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

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

19 Plaintiffs,

20 v.

21 Chad F. Wolf,¹ *et al.*,

22 Defendants.

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

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

REDACTED PUBLIC VERSION

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

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

26
 27 _____
 28 ¹ Acting Secretary Wolf is automatically substituted for former Acting Secretary
 McAleenan pursuant to Fed. R. Civ. P. 25(d).

TABLE OF CONTENTS

Page

1 I. INTRODUCTION 1

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

3 A. Overview of Defendants’ Unlawful Conduct 4

4 B. Defendants Adopt the Turnback Policy 7

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

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

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

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

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

10 III. LEGAL STANDARD 18

11 IV. ARGUMENT 18

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

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

14 C. The Turnback Policy Violates the ATS 33

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

16 E. The Court Should Enter A Declaratory Judgment 38

17 V. CONCLUSION 39

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

TABLE OF AUTHORITIES

1
2
3
4
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20
21
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Page(s)

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

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

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

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

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

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

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

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

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

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

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

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

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

1 *EBSC v. Trump*,
2 932 F.3d 742 (9th Cir. 2018)..... 24
3 *EBSC v. Trump*,
4 950 F.3d 1242 (9th Cir. 2020)..... 31, 32
5 *GEICO v. Dizol*,
6 133 F.3d 1220 (9th Cir. 1998)..... 39
7 *Goldberg v. Kelly*,
8
9
10
11
12
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14
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16
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19
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23
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1 *Siderman de Blake v. Rep. of Arg.*,
 2 965 F.2d 699 (9th Cir. 1992)..... 34

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

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

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

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

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

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

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

17 **OTHER CASES**

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

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

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

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

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

28

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2 5 U.S.C.

3 § 704 19

4 § 706(1)..... 2, 22, 24, 25

5 § 706(1), (2)(A), (C)..... 19

6 § 706(2)..... 2, 22, 24, 25

7 § 706(2)(A), (C)..... 22, 24, 26

8 8 U.S.C.

9 §§ 1158(a)(1) 22

10 § 1225 22, 24, 31, 32

11 § 1225(a)(3) 4, 22

12 § 1225(b)(1)..... 4

13 § 1225(b)(1)(a)(ii) 22

14 §§ 1225(b)(2)..... 4

15 § 1229(a)(1) 28

16 28 U.S.C.

17 § 1350 34

18 § 2201(a)..... 39

19 **OTHER AUTHORITIES**

20 8 C.F.R. § 235.3(b)(4) 22

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23 (Jun. 6, 2020) 36

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

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

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

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

4 **II. THE UNDISPUTED FACTS**

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

6 There is no cap on the number of asylum seekers who may arrive in the U.S.
7 in a particular time period. Dkt. 260 at 4:24-5:2 (“there aren’t limits on the number
8 of people who can seek asylum.”). When a person without entry documents is
9 arriving at a POE and asserts a fear of return to her home country or an intention to
10 seek asylum, CBP must inspect her, *see* 8 U.S.C. § 1225(a)(3), and process her—
11 either refer the asylum seeker for an interview with an asylum officer, *see* 8 U.S.C.

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

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

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

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

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

6 It was not until the San Ysidro POE received media inquiries about asylum
7 seekers at the port that CBP decided to abandon its existing contingency plans and
8 began turning back asylum seekers instead. By May 26, 2016, CBP’s San Diego
9 Field Office⁸ “

10 .” Ex. 39 at 741. On the same day, the offices of Senator
11 Barbara Boxer and Representative Susan Davis asked questions about the asylum
12 seekers at the San Ysidro POE. Ex. 40 at 870. In response to those inquiries, Sidney
13 Aki, the Port Director of the San Ysidro POE, wrote, “
14 .” Ex. 41 at 552.

15 The next day, the San Ysidro POE began turning back asylum seekers that
16 were in the process of arriving at the POE and preventing them from crossing the
17 international boundary. *See* Ex. 42 (“

18 ”); Ex. 43 (“ ”); Ex. 44 (“
19 .”); Ex. 45 (instructing CBP officers “
20 ”). However, San Ysidro POE leadership agreed that “
21 ” to inspect a few asylum seekers “ ”.

22 Ex. 46. By the end of May 2016, CBP was

23
24 . Ex. 11 at 298.

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

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

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

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

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

27 [REDACTED].” Ex. 55 at 175. In addition to the
28 processing facilities in [REDACTED], Defendants began examining ways

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

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

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

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

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

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Todd Owen told McAleenan that he was “ .” Ex. 6.

However, Mr. Owen explained that he “ .” *Id.*; see also Ex. 69 at 935 (“

.”). Although CBP decided

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In the Laredo Field Office, multiple CBP officers observed asylum seekers being returned from U.S. territory to Mexico without being processed. Ex. 77 at 136. The CBP officers who witnessed these turnbacks summarized them in emails sent to Chapter 149 of the National Treasury Employees Union (“NTEU”).¹⁰ *See,*

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“

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

s. *Id.* at 316. OFO’s

El Paso Field Office reported that

Ex. 94 at 575. The Tucson Field Office said that it

could . Ex. 95. Synthesizing this information,

Todd Owen reported to CBP Commissioner McAleenan that

1 in order to “

.” Ex. 100 at 207:7-14.

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”).

As the turnback policy was rolled out border-wide, POEs tracked
. See,
e.g., Ex. 106 at 089 (“
”); Ex. 107 at 2 (internal CBP study
analyzing whether
); Ex. 108
 (“
”).

Defendants refused to implement plans that could have considerably increased
the capacity of POEs to process asylum seekers. For instance, in November 2018,
Pete Flores, the Director of Field Operations for OFO’s San Diego Field Office,
. Ex.

109; Ex. 110. DHS Secretary Nielsen
Ex. 111.

CBP also considered whether
. Ex. 112. However,
Id.

G. Defendants Harmed the Class and Al Otro Lado

The turnback policy seriously harmed asylum seekers, returning them to
Mexican border cities that Defendants knew were dangerous. See Ex. 96 (“
”); Ex. 100 at 202:24-203:5; Ex. 50 at 746 (report
indicating that turnbacks were “
” in Tijuana). In
response to “the needs of particularly vulnerable migrants who ha[d] been metered[,
s]pecifically those who are in imminent danger of harm or death in Tijuana,”

1 Ex. 116.

2 Defendants take no responsibility for the harm they have caused. When Todd
3 Owen was asked, “Do you take responsibility for instances where the metering
4 policy was implemented in ways that broke the law?”, he answered, “I do not take
5 responsibility for the 30,000 officers that work under me.” Ex. 10 at 239:22-240:6.
6 When asked whether he takes responsibility for asylum seekers staying in squalid
7 conditions at migret42x6u1 0 0 ,3yI40(w)2.2()4.2(ce7.3(n)33u)10.5(t)-4w”(s)-4.3(o)3.I 4

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

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

13 The APA permits judicial review over agency actions that are “final.” 5 U.S.C.
14 § 704; *Navajo Nation v. Dep’t of the Interior*, 876 F.3d 1144, 1171 (9th Cir. 2017).

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Defendants first began turning back asylum seekers at the San Ysidro POE in

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

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

14 Congress has spoken clearly about what Defendants are required to do when
15 noncitizens come to POEs—inspect them when they arrive and allow those seeking
16 asylum to access the asylum process. *See* 8 U.S.C. §§ 1158(a)(1), 1225(a)(1), (3),
17 and (b)(1)(A)(ii). Because Defendants have a discrete mandatory duty to inspect and
18 refer asylum seekers arriving at POEs, *see* Dkt. 280 at 31-46; 8 U.S.C. § 1225, each
19 turnback amounts to the unlawful withholding of mandatory agency acs3eHida94.7(a)-S or

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

6 This Court previously concluded that “the mandatory duties to inspect all
7 aliens and refer certain aliens seeking asylum are discrete actions for which this
8 Court can compel Section 706(1) relief under 8 U.S.C. § 1225(a)(3), 8 U.S.C.
9 § 1225(b)(1)(a)(ii), and 8 C.F.R. § 235.3(b)(4).” Dkt. 280 at 31. Defendants’ duty to
10 inspect and refer applies to those “who are in the process of arriving in the United
11 States,” including those who may not yet have set foot across the physical border.
12 Dkt. 280 at 46. The Ninth Circuit found this analysis “sound and persuasive.” *Al*
13 *Otro Lado v. Wolf*, 952 F.3d 999, 1011-12 (9th Cir. 2020). The Court’s prior

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1 should return to be processed later?

2 A. Yes.

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

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

9 A. Yes.

10 Ex. 17 at 201:22-202:3 (objection omitted).¹³ Thus, Defendants have admitted that
11 it is their policy to turn back asylum seekers who are in the process of arriving in the
12 United States. Dkt. 280 at 314-16, 319-21, 354-55, 367-70, 371-73, 374-75, 377-78, 380-81, 383-84, 386-87, 389-90, 392-93, 395-96, 398-99, 401-02, 404-05, 407-08, 410-11, 413-14, 416-17, 419-20, 422-23, 425-26, 428-29, 431-32, 434-35, 437-38, 440-41, 443-44, 446-47, 449-50, 452-53, 455-56, 458-59, 461-62, 464-65, 467-68, 470-71, 473-74, 476-77, 479-80, 482-83, 485-86, 488-89, 491-92, 494-95, 497-98, 500-01, 503-04, 506-07, 509-10, 512-13, 515-16, 518-19, 521-22, 524-25, 527-28, 530-31, 533-34, 536-37, 539-40, 542-43, 545-46, 548-49, 551-52, 554-55, 557-58, 560-61, 563-64, 566-67, 569-70, 572-73, 575-76, 578-79, 581-82, 584-85, 587-88, 590-91, 593-94, 596-97, 599-600, 603-04, 606-07, 609-10, 612-13, 615-16, 618-19, 621-22, 624-25, 627-28, 630-31, 633-34, 636-37, 639-40, 642-43, 645-46, 648-49, 651-52, 654-55, 657-58, 660-61, 663-64, 666-67, 669-70, 672-73, 675-76, 678-79, 681-82, 684-85, 687-88, 690-91, 693-94, 696-97, 699-700, 703-04, 706-07, 709-10, 712-13, 715-16, 718-19, 721-22, 724-25, 727-28, 730-31, 733-34, 736-37, 739-40, 742-43, 745-46, 748-49, 751-52, 754-55, 757-58, 760-61, 763-64, 766-67, 769-70, 772-73, 775-76, 778-79, 781-82, 784-85, 787-88, 790-91, 793-94, 796-97, 799-800, 803-04, 806-07, 809-10, 812-13, 815-16, 818-19, 821-22, 824-25, 827-28, 830-31, 833-34, 836-37, 839-40, 842-43, 845-46, 848-49, 851-52, 854-55, 857-58, 860-61, 863-64, 866-67, 869-70, 872-73, 875-76, 878-79, 881-82, 884-85, 887-88, 890-91, 893-94, 896-97, 899-900, 903-04, 906-07, 909-10, 912-13, 915-16, 918-19, 921-22, 924-25, 927-28, 930-31, 933-34, 936-37, 939-40, 942-43, 945-46, 948-49, 951-52, 954-55, 957-58, 960-61, 963-64, 966-67, 969-70, 972-73, 975-76, 978-79, 981-82, 984-85, 987-88, 990-91, 993-94, 996-97, 999-1000.

13 Defendants also turned back to Mexico asylum seekers who were standing *on*
14 *U.S. soil*. See, e.g., Ex. 1 at 97:14-18; Ex. 3 at 61:13-16; Ex. 73 0 g /F2,t4sS.

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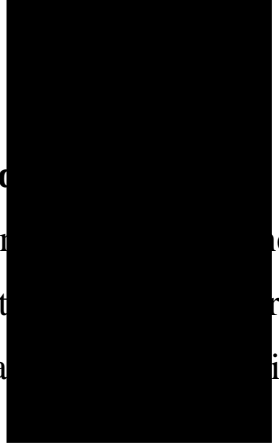
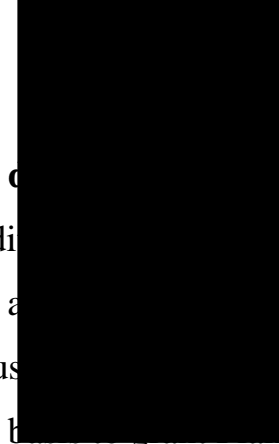
c. The policy contravenes Congress’ unambiguous statutory scheme and exceeds Defendants’ authority

Even if CBP’s ministerial duties to inspect and process were not triggered until an asylum seeker steps onto U.S. soil, summary judgment is still warranted on Plaintiffs’ § 706(2) claim because the turnback policy contravenes Congress’ statutory scheme governing inspection at POEs and exceeds Defendants’ statutory authority. “[A]n agency’s power is no greater than that delegated to it by Congress.” *Lyng v. Payne*, 476 U.S. 926, 937 (1986); *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 328 (2014) (“[A] core administrative-law principle [is] that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.”). In particular, agencies lack authority to “abandon” a “detailed scheme” established by Congress if they think it is not working well. *EBSC v. Trump*, 932 F.3d 742, 774 (9th Cir. 2018). Because Congress designed a “statutory scheme” by which all noncitizens are to u] 7-4.9(8(o)3.2(n)- D)-1773()-4.8(u1.4(s)4(i).2(t)3.3

1 “attempting to enter the United States at a [POE].” Ex. 17 at 201:22-202:3. CBP
2 officers at POEs physically block those perceived to be asylum seekers—and only
3 asylum seekers—from crossing the border, and tell them “that the port is at capacity

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...ack Policy is arbitrary and
In addition, the policy's categorical incorporation of the INA,
the policy is arbitrary and capricious under APA § 706(2)(A) because it is arbitrary, capricious,
[and] an abuse of discretion for a number of reasons, each of which provides an
independent basis for granting the plaintiffs' motion.

i. The Turnback Policy Is Based On Pretext

It is arbitrary and capricious for an agency to “offer[] an explanation for its
decision that runs counter to the evidence before the agency, or is so implausible that
it could not be ascribed to a difference in view or the product of agency expertise.”
San Luis & Delta-Mendota Water Auth. v. Locke, 776 F.3d 971, 994 (9th Cir. 2014)
(citation omitted). “[A]gencies [must] offer genuine justifications for important
decisions.” *Dep’t-3.90 ()T-211.80 (o)-15.10 m 7Tf 10v)T-211.80 (o)-15.10 m 7Tf*

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. *See, e.g.,*

Ex. 3 at 157:15-18; Ex. 14 at 96:17-99:6.

In June 2018—well after this litigation began—CBP began using “operational capacity,” as opposed to “detention capacity,” as its justification for turnbacks. *See supra* at 14-16. The new metric, “operational capacity,” has no definition and is not—and has never been—tracked, and it is impossible to reconstruct a port’s operational capacity. *See supra* at 14-15. “Operational capacity” means w

. Ex. 100 at 181:22-182:4; *see also* Ex. 14 at 140:19-21. “Operational capacity” as a reason for turning back asylum seekers

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

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8 *See supra* at 15-16.

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

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

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

24 A desire to limit access to the asylum process at POEs for its own sake is not
25 a legitimate basis for the turnback policy. *See Dkt. 280* at 63 (explaining that unlike
26 the statutory numerical limit on refugee admissions, the INA does not cap the
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1 The turnback policy has resulted in a humanitarian crisis across the border in
2 contravention of the INA and the humanitarian principles Congress sought to
3 enshrine in it. *See* Ex. 51 at 746. Under the policy, Defendants have forced thousands
4 of asylum seekers to wait in dangerous border towns where they risk physical harm
5 or death. *See, e.g.,*

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

12 In addition, the government’s policy to categorically deny class members their
13 statutorily mandated entitlement to the asylum scheme also constitutes a violation of
14 fundamental due process principles. At its core, due process is a “protection of the
15 individual against arbitrary action of government,” *County of Sacramento v. Lewis*,
16 523 U.S. 833, 845 (1998), and its procedural component protects against “denial of
17 fundamental procedural fairness.” *Id.* at 845-46. In applying procedural due process,
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1 *Lewis*, 92 F.3d 195, 203 (3d Cir. 1996) (“The basic procedural rights Congress
2 intended to provide asylum applicants . . . are particularly important because an
3 applicant erroneously denied asylum could be subject to death or persecution if
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1 obligations under 1951 Refugee Convention), and it “encompass[es] any measure .
2 . . . which could have the effect of returning an asylum-seeker or refugee to the
3 frontiers of territories where his or her life or freedom would be threatened[.]” U.N.
4 High Comm’r for Refugees, *Note on International Protection*, ¶ 16 (citing Refugee
5 Convention, art. 33(1)). As interpreted by the European Court of Human Rights, the
6 principle of *non-refoulement* “essentially means that States must refrain from

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

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Mexican-ordered detention. Dkt. 390-101 at ¶¶ 8-9. CBP’s cooperation with Mexican immigration authorities jeopardizes hundreds—if not thousands—of

1 asylum process. These violations constitute irreparable harm. *See E. Bay Sanctuary*
2 *Covenant v. Trump*, 349 F. Supp. 3d 838, 864 (N.D. Cal. 2018) (loss of the right to

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

5 Complying with an injunction should not be difficult. Defendants have
6 Ex. 120 at
7 270 (“
8 ”). Moreover, the Supreme Court has recognized that
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1 the legal relations at issue,” *GEICO v. Dizol*, 133 F.3d 1220, 1225 n.5 (9th Cir.
2 1998), namely adjudicating whether the turnback policy broke the law. Because
3 Plaintiffs have shown via undisputed facts that Defendants’ conduct was unlawful,
4 this Court should enter a declaratory judgment that Defendants violated the APA,
5 Fifth Amendment, and ATS. *See California v. Trump*, 963 F.3d 926, 949 (9th Cir.

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1 **CERTIFICATE OF SERVICE**

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

4 Dated: September 4, 2020

MAYER BROWN LLP

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6 By

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