dealing with] aliens,” the Executive  
18 cannot “abandon that scheme because [it] thinks it is not working well[.]” *E. Bay*  
19 *Sanctuary Covenant v. Trump*, 932 F.3d 742, 774 (9th Cir. 2018).

20 As aforementioned, an asylum seeker must only arrive and indicate an intention to  
21 apply for asylum for inspection and referral to commence. Requiring asylum seekers to  
22 arrive again at POEs requires an additional step neither stated in nor contemplated by  
23 § 1225(b)(1)(A)(ii). Therefore, failing to inspect and refer class members upon arrival,  
24 and instead turning them back, conditions the ability to apply for asylum “on a migrant’s  
25 manner of entry,” and “flouts this court’s and the BIA’s discretionary, individualized  
26 treatment of refugees’ methods of entry[.]” *E. Bay Sanctuary Covenant*, 993 F.3d at 675.  
27 Accordingly, the Court concludes that turning back asylum seekers at POEs without  
28 inspecting and referring them upon their arrival unlawfully withholds Defendants’

1 statutory duties under 8 U.S.C. § 1158(a)(1) and § 1225. Because the Court concludes that  
 2 turnbacks are unlawful regardless of their purported justification, the Court finds it  
 3 unnecessary to address the parties' arguments regarding the § 706(2) arbitrary and  
 4 capricious claim based on pretext.<sup>16</sup>

### 5 **III. Fifth Amendment**

6 Plaintiffs' second claim alleges that Defendants' act of turning back asylum seekers  
 7 from POEs violates the Fifth Amendment. The Fifth Amendment provides that "[n]o  
 8 person shall be . . . deprived of life, liberty, or property, without due process of law." U.S.  
 9 Const. amend. V. "The touchstone of due process is protection of the individual against  
 10 arbitrary action of government[.]" *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

11 Plaintiffs argue that Defendants' violation of the procedural protections embodied  
 12 in the INA provisions alone prove a violation of due process. (Pls.' Mem. of P. & A. at  
 13 32.) Alternatively, they argue that weighing the individual interest in seeking asylum  
 14 outweighs any governmental interest or burden. (*Id.* at 31–32.) Defendants argue that  
 15 summary judgment is appropriate on this issue because: (1) neither § 1225 nor due process  
 16 protects foreign nationals outside U.S. territory; and (2) "class members cannot obtain  
 17 more than what the statute already provides: to be inspected and processed for admission."  
 18 (Defs.' Mem. of P. & A. at 54.) The Court addresses each argument below.

#### 19 **A. The Fifth Amendment Still Applies**

20 Defendants first take issue with the Court's prior conclusion regarding the  
 21 extraterritorial application of due process. The Court previously held that the  
 22 extraterritorial application of constitutional rights under the Fifth Amendment was not

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23  
 24 <sup>16</sup> Other courts have found significant overlap between § 706(1) and the contrary to law provisions  
 25 in § 706(2). *See Ramirez*, 471 F. Supp. 3d at 191 (finding, after bench trial, that ICE's failure to follow  
 26 procedures was "otherwise not in accordance with law" and an unlawful withholding or unreasonable  
 27 delay of agency action); *N.A.A.C.P. v. Sec'y of Hous. & Urb. Dev.*, 817 F.2d 149, 160 (1st Cir. 1987)  
 28 (finding no difference between a "failure to exercise" discretion and "abuse" of discretion as revealed by  
 a pattern of activity); *Ligon Specialized Hauler, Inc. v. I. C. C.*, 587 F.2d 304, 315 (6th Cir. 1978) (noting  
 that "unlawful" in § 706(1) includes but is not limited to the meaning given in § 706(2)(A) and (D)); *see also* Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 Va. Environmental L.J., 461–503 (2008).

1 subject to a bright-line test but instead required that the court examine the “particular  
2 circumstances, the practical necessities, and the possible alternatives which Congress had  
3 before it and, in particular, whether judicial enforcement of the provision would be  
4 impracticable and anomalous.” *Al Otro Lado, Inc.*, 394 F. Supp. 3d at 1218 (citing the  
5 “functional approach” in *Boumediene v. Bush*, 553 U.S. 723 (2008)). The Court  
6 specifically found that the “substantial connection” test articulated by the Supreme Court  
7 in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)—applied alongside  
8 *Boumediene*’s functional approach by the Ninth Circuit in *Ibrahim v. Department of*  
9 *Homeland Security*, 669 F.3d 983 (9th Cir. 2012)—“does not constitute a ceiling on the  
10 application of the Constitution to aliens.” *Id.* Relying on *Rodriguez v. Swartz*, 899 F.3d  
11 719 (9th Cir. 2018), this Court rejected Defendants’ argument that class members outside  
12 the country were required to allege a “prior significant voluntary connection” with the  
13 United States to receive the protections of the Fifth Amendment, particularly where the  
14 defendant’s conduct occurred on American soil. *Id.* at 1219–21.

15 Defendants argue that two intervening Supreme Court decisions invalidate these  
16 previous legal conclusions. First, the Supreme Court vacated the judgment in *Rodriguez*  
17 and remanded the decision to the Ninth Circuit “for further consideration in light of  
18 *Hernandez v. Mesa*, 589 U.S. \_\_\_, 140 S. Ct. 735 (2020).” In *Hernandez*, the Court found  
19 it improper to extend *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), to provide a  
20 damages remedy for a cross-border shooting in which a Border Patrol agent standing on  
21 American soil shot and killed a 15-year-old Mexican national standing on Mexican soil.  
22 The Court’s analysis focused on the “special factors counseling hesitation” unique to the  
23 *Bivens* context, specifically the separation of powers and Congress’s role in providing for  
24 a damages remedy. *Hernandez*, 140 S.Ct. at 749–50 (“[T]his case features multiple factors  
25 that counsel hesitation about extending *Bivens*, but they can all be condensed to one  
26 concern—respect for the separation of powers.”).

27 Although *Rodriguez* was remanded in light of *Hernandez*, the Court does not  
28 understand *Hernandez* to invalidate the propositions in *Rodriguez* on which this Court

1 relied. While the Supreme Court in *Hernandez* found that the particular circumstances of  
2 that case implicated foreign policy and national security in a way that counseled against  
3 fashioning a *Bivens* remedy “for injuries incurred on foreign soil,” it did not hold that due  
4 process itself cannot extend extraterritorially in any circumstance or that extraterritorial  
5 application would require a “previous voluntary significant connection.” Indeed, the Fifth  
6 Circuit’s earlier decision found Hernandez was not entitled to protection under the Fourth  
7 Amendment because of his lack of “significant voluntary connection.” *Hernandez v.*  
8 *United States*, 785 F.3d 117, 120 (5th Cir. 2015). The Supreme Court ultimately vacated  
9 this decision and remanded to the Fifth Circuit for consideration of a completely different  
10 question: whether Hernandez had a cause of action under *Bivens* to bring a due process  
11 claim in the first place. *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017). Thus, this particular  
12 holding in *Rodriguez* that a substantial connection is not necessary for extraterritorial  
13 application was never addressed by the Supreme Court in its *Hernandez* decision.

14 Second, Defendants argue that *Thuraissigiam* contravenes the Court’s reliance on  
15 *Boumediene*’s functional test for due process. As aforementioned, the Court in  
16 *Thuraissigiam* addressed a constitutional challenge to 8 U.S.C. § 1252(e)(2), which limits  
17 habeas review of expedited removal orders. The Court indeed distinguished *Boumediene*  
18 because it “is not about immigration at all.” *Id.* at 1981. The decision, however, makes  
19 this distinction in the context of habeas relief, noting that the challengers in *Boumediene*  
20 “were apprehended on the battlefield in Afghanistan and elsewhere, not while crossing the  
21 border,” and “sought only to be released from Guantanamo, not to enter this country.” *Id.*  
22 (quotations omitted). However, this Court did not cite to *Boumediene* for its conclusions  
23 regarding the propriety of habeas relief; rather, the Court relied on its instruction to conduct  
24 fact-specific extraterritoriality analyses and not rely on formalism. *See Al Otro Lado*, 394  
25 F. Supp. 3d at 1218. Nothing in *Thuraissigiam* has any bearing on this principle.<sup>17</sup>

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27 <sup>17</sup> While *Thuraissigiam* primarily concerned whether the statute violated the Suspension Clause,  
28 the respondent also raised a due process claim related to his “allegedly flawed credible-fear proceeding.”  
*Id.* at 1982. The Court addresses the Supreme Court’s holding into its analysis below.

1 While future case law could alter this holding, the cases cited by Defendants do not,  
2 at this juncture, displace the Court’s adoption of the extraterritorial application of the Fifth  
3 Amendment. Thus, the Court finds no basis in the case law cited by Defendants to depart  
4 from its original conclusion that, under the functional approach in *Boumediene*, the Fifth  
5 Amendment applies to conduct that occurs on American soil and therefore applies here,  
6 where CBP failed to inspect and refer class members for asylum under statute. *See id.* at  
7 1218–21.

### 8 **B. Denial of Due Process**

9 The Supreme Court recently emphasized that “the only procedural rights of an alien  
10 seeking to enter the country are those conferred by statute,” and as such “the decisions of  
11 executive or administrative officers, *acting within powers expressly conferred by congress,*  
12 are due process of law.” *Thuraissigiam*, 140 S. Ct. at 1977 (emphasis added) (quoting  
13 *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892)); *see also Wolff*, 418 U.S. at  
14 557 (“A liberty interest created by statute is protected by due process.”); *Meachum v. Fano*,  
15 427 U.S. 215, 226 (1976) (“[A] person’s liberty is equally protected, even when the liberty  
16 itself is a statutory creation of the State.” (quotation omitted) (quoting *Wolff*, 418 U.S. at  
17 557)). As Plaintiffs point out, Defendants have conceded this point. *See Al Otro Lado*,  
18 394 F. Supp. 3d at 1221 (quoting Defendants’ argument that “[w]here plaintiffs premise  
19 their procedural due process challenge on having a protected interest in a statutory  
20 entitlement, the protections of the Due Process Clause . . . extend only as far as the  
21 plaintiffs’ statutory rights”).

22 Plaintiffs allege that their due process rights derive from a congressionally enacted  
23 statute; namely, the process of inspection and referral afforded in § 1225 by way of  
24 § 1158(a)(1). Plaintiffs’ due process rights therefore extend as far as their rights under  
25 these provisions. *Thuraissigiam*, 140 S. Ct. at 1977. The Court determined above that  
26 turning asylum seekers away from POEs constitutes an unlawful exercise of Defendants’  
27 authority under the INA to inspect and refer asylum seekers both on U.S. soil and outside  
28 the international boundary line who are arriving at POEs. (*See supra* Section II.C.4.) *Al*

1 *Otro Lado*, 394 F. Supp. 3d 1168, 1198–1205. Because Defendants’ turning back of  
 2 asylum seekers unlawfully withholds their duties under statute, it violates the process due  
 3 to class members.<sup>18</sup> Thus, the Court finds summary judgment appropriate in Plaintiffs’  
 4 favor on their due process claim.

#### 5 **IV. Alien Tort Statute**

6 The ATS confers on district courts “original jurisdiction of any civil action by an  
 7 alien for a tort only, committed in violation of the law of nations or a treaty of the United  
 8 States.” 28 U.S.C. § 1350. “The ATS ‘is a jurisdictional statute creating no new causes of  
 9 action,’ although the First Congress adopted it on the assumption that ‘district courts would  
 10 recognize private causes of action for certain torts in violation of the law of nations . . . .”  
 11 *Mujica v. AirScan Inc.*, 771 F.3d 580, 591 (9th Cir. 2014) (quoting *Sosa v. Alvarez–*  
 12 *Machain*, 542 U.S. 692, 724 (2004)). When a plaintiff seeks to plead an ATS claim based  
 13 on an alleged violation of the law of nations, the plaintiff must identify an international  
 14 norm that is specific, universal, and obligatory. *Sosa*, 542 U.S. at 732. Courts must  
 15 “determine whether a norm of customary international law has attained the status of jus  
 16 cogens” by consulting scholarship, judicial decisions, and “the general usage and practice  
 17 of nations” but “must also determine whether the international community recognizes the  
 18 norm as one from which no derogation is permitted.” *Siderman de Blake v. Republic of*  
 19 *Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (quotations omitted).

20 Even where a jus cogens norm exists, the Supreme Court has advised courts to  
 21 exercise “a restrained conception of the discretion [it] should exercise in considering a new  
 22 cause of action” under the ATS. *Id.* at 724–25. Specifically, the Court cited to the  
 23 following five reasons:

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 26 <sup>18</sup> During oral argument, Defendants argued that Plaintiffs’ due process argument fails because  
 27 they cannot show a deprivation on a class-wide basis. However, the Court found above that Defendants  
 28 unlawfully withhold the duties of inspection and referral for all asylum seekers by turning them back upon  
 their arrival at a POE. Thus, the class was uniformly subject to the same deprivation of process. (*See*  
*supra* note 2.) Defendants’ argument regarding this issue therefore fails.

1 First, . . . the [modern] understanding that the law is not so much found or  
 2 discovered as it is either made or created[;] . . . [s]econd, . . . an equally  
 3 significant rethinking of the role of the federal courts in making it [;] . . .  
 4 [t]hird, [the modern view that] a decision to create a private right of action is  
 5 one better left to legislative judgment in the great majority of cases[;] . . .  
 6 [f]ourth, . . . risks of adverse foreign policy consequences [; and] . . . fifth[,]  
 . . . [the lack of a] congressional mandate to seek out and define new and  
 debatable violations of the law of nations.

7 *Presbyterian Church Of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 255 (2d Cir. 2009)  
 8 (quoting *Sosa*, 542 U.S. at 725–28).

9 The norm at issue in this case is the duty of non-refoulement. The principle is  
 10 defined in Article 33 of the United Nations Convention Relating to the Status of Refugees  
 11 (“Refugee Convention”) as follows:

12 No Contracting State shall expel or return (“refouler”) a refugee in any manner  
 13 whatsoever to the frontiers of territories where his life or freedom would be  
 14 threatened on account of his race, religion, nationality, membership of a  
 15 particular social group or political opinion.

16 Jan. 31, 1967, 19 U.S.T. 6223, 6276 (“Article 33”). Plaintiffs have previously provided  
 17 extensive citation to sources—including findings and conclusions from the Executive  
 18 Committee of the United Nations High Commissioner for Refugees (“UNHCR”), the  
 19 Oxford Encyclopedia of Human Rights, and academic journals and other scholarship—to  
 20 establish that non-refoulement is a jus cogens norm. (*See* Pls.’ Opp’n to Defs.’ Mot. to  
 21 Dismiss the SAC at 28–29, ECF No. 210 (citing to sources).) The UNHCR, in particular,  
 22 has expressly concluded that non-refoulement had achieved the status of a jus cogens norm  
 23 “not subject to derogation.” UNHCR Executive Cmty. Conclusion No. 79 (XLVII),  
 24 General Conclusion on Int’l Protection (1996).

25 The more nuanced question in this case is whether the duty of non-refoulement is  
 26 universally understood to provide protection to those who present themselves at a country’s  
 27 borders but are not within a country’s territorial jurisdiction. This is analogous to the earlier  
 28 question addressed by the Court regarding the scope of the INA provisions governing

1 inspection and referral. (*See supra* Section II.C.1.) Concerning the ATS, however, the  
2 Court cannot rely on its previous interpretation of the relevant domestic statutes but must  
3 instead determine here, with reference to scholarship, judicial decisions, and “the general  
4 usage and practice of nations,” whether this understanding of the duty of non-refoulement  
5 is specific, universal, and obligatory from which no derogation is permitted.

6 “Turnbacks” or “pushbacks” have been acknowledged in international legal  
7 literature as a “direct arrival prevention measure” that, on land, usually involve some tactics  
8 or measures “to prevent migrants from approaching or crossing the border” such that  
9 “screening for protection needs will be summary or non-existent.” Rep. of the Special  
10 Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment,  
11 U.N. Human Rights Council, at ¶ 51, U.N. Doc. A/HRC/37/50 (Nov. 23, 2018). Several  
12 international legal authorities have expressed that pushbacks are incompatible with the duty  
13 of non-refoulement because they deprive migrants of their right to seek international  
14 protection on an individualized basis. *Id.* ¶ 52; *see also* Advisory Op. on the Extraterritorial  
15 Application of Non-Refoulement Obligations under the 1951 Convention relating to the  
16 Status of Refugees and its 1967 Protocol (“Advisory Op.”), U.N. High Comm’r for  
17 Refugees (UNHCR), ¶ 43 (Jan. 26, 2007). This is premised on the legal principle that the  
18 source of this duty, Article 33, applies extraterritorially to asylum seekers approaching land  
19 borders from contiguous countries. *See* UNHCR Advisory Op. ¶ 7 (“The prohibition of  
20 refoulement to a danger of persecution under international refugee law is applicable to any  
21 form of forcible removal, including . . . non-admission at the border . . .”); UNHCR  
22 Executive Cmty. Conclusion No. 22 (XXXII), Protection of Asylum-Seekers in Situations  
23 of Large-Scale Influx (1981) (“In all cases the fundamental principle of non-refoulement—  
24 including non-rejection at the frontier—must be scrupulously observed.”); *see also* Mark  
25 Gibney, Refugees, 4 Encyclopedia of Human Rights 315, 318 (Oxford University Press,  
26 2009) (“In practice, [the duty of non-refoulement] means that a . . . state must either admit  
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28



1 the person to its territory and process her claim for protection or send the person to a safe  
2 third state.”).<sup>19</sup>

3         However, acceptance of this specific extraterritorial application of non-refoulement  
4 is not universal. Several countries have adopted pushback or “offshoring” policies that  
5 seek to “offload” the obligations of non-refoulement on other countries and “seal” borders  
6 from asylum seekers.<sup>20</sup> *See* Azadeh Erfani and Maria Garcia, “Pushing Back Protection:  
7 How Offshoring and Externalization Imperil the Right to Asylum,” at 7, Nat’l Immigrant  
8 Justice Center and FWD.us (Aug. 3, 2021). This practices, in some form or another, has  
9 been implemented in some European Union members states and Australia. *See generally,*  
10 *id.*; *see also* Marianna Karakoulaki, et al., *Critical Perspectives on Migration in the*  
11 *Twenty-First Century*, at 144, (E-International Relations Publishing, July 30, 2018) (noting  
12 “states are able to significantly limit the activation of their Convention obligations  
13 through the implementation of ‘non-arrival regimes’ that aim to directly impede access  
14 to asylum”). This stems from significant disagreement over the scope and extent of  
15 countries’ jurisdictions, within which they are obligated not to refoul asylum seekers. *See*  
16 Cathryn Costello and Itamar Mann, “Border Justice: Migration and Accountability for  
17 Human Rights Violations,” 21 *German L.J.* 311, 313–14 & n.19 (Cambridge Univ. Press,  
18 March 3, 2020) (describing the definition of “jurisdiction” in human rights treaties as  
19 “constantly contested”).

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22         <sup>19</sup> These resources do not expressly address whether the duty of non-refoulement is breached where  
23 a country turns back asylum seekers temporarily and processes them at a later date. However, many seem  
24 to embrace a broad view of this obligation as prohibiting any country from subjecting or exposing asylum  
25 seekers, for any amount of time, to foreseeable risks of violence (including not only persecution on a  
26 protected ground, but also ill-treatment, abuse, and other forms of bodily harm). Because the Court’s  
conclusion here is that the extraterritorial application of the duty has not been established as a jus cogens  
norm, the Court need not determine whether the duty of non-refoulement extends to these other  
circumstances.

27         <sup>20</sup> Evidence in this case demonstrates that some of these “offshoring” techniques are used by CBP  
28 in coordination with the Government of Mexico to interdict migrants en route to United States POEs. The  
Court does not address the lawfulness of any measures taken by CBP, beyond metering, regarding asylum  
seekers in contiguous countries.

1 This rift has manifested itself in judicial and tribunal determinations as well. Some  
 2 courts have adopted an expansive understanding of jurisdiction and even applied it to find  
 3 an extraterritorial duty regarding non-refoulement obligations.<sup>21</sup> The United States  
 4 Supreme Court, however, has not. In *Sale v. Haitian Centers Council, Inc.*, the Court held  
 5 that “the text of Article 33 cannot reasonably be read to say anything at all about a nation’s  
 6 actions toward aliens outside its own territory[.]” 509 U.S. at 183 (1993). The Court in  
 7 *Sale* relied heavily on statutory interpretation of the text of Article 33 and the “negotiating  
 8 history” of this provision to conclude that it was not intended to apply outside the territorial  
 9 seas of the United States. *See id.* at 179–87. The Court acknowledges that this precedent  
 10 is almost three decades old, and its conclusion is dependent on an interpretation of Article  
 11 33 that has since been explicitly disagreed with by the UNHCR itself. UNHCR Advisory  
 12 Op. ¶¶ 24 n.54, 28–29, 31; *see also The Haitian Centre for Human Rights et al. v. United*  
 13 *States*, Inter-American Comm. on Human Rights, Case 10.675 (1997). Nonetheless, its  
 14 interpretation of Article 33 remains binding precedent on this Court. *See Hart v.*  
 15 *Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) (“Binding authority within this regime  
 16 cannot be considered and cast aside; it is not merely evidence of what the law is. Rather,

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 18 <sup>21</sup> *See Hirsijamaa and Others v. Italy*, Application No. 27765/09, European Court of Human Rights  
 19 (“ECHR”) (2012) (“[T]he Italian border control operation of ‘push-back’ on the high seas, coupled  
 20 with the absence of an individual, fair and effective procedure to screen asylum seekers, constitutes a  
 21 serious breach of the prohibition of collective expulsion of aliens and consequently of the principle of  
 22 non-refoulement.”); *Bankovic et al. v. Belgium and 16 other contracting States (Admissibility)*,  
 23 Application No. 52207/99, ECHR (Dec. 12, 2001) (recognizing exercise of extraterritorial jurisdiction  
 24 when a “State, through the effective control of the relevant territory and its inhabitants abroad as a  
 25 consequence of military occupation or through the consent, invitation or acquiescence of the Government  
 26 of that territory, exercises all or some of the public powers normally to be exercised by that Government”);  
 27 *see also, Coard et al. v. United States*, Report No. 109/99, Case No. 10.951, Inter-American Comm. on  
 28 Human Rights (“IACHR”) (Sept. 29, 1999) (noting that extraterritorial application may be “required by  
 the norms which pertain” and as such, the focus should not be “on the presumed victim’s nationality or  
 presence within a particular geographic area, but on whether, under the specific circumstances, the  
 State observed the rights of a person subject to its authority and control”); *Loizidou v. Turkey (Preliminary  
 Objections)*, Application No. 15318/89, ECHR (Feb. 23, 1995), Series A, No. 310, para. 62 (finding, in  
 the context of the convention at issue, that “the concept of ‘jurisdiction’ under this provision is not  
 restricted to the national territory of the High Contracting Parties” but also extends to “acts of their  
 authorities, whether performed within or outside national boundaries, which produce effects outside their  
 own territory”).

1 caselaw on point is the law. If a court must decide an issue governed by a prior opinion  
 2 that constitutes binding authority, the later court is bound to reach the same result, even if  
 3 it considers the rule unwise or incorrect. Binding authority must be followed unless and  
 4 until overruled by a body competent to do so.”); *cf. Guaylupo-Moya v. Gonzales*, 423 F.3d  
 5 121, 136 (2d Cir. 2005) (“[C]lear congressional action trumps customary international law  
 6 and previously enacted treaties.”).<sup>22, 23</sup>

7 Abiding by non-refoulement principles in the instant circumstances is an objective  
 8 toward which all countries—including this one—should undoubtedly strive. However,  
 9 given both controlling case law and the ongoing debate over the proper scope of countries’  
 10 jurisdictions, the Court regrettably cannot find that this norm is universally applied beyond  
 11 borders. As such, the Court finds that the duty of non-refoulement as it applies to migrants  
 12 at the border but physically outside the territorial United States is not a norm from which  
 13 no derogation is permitted. *See Sosa*, 542 U.S. at 725 (limiting the international norms  
 14 actionable under the ATS to only those that “rest on a norm of international character  
 15 accepted by the civilized world”). In the absence of jus cogens norm, the Court finds  
 16 Plaintiffs’ ATS claim is not actionable as a matter of law.

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20 <sup>22</sup> The Department of Justice (“DOJ”) also does not recognize the extraterritoriality of Article 33,  
 21 even after the UNHCR stated that it applies extraterritorially. *See* Legal Obligations of the United States  
 22 Under Article 33 of the Refugee Convention, Dep’t of State Mem. Op. for the Legal Adviser (Dec. 12,  
 23 1991), accessed at <https://www.justice.gov/file/23326/>; U.S. observations on UNCHR Advisory Opinion  
 on Extraterritorial Application of Non-Refoulement Obligations (Dec. 28, 2007), accessed at <https://2001-2009.state.gov/s/l/2007/112631.htm>.

24 <sup>23</sup> Although the law is not conclusive on customary international laws’ relationship with domestic  
 25 laws, lower courts have held that federal statutes have supremacy. *See, e.g., Flores-Nova v. Att’y Gen.*  
 26 *of U.S.*, 652 F.3d 488, 495 (3d Cir. 2011) (finding customary international law not binding on the court to  
 27 the extent that it conflicted with a statute); *Payne–Barahona v. Gonzales*, 474 F.3d 1, 3–4 (1st Cir. 2007)  
 28 (stating that where customary international law conflicts with a federal statute, “the clear intent of  
 Congress would control”); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) (same);  
*Martinez–Lopez v. Gonzales*, 454 F.3d 500, 502–03 (5th Cir. 2006) (same). The Court finds no reason  
 why this well-established rule establishing the supremacy of federal statutes over customary international  
 law would not also apply to the decisions of the Supreme Court.

1 **V. Equitable Relief**

2 Plaintiffs seek declaratory relief on the basis that Defendants violated the law by  
 3 implementing turnbacks. (Pls.' Mem. of P. & A. at 38–39.) Further, Plaintiffs request a  
 4 permanent injunction on the basis that the denial of access to the asylum process causes  
 5 irreparable harm, no remedy at law will cure the violations, and access to the asylum  
 6 process is both in the public interest and outweighs any burden to Defendants in complying  
 7 with asylum procedure. (Pls.' Mem. of P. & A. at 36–38.) Defendants argue that equitable  
 8 relief is unwarranted because Plaintiffs fail on the merits and raise several, specific  
 9 objections to a permanent injunction, including based on 8 U.S.C. § 1252(f)(1) and an  
 10 argument that vacatur, rather than an injunction, is the proper remedy here. (See Defs.'  
 11 Mem. of P. & A. at 59 (citing *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d  
 12 1072, 1095 (9th Cir. 2011)).

13 Although the parties raise several arguments regarding this limitation, both parties  
 14 agree that additional briefing on the scope of the remedy is warranted due to the complexity  
 15 of the issues. (Defs.' Mem. of P. & A. at 58; Pls.' Reply at 16 n.11.) Because the parties  
 16 request an additional opportunity to fully explore the legal questions related to the  
 17 requested remedy, the Court orders further briefing below.

18 **CONCLUSION**

19 Accordingly, the Court orders as follows:

20 (1) As to Plaintiffs' first claim for ultra vires violations of the right to seek asylum  
 21 under the INA, Plaintiffs' MSJ is **DENIED** and Defendants' MSJ is **GRANTED**;

22 (2) As to Plaintiffs' second claim for violations of APA § 706(1), Plaintiffs' MSJ  
 23 is **GRANTED** and Defendants' MSJ is **DENIED**;

24 (3) As to Plaintiffs' second claim for violations of APA § 706(2), Plaintiffs' MSJ  
 25 and Defendants' MSJ are **DENIED AS MOOT**;

26 (4) As to Plaintiffs' third claim for a violation of the Fifth Amendment's Due  
 27 Process clause, Plaintiffs' MSJ is **GRANTED** and Defendants' MSJ is **DENIED**;

28

1 (5) As to Plaintiffs’ fourth claim for a violation of the ATS, Plaintiffs’ MSJ is  
2 **DENIED** and Defendants’ MSJ is **GRANTED**;

3 (6) As to Plaintiffs’ fifth claim for equitable relief, both parties are **DENIED**  
4 **WITHOUT PREJUDICE** pending further briefing on the following questions:

5 a. What remedy is appropriate in light of the Court’s § 706(1)  
6 finding?

7 b. How does 42 U.S.C. § 265 (“Title 42”) affect the  
8 implementation of a remedy in this case?

9 The parties shall submit their supplemental briefs regarding the appropriate remedy in this  
10 action, not to exceed 20 pages each, by **October 1, 2021**.

11 **IT IS SO ORDERED.**

12  
13 **DATED: September 2, 2021**

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

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