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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(San Diego)

AL OTRO LADO, Inc., *et al.*, *Plaintiffs*, v. ALEJANDRO N. MAYORKAS, Secretary of Homeland Security, *et al.*, in their official capacities, *Defendants*.	Case No. 3:23-cv-01367-AGS-BLM Hon. Andrew G. Schopler **[CORRECTED] DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

This Court should deny the individual Plaintiffs' Motion for a Preliminary Injunction (ECF No. 39).[1] Plaintiffs' Motion concerns U.S. Customs and Border Protection's (CBP) alleged noncompliance with its internal policy for the management and processing of noncitizens without documents sufficient for admission (referred to herein as "undocumented noncitizens") at ports of entry along the U.S.-Mexico border. It seeks a preliminary injunction requiring Defendants to enforce something Plaintiffs call "the Binding Guidance," under the doctrine announced in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). Mot. 1. Plaintiffs' requested order would prohibit CBP "from turning back, or directing or encouraging others to turn back, non-citizens arriving or attempting to arrive at a Port of Entry on the U.S.-Mexico border, regardless of whether those arriving non-citizens have an appointment made on the CBP One App." Defs.' Ex.[2] 1 (Pl. Proposed Order).

Plaintiffs cannot succeed on their claims as a factual or legal matter. Critically, Plaintiffs' own evidence rebuts any conclusion that there exists a borderwide policy of the sort they allege. Although CBP prioritizes the processing of undocumented noncitizens with appointments made through the CBP One mobile application (CBP One), CBP's policy remains that those without appointments may not be turned away. The agency has reiterated that directive to its officers. And the data confirms that generally, noncitizens without appointments are not turned away because CBP regularly processes a substantial number of such noncitizens. This is sufficient to rebut the existence of a borderwide policy. Plaintiffs' legal arguments fail, too. They do not identify a cause of action for their *Accardi* claim; they seek compliance with policy documents that are not subject to judicial enforcement; they appear to request

[1] Defendants have not yet responded to the Complaint. Defendants preserve, and do not waive, any available arguments, defenses, or positions relating to the Complaint.
[2] "Defs.' Ex." refers to Defendants' Exhibits, attached to the accompanying Declaration of Katherine Shinners.

more than what the policies themselves require; and they seek relief as to ports of entry where no individual Plaintiff was allegedly "turned back." Further, by requesting an order that would compel CBP to discharge obligations under 8 U.S.C. § 1225 to noncitizens in Mexico in a particular manner, Plaintiffs seek relief that is prohibited by the Immigration and Nationality Act (INA).

Plaintiffs have also failed to establish that irreparable injury is likely to occur absent an injunction, particularly given that all individual Plaintiffs have now been processed and CBP is in fact processing undocumented noncitizens who lack appointments. Moreover, to the extent Plaintiffs are seeking an injunction that requires *immediate* inspection and processing of every noncitizen whenever they present at a POE—which goes well beyond what CBP policy requires—such an order would be contrary to the public interest and impossible to comply with. Such on order also would not ultimately benefit the putative class, as it would undermine the efficacy of an appointment system that promotes safe and humane processing and likely decrease the overall number of noncitizens CBP is able to process. Defs.' Ex. 2, ¶¶ 8-12. The Court should deny Plaintiffs' Motion.

BACKGROUND

A. The *Al Otro Lado I* Litigation: Metering at Ports of Entry Along The U.S.-Mexico Border

CBP's Office of Field Operations (OFO) is responsible for "coordinat[ing] the enforcement activities of [CBP] at United States air, land, and sea ports of entry." 6 U.S.C. § 211(g). These statutory obligations—including but not limited to deterring and preventing entry of terrorists, guarding against illegal entry of individuals, illicit drugs, agricultural pests, and contraband, and facilitating and expediting the flow of legitimate travelers and trade, *id.*—apply at all U.S. ports of entry (POEs), including the 25 Class A land POEs on the U.S.-Mexico border.[3] Those POEs fall

[3] "Class A means that the port is a designated Port–of–Entry for all aliens." 8 C.F.R.

under the jurisdictions of the San Diego, Tucson, El Paso, and Laredo Field Offices.

In 2016, a sustained surge of undocumented noncitizens began arriving at southwest border POEs. As part of various efforts to increase the Department of Homeland Security's (DHS) capacity to inspect and process these noncitizens, the POEs began to implement a practice known as metering (or queue management) to manage the flow of these high numbers of noncitizens into POEs to assist in providing a safe and secure environment for all travelers, and to prevent severe strains on border resources and diversion from counterterrorism and other resources. *See generally Al Otro Lado, Inc. v. Mayorkas*, No. 17-cv-2366, 2021 WL 3931890, at *2 (S.D. Cal. Sept. 2, 2021). In April 2018, CBP issued a Metering Guidance memorandum that provided the Directors of Field Operations at the four southwest border Field Offices discretion "to meter the flow of travelers at the land border to take into account the port's processing capacity" "[w]hen necessary or appropriate to facilitate orderly processing and maintain the security of the port and safe and sanitary conditions for the traveling public." *Id.* at *3. Beginning in June 2018, DHS issued further guidance instructing CBP "to prioritize staffing and operations" at the POEs in the following order of priority: national security efforts, counter-narcotics operations, economic security efforts, and trade and travel facilitation, and to use queue management as necessary to protect these priority missions. *Id*. at *3.

Plaintiff Al Otro Lado and individual noncitizens challenged metering and other practices in this Court, claiming that CBP had engaged in what they called "turnbacks" at Class A POEs along the U.S.-Mexico Border. *See* Second Am. Compl., *Al Otro Lado, Inc. v. Mayorkas*, No. 17-cv-2366, ECF No. 189 (Nov. 13, 2018). The plaintiffs in *AOL I* asserted that this conduct was unlawful on several grounds, including that it infringed upon rights and obligations under the INA, at 8 U.S.C. §§ 1158(a) and 1225(a) and (b), as to noncitizens who approach a port of

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§ 100.4.

entry but do not cross the border into the United States. *See id.* The government, in turn, argued that those statutes did not apply to noncitizens outside the United States.

The *AOL I* Court concluded that "turnbacks" of asylum seekers through metering, prioritization-based queue management, and similar practices that occur without express statutory authority constitute a withholding of CBP's obligation to inspect and refer asylum seekers pursuant to 8 U.S.C. §§ 1225(a)(3) and (b)(1)(A)(ii). *Al Otro Lado*, 2021 WL 3931890, at *18. The court described the "turnbacks" at issue as CBP officers "affirmatively turning asylum seekers away from the border" through a variety of practices. *Id.* at *9. The Court did not define the "turnbacks" to include coordination "with Mexican officials to 'control the flow' of migrants seeking asylum before they reached the border." *Id.*; *see also id.* at *22 n.20. The Court subsequently entered a declaratory judgment, but concluded that classwide injunctive relief was prohibited under 8 U.S.C. § 1252(f)(1), because any such order would enjoin or restrain CBP's efforts to operate 8 U.S.C. § 1225. *Al Otro Lado, Inc. v. Mayorkas*, 619 F. Supp. 3d 1029, 1045 (S.D. Cal. 2022). The government appealed from that judgment, and the appeal is fully briefed and pending. *See Al Otro Lado, Inc. v. Mayorkas*, No. 22-55988 (9th Cir.)

B. CBP's Post-Title 42 Guidance for Processing Undocumented Noncitizens at The Ports of Entry

While *AOL I* was pending in the district court, the COVID-19 pandemic altered the processing of undocumented noncitizens. From March 20, 2020, until May 11, 2023, most undocumented noncitizens who sought to enter the United States at its borders were subject to a series of public health orders in effect to combat the pandemic (Title 42 Orders). Under those orders, covered noncitizens were generally stopped at the border or expelled to Mexico or their home countries without processing under the immigration statutes. *See, e.g.*, Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 86 Fed. Reg. 42,828 (Aug. 5, 2021).

During the same period, in November 2021, CBP issued a memorandum to OFO regarding the management and processing of undocumented noncitizens at POEs along the U.S.-Mexico border. *See* Pl. Ex. 1. The memorandum instructs OFO "to consider and take appropriate measures, as operationally feasible, to increase capacity to process undocumented noncitizens at Southwest Border POEs, including those who may be seeking asylum and other forms of protection." *Id.* "Possible additional measures include the innovative use of existing tools such as the CBP One mobile application, which enables noncitizens seeking to cross through land POEs to securely submit certain biographic and biometric information prior to arrival and thus streamline their processing upon arrival." *Id.* "Importantly, however, asylum seekers or others seeking humanitarian protection cannot be required to submit advance information in order to be processed at a Southwest Border land POE." *Id.* The memorandum permits CBP to staff the border line to manage safe and orderly travel into the POE, but "undocumented noncitizens who are encountered at the border line should be permitted to wait in line, if they choose, and proceed into the POE for processing as operational capacity permits." *Id.* It instructs: "Absent a POE closure, officers also may not instruct travelers that they must return to the POE at a later time or travel to a different POE for processing." *Id.*

C. The Circumvention of Lawful Pathways Rule

In early 2023, the President announced the expiration of the public health emergency on May 11, 2023, which would cause the then-operative Title 42 Order to end. *See* Circumvention of Lawful Pathways (NPRM), 88 Fed. Reg. 11,704, 11,708 (Feb. 23, 2023). The end of the Title 42 Order was expected to cause the number of migrants seeking to illegally enter the United States at the southwest border to surge to or remain at all-time highs—an estimated 11,000 migrants daily. *See* Circumvention of Lawful Pathways, 88 Fed. Reg. 31,314, 31,331 (May 16, 2023).

To address this expected spike in the number of migrants at the southwest border seeking to enter the United States without authorization, the Department of

Justice and DHS promulgated the Circumvention of Lawful Pathways Rule, effective May 11, 2023. *Id*. at 31,314, 31,324; *see also* 88 Fed. Reg. at 11,704. The Rule provides that most noncitizens who enter the United States during the next two years at the southwest land border or adjacent coastal borders after traveling through a country other than their native country are subject to a rebuttable presumption of asylum ineligibility unless they avail themselves of orderly processes for entry into the United States or seek and are denied protection in a third country. 88 Fed. Reg. at 31,321–23. The presumption does not apply to unaccompanied minors, and other noncitizens may be excepted from the presumption if they meaningfully seek protection in a third country through which they traveled en route to the United States, were "provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process," "[p]resented at a port of entry, pursuant to a pre-scheduled time and place," or "presented at a port of entry without a pre-scheduled time and place" but can "demonstrate[] by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle." 8 C.F.R. §§ 208.33(a)(2), 1208.33(a)(2). Noncitizens who are otherwise subject to presumptive asylum ineligibility may also rebut the presumption by demonstrating that "exceptionally compelling circumstances exist." *Id.* §§ 208.33(a)(3), 1208.33(a)(3). Noncitizens who are subject to the presumption of asylum ineligibility are still considered for statutory withholding of removal and protection under the Convention Against Torture and may not be removed to a country where it is likely that they will be persecuted on account of a protected ground or tortured. *See id.* §§ 208.33(b)(2), 1208.33(b)(2)(ii), (4); 88 Fed. Reg. at 11,733.

The Rule aims to reduce irregular migration and to correspondingly decrease crowding in border facilities and projected severe strains on DHS border resources and facilitate safe, humane processing. *See, e.g.*, 88 Fed. Reg. at 31,324. It does so by encouraging migrants to seek protection in other countries or take advantage of

lawful, safe, and orderly migration pathways to enter the United States—and thus discourages illegal entry or presenting at a southwest border POE without an appointment—by generally conditioning eligibility for asylum on migrants' availing themselves of such pathways (or demonstrating exceptionally compelling circumstances). *Id.* at 31,235. Thus, noncitizens who have already traveled to Mexico with the intent of entering the United States can avoid the presumption of asylum ineligibility by prescheduling an appointment to present at a POE for orderly processing. 8 C.F.R. §§ 208.33(a)(1), 1208.33(a)(1). CBP currently uses CBP One to allow noncitizens to make such appointments. 88 Fed. Reg. at 31,317. For this purpose, CBP One allows "noncitizens located in Central or Northern Mexico who seek to travel to the United States" to submit information in advance and schedule an appointment to present themselves at" eight southwest-border POEs: Nogales, Brownsville, Eagle Pass, Hidalgo, Laredo, El Paso, Calexico, and San Ysidro. *See* "Advance Submission and Appointment Scheduling," https://www.cbp.gov/about/mobile-apps-directory/cbpone (last visited Sept. 13, 2023). Use of appointments allows these POEs to manage the flow of undocumented migrants into the POE facility, efficiently allocate border enforcement resources, and streamline processing through advanced vetting for public safety and national security concerns, thus reducing overall burdens on immigration enforcement at the border. 88 Fed. Reg. at 31,318; Defs.' Ex. 2, ¶¶ 8–12. As the Rule's preamble states, an appointment is "not a prerequisite to approach a POE . . . [or be] inspected or processed," but use of a CBP One appointment will allow noncitizens to avoid the presumption of asylum ineligibility and avoid "waiting in long lines of unknown duration at POEs." 88 Fed. Reg. at 31,317–18, 31,332, 31,365.

D. Plaintiffs' Complaint and Motion for Preliminary Injunction

Plaintiffs Al Otro Lado, Haitian Bridge Alliance, and ten individual noncitizens allege CBP has denied noncitizens "access to the U.S. asylum process" at Class A POEs along the U.S.-Mexico border "due to [the noncitizens'] inability to obtain

an appointment via Defendants' CBP One smartphone application." Compl. ¶ 1. Plaintiffs contend they have been subjected to an alleged policy they call the "CBP One Turnback Policy," under which asylum seekers who approach a POE from Mexico "are typically met at or near the 'limit line' . . . by CBP officers or Mexican authorities who . . . are acting at the behest of CBP. If the asylum seekers do not have a CBP One appointment confirmation or present at a date or time different from the designated appointment slot, they are turned back to Mexico." Compl. ¶ 5.

On August 10, 2023, the individual Plaintiffs filed a Motion for Preliminary Injunction, seeking to enforce what they call "the Binding Guidance" under the *Accardi* doctrine. Mot. 1. The "Binding Guidance" is the term Plaintiffs use to "[c]ollectively" refer to "the November 2021 Memo, the DHS policy as reflected in statements in the preamble to the [Pathways] Rule, and the structure of the Rule." Mot. 5; *see id.* at 2–5. The Motion contains further information about each individual Plaintiff's circumstances. The majority of the individual Plaintiffs' claims center on the San Diego Field Office, which contains the San Ysidro and Otay Mesa POEs. Of the nine Plaintiffs who seek to represent the proposed class, seven claim to have been refused access (or directed or encouraged to use CBP One) by officers at the San Ysidro or Otay Mesa Ports. *See* Pl. Ex. 2–8. One Plaintiff claims to have been turned back at the Paso del Norte pedestrian entrance to the El Paso POE. Pl. Ex. 9, ¶ 9. No individual Plaintiffs or any other noncitizen declarant alleges having been turned back at any ports within the Nogales or Laredo Field Offices. One Plaintiff (Natasha Doe) does not claim to have been turned back at all; she instead decided not to approach the Eagle Pass POE on the advice of other migrants she encountered. Pl. Ex. 14, ¶¶ 11–12. Based on these and other contentions, Plaintiffs seek a preliminary injunction prohibiting Defendants "from turning back, or directing or encouraging others to turn back, non-citizens arriving or attempting to arrive at a Port of Entry on the U.S.-Mexico border, regardless of whether those arriving non-citizens have an appointment made on the CBP One App." Defs.' Ex. 1 (Pl. Proposed Order).

ARGUMENT

This Court should deny Plaintiffs' Motion. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008). Consideration of the third and fourth factors "merge[s] when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). "A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quotation marks omitted). Plaintiffs cannot satisfy any of these requirements.

I. Plaintiffs Are Not Likely to Succeed on the Merits.

A. Plaintiffs Lack Standing to Seek Prospective Injunctive Relief.

First, the individual Plaintiffs have all been inspected and processed as a result of receiving CBP One appointments, *see* Mot. at 5–6; Defs.' Ex. 2, ¶¶ 18–19. As there is thus no indication that they would be subject to the alleged CBP conduct in the future, their individual claims are now moot, and they lack standing to seek a preliminary injunction. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983); *The Presbyterian Church v. United States*, 870 F.2d 518, 528–29 (9th Cir. 1989) ("[W]hen injunctive relief is sought, litigants must demonstrate a credible threat of future injury."). For this reason alone, their Motion should be denied.

B. Plaintiffs Do Not Identify a Cause of Action for Their Claim.

Plaintiffs also cannot succeed on the merits of their *Accardi* claim. At the outset, they do not identify any cause of action to raise that claim. *See* Compl. ¶¶ 158–66; Mot. 12–14. Dismissal of a complaint (or a claim thereof) can be "based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). A plaintiff lacks a cognizable legal theory when he fails to identify a

provision of law supplying him with a cause of action. *See, e.g.*, *Salsman v. Access Sys. Americans, Inc.*, 2011 WL 1344246, at *3 (N.D. Cal. Apr. 8, 2011) (dismissing a complaint because it "d[id] not identify the provision of the [Uniform Commercial Code] . . . that now provides [the plaintiff] with a cause of action").

Plaintiffs do not invoke any statutory cause of action to support their *Accardi* claim. Instead, Plaintiffs assume the *Accardi* doctrine itself provides a cause of action. *See* Mot. 12–14. That assumption is incorrect. The Supreme Court in *Accardi* did not abrogate the requirement that a plaintiff must identify a cause of action permitting him to bring his claim to federal court, nor did it create a new private right of action against alleged government wrongdoing (as the Court has done in other contexts, *see, e.g.*, *Bivens v. Six Unknown Agents*, 403 U.S 388 (1971)). It merely established a principle that courts can require administrative agencies to abide by their own regulations or certain internal policies. *See Accardi*, 347 U.S. 260. It is the APA that provides a private litigant with a cause of action to challenge government action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or that is taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). This is consistent with the Supreme Court's and Ninth Circuit's identification of the *Accardi* principle as a "rule of administrative law." *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979) ("While courts have generally invalidated adjudicatory actions by federal agencies which violated their own regulations promulgated to give a party a procedural safeguard, the basis for such reversals is not the Due Process Clause, but rather a rule of administrative law.") (cleaned up); *see also Brown v. Haaland*, 2023 WL 5004358, at *4–5 (D. Nev. Mar. 6, 2023) (dismissing due process claim and explaining that plaintiffs "may bring [an] *Accardi* claim under the APA"). But Plaintiffs do not invoke the APA for their *Accardi* claim, nor any other provision of law providing them with a cause of action. *See* Compl. ¶¶ 158–66; Mot. 12–14. Without a cause of action, Plaintiffs' *Accardi* claim must be dismissed, and thus it cannot succeed on its merits.

Plaintiffs suggest the failure to identify a cause of action is immaterial because "the contours of the claim are the same," whether "considered as an [APA] claim under Section 706(2) . . . , a claim grounded in due process, or a free-standing claim." Mot. 13 n.8 (citing *Emami v. Nielsen*, 465 F. Supp. 3d 991, 997 (N.D. Cal. 2020), and *Jefferson v. Harris*, 285 F. Supp. 3d 173, 185–86 (D.D.C. 2018)). But the fact that their *Accardi* claim may be similar under any cause of action does not excuse them from identifying a cause of action in the first place. Moreover, none of Plaintiffs' key cases supports the proposition that an *Accardi* claim may be raised as a freestanding claim independent of any cause of action. In *Accardi*, the plaintiff raised his claim through "a habeas corpus action . . . attack[ing] the validity of the denial of his application for suspension of deportation," which at that time was the route for judicial review of such claims. *Accardi*, 347 U.S. at 261 & n.1. In *Alcaraz* (cited at Mot. 12, 13, 15 n.9, 19) and *Montilla* (cited at Mot. 13), the plaintiffs raised their *Accardi* claims in petitions for review of their final orders of deportation, which was and remains the statutory route for noncitizens to obtain judicial review of their removal proceedings. *Alcaraz v. INS*, 384 F.3d 1150, 1152 (9th Cir. 2004); *Montilla v. INS*, 926 F.2d 162, 164 (2d Cir. 1991);[4] *see also Carnation Co. v. Secretary of Labor*, 641 F.2d 801, 802 (9th Cir. 1981) (cited at Mot. 14) (raising an *Accardi* theory in a "petition[] to review the validity of [a] [Department of Labor] finding" of liability). In *Innovation Law Lab* (cited at Mot. 13), *Damus* (cited at Mot. 17–18), and the two *Emami* decisions (cited at Mot. 13 n.8, 16–17), the plaintiffs raised their *Accardi* claims under the APA. *See Innovation Law Lab*, 342 F. Supp. 3d 1067, 1079 (D. Or. 2018); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 335–36 (D.D.C. 2018); *Emami v. Nielsen*, 365 F. Supp. 3d 1009, 1017, 1019–21 (N.D. Cal. 2019); *Emami*,

[4] For this reason, the court in *Emami* was incorrect when it said the *Montilla* decision is "notable for applying *Accardi* as a freestanding claim, untethered to the APA or other statute," and that such an approach was "entirely consistent with the decision in *Accardi* itself." 465 F. Supp. 3d at 997. Unlike Plaintiffs here, the plaintiffs in *Montilla* and *Accardi* invoked statutory avenues for judicial review of their claims.

465 F. Supp. 3d at 996–97. And in *Jefferson* (cited at Mot. 13 n.8), the plaintiff raised an *Accardi* theory as part of his substantive due process claim. *Jefferson v. Harris*, 285 F. Supp. 3d 173, 185 (D.D.C. 2018).[5] None of these cases supports Plaintiffs' position that they can raise an *Accardi* claim without identifying a cause of action for that legal theory. To the contrary, every litigant in these cases had a cause of action or other statutorily-authorized vehicle to obtain judicial review. These decisions are thus consistent with the notion that an *Accardi* claim is merely a theory of legal liability that must be raised under an existing cause of action.

C. The November 2021 Memo and Preamble and "Structure" of The Pathways Rule Are Not Judicially Enforceable Under *Accardi*.

Regardless of how Plaintiffs present their *Accardi* claim, that claim still fails as a matter of law because the *Accardi* doctrine does not apply to the November 2021 memo or the preamble or "structure" of the Pathways Rule. Mot. 2–4. "Not all agency policy pronouncements . . . can be considered regulations enforceable in federal court." *United States v. Fifty-Three Eclectus Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982); *Jane Doe 1 v. Nielsen*, 357 F. Supp. 3d 972, 1000 (N.D. Cal. 2018) (same). "To have the force and effect of law, enforceable against an agency in federal court, the agency pronouncement must (1) prescribe substantive rules—not interpretive rules, general statements of policy or rules of agency organization, procedure or practice—and (2) conform to certain procedural requirements." *Id.* (quotation marks and citations omitted). A general statement of agency policy—as distinct from a prescriptive rule—is not subject to judicial enforcement when it "merely provides *guidance* to agency officials in exercising their discretionary powers while preserving their flexibility and their opportunity to make individualized determinations." *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987).

[5] Unlike the court in *Jefferson*, the Ninth Circuit has held that "[t]he Accardi doctrine is not a constitutional one." *Carnation Co. v. Secretary of Labor*, 641 F.2d 801, 804 (9th Cir. 1981); *see also Calderon-Medina*, 591 F.2d at 531.

Likewise, and as Plaintiffs acknowledge, courts "distinguish[] rules benefiting the agency from rules benefitting private parties." Mot. 14 (citing *Lopez v. FAA*, 318 F.3d 242, 247 (D.C. Cir. 2003)); *see also, e.g.*, *Morton v. Ruiz*, 415 U.S. 199, 204 n.6 (1974) (affirming order directing the Bureau of Indian Affairs to follow an internal policy the "purpose of" which was "to *provide necessary financial assistance* to" covered individuals) (emphasis added). Courts will only mandate compliance with internal rules that are "intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion," *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538–39 (1970), or when the case involves "an agency [that is] required by rule to exercise independent discretion [but] has failed to do so," *id.* at 539.

The November 2021 memo is not judicially enforceable under the *Accardi* doctrine because it is a "general statement[] of policy," not a "substantive rule[]." *Eclectus Parrots*, 685 F.2d at 1136. The memo states that it "provides updated *guidance* for the management and processing of" undocumented noncitizens at southwest border ports of entry. Pl. Ex. 1 at 4 (emphasis added); *see Mada-Luna*, 813 F.2d at 1310. It provides no definite or mandatory timeline for processing undocumented noncitizens. In this regard, the memo leaves discretion to the POEs and states merely that ports must "strive" to process travelers "as expeditiously as possible," and it expressly contemplates that there may be lines of individuals "who are waiting to enter." Pl. Ex. 1 at 5. Moreover, the memo ties the rate of intake to the ports' "available resources and capacity." Pl. Ex. 1 at 4; *see id.* at 5 ("At all times, the capacity to process undocumented noncitizens must take into account CBP's other vital priorities, including our mission to protect public safety and national security, interdict the flow of narcotics and contraband, and facilitate lawful trade and travel."); *id.* ("A POE's capacity to process undocumented noncitizens is influenced by operational realities and circumstances that could change day to day and could include unanticipated incidents, emergencies, or challenges."). That the memo is directed to CBP

officers, and does not seek to regulate private parties, further evidences that it is a general statement of policy not subject to judicial enforcement. *See Mada-Luna*, 813 F.2d at 1013 ("It may be that 'general statements of policy' are rules directed primarily at the staff of an agency describing how it will conduct agency discretionary functions . . . .") (citation omitted).

Similarly, there is no evidence that the memo is "intended primarily to confer important procedural benefits upon individuals." *Am. Farm Lines*, 397 U.S. at 538. As explained, the memo "provides updated guidance" to the southwest border field offices "for the management and processing" of undocumented noncitizens. Pl. Ex. 1 at 4. Plaintiffs argue the memo "affects individual rights," but they do not define those "individual rights." Mot. 14. To the extent Plaintiffs claim a right to be inspected for admission to the United States, no such statutory right exists, as 8 U.S.C. § 1225 only imposes "duties" on immigration officers. *Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1205 (S.D. Cal. 2019). To the extent Plaintiffs claim a right to seek asylum in the United States, the government maintains its position that no such right exists as to noncitizens outside the United States. *See* 8 U.S.C. § 1158(a)(1) (referring to a noncitizen "who is physically present in the United States or who arrives in the United States"). And even if such a statutory right existed, the Court may not enforce that right through an injunction because Congress has not "explicitly impose[d] any duties upon [DHS and CBP] to carry out tasks to put that right into practice." *Al Otro Lado*, 619 F. Supp. 3d at 1046; *see also Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1311 n.12 (S.D. Cal. 2018) (8 U.S.C. § 1158(a)(1) "does not identify any specific obligations placed on an immigration officer"). More importantly, nothing about the November 2021 memo suggests it was intended to effectuate any right to seek asylum in the United States. In any event, as discussed below, any asylum rights are not violated because CBP does not have a borderwide policy of turning back undocumented citizens without appointments.

Likewise, "the preamble" to an agency rule like the Pathways Rule "is not

legally binding," *Peabody Coal Co. v. Dir., Off. of Workers' Comp. Programs*, 746 F.3d 1119, 1125 (9th Cir. 2014), and thus is not enforceable under *Accardi*. Plaintiffs only point to one case—*Alcaraz*—in which a court "cit[ed] to [a] preamble to [a] proposed rule in" purportedly "determining [the] government's official policy." Mot. 15 n.9 (citing *Alcaraz*, 384 F.3d at 1156). But in that case, the Ninth Circuit merely looked to the preamble among a host of other policy documents, and ultimately, it declined to enforce the preamble or the policy documents at all. *Alcaraz*, 384 F.3d at 1162–63. Instead, the court "remand[ed] th[e] issue to the [Board of Immigration Appeals] for a determination in the first instance" whether the agency's various statements were "sufficient to establish a policy to which the agency was bound under the *Accardi* doctrine." *Id.* at 1162. Thus, Plaintiffs offer no support to demonstrate that the preamble to the Pathways Rule is enforceable under *Accardi*.

Nor do Plaintiffs offer any support for their argument that the "structure of the [Pathways] Rule" is enforceable under *Accardi*. Mot. 15. To be amenable to judicial enforcement, a purported policy "requires sufficient formality to bind the agency." *Yavari v. Pompeo*, No. 19-cv-2524, 2019 WL 6720995, at *6 (C.D. Cal. Oct. 10, 2019) (citing *Alcaraz*, 384 F.3d at 1162). The *Accardi* doctrine can apply to "[r]egulations with the force and effect of law," *Accardi*, 347 U.S. at 265, or certain "internal operating procedures," *Church of Scientology v. United States*, 920 F.2d 1481, 1487 (9th Cir. 1990). But Plaintiffs offer no authority or argument establishing that something as formless as the "structure" of an administrative rule is enforceable against the government. Likewise, to the extent the term "Binding Guidance" is intended to mean something besides the November 2021 memo and the preamble and structure of the Pathways Rule, or something more than the sum of those constituent parts, *see* Mot. 2–5, the "Binding Guidance" is not enforceable against CBP for the reasons just discussed.

Additionally, a departure from internal rules "is not reviewable except upon a showing of substantial prejudice to the complaining party." *Am. Farm Lines v. Black*

Ball Freight Serv., 397 U.S. 532, 539 (1970); *Carnation Co. v. Secretary of Labor*, 641 F.2d 801, 804 n.4 (9th Cir. 1981). Whether a plaintiff has been prejudiced for purposes of an *Accardi* claim is distinct from whether he suffered an irreparable injury for purposes of obtaining a preliminary injunction. The prejudice inquiry looks to whether the alleged violation created a "significant possibility . . . [of] affect[ing] the ultimate outcome of the agency's action." *Carnation Co.*, 641 F.2d at 804 n.4. Plaintiffs cannot demonstrate a "significant possibility" that any departure from CBP's internal guidance "affected the ultimate outcome of the agency's action." *Id.* Since the filing of the Complaint, four of the ten original Named Plaintiffs obtained CBP One appointments in the usual course, *see* Mot. 5 n.3, 6 n.4; Defs.' Ex. 2, ¶ 18, suggesting that any asserted failure to process noncitizens earlier did not ultimately affect the administrative action. Even if the November 2021 memo and the preamble or structure of the Pathways Rule were amenable to judicial enforcement, Plaintiffs cannot demonstrate the prejudice necessary to show they are likely to succeed on the merits of their claims.

D. There Is No Practice or Policy of a Failure to Follow Agency Policy.

Plaintiffs' Motion also fails as a factual matter because there is no "CBP One Turnback Policy" for this Court to enjoin, nor any other borderwide failure to comply with CBP policy.

First, although Plaintiffs make "allegations about the tactics employed by various CBP officials," there are "no allegations connecting any of that conduct with an unwritten policy created by the Defendants." *Al Otro Lado*, 327 F. Supp. 3d at 1320 (dismissing original complaint). To the contrary, Plaintiffs acknowledge that DHS and CBP's stated policy is to allow "individuals without CBP One appointments . . . to present at POEs to seek asylum." Pl. Ex. 14 ¶ 68. And CBP OFO affirms that it remains their policy, as expressed in the November 2021 memorandum, not to turn

away any undocumented noncitizens and that appointments are not required to present at a POE. Defs.' Exs. 2 ¶¶ 6–7; 3, ¶ 9; 4, ¶ 16. Since the end of the Title 42 Orders, both headquarters and local OFO officials have reiterated this directive in writing and orally, including in response to allegations that individuals without appointments had been refused access to a POE. Defs.' Exs. 2, ¶ 7; 3, ¶¶ 11–16.

Second, even assuming that some of the Named Plaintiffs were "turned back" from POEs because they lacked a CBP One appointment, both Plaintiffs' and Defendants' evidence rebuts their assertion that this is a borderwide "CBP One Turnback Policy" "under which CBP officials refuse to process asylum seekers at POEs who present without a CBP One appointment" contrary to the agency's own guidance. Mot. 5; *see Al Otro Lado*, 327 F. Supp. at 1320–21. Even Plaintiffs' own declarants acknowledge that individuals without CBP One appointments are regularly processed at POEs. For example, Erika Pinheiro, the Executive Director of Al Otro Lado, attests that near the end of May 2023, at the San Ysidro Port of Entry, "up to three families, were being processed by CBP every 24 hours [from a line of non-appointment-holders]," Pl. Ex. 14, ¶ 50; that over the course of ten or eleven days in June 2023, San Ysidro processed at least 80 individuals without CBP One appointments, *id.* ¶¶ 51–53; and that Al Otro Lado staff "has observed . . . a handful of individuals being processed as walk-ups," *id.* ¶ 55. The co-director of the Sidewalk School for Asylum Seekers admits that CBP "permits non-governmental organizations at certain ports of entry, including Matamoros and Reynosa, to present limited numbers of individuals without CBP appointments." Pl. Ex. 19, ¶ 26. And the Executive Director of the Kino Border Initiative cedes that at the DeConcini crossing of the Nogales POE, CBP officers permitted "a small number of those [individuals] waiting in line without appointments to present at the port of entry each day," Pl. Ex. 11, ¶ 10; and that "on most days in July [2023] . . . one family from the line has been processed at the DeConcini POE each day," *id.* ¶ 12.

Reports cited or authored by Plaintiffs' witnesses similarly rebut Plaintiffs'

claims of a borderwide failure to process non-CBP One appointment holders. A May 2023 report authored in part by Caitlyn Yates, one of Plaintiffs' declarants, states that the Brownsville Port of Entry accepted 250 CBP One appointment holders and 50 non-CBP One appointment holders per day; that the Hidalgo Port of Entry accepted 170 appointment holders and 30 non-appointment holders per day; that the Laredo Port of Entry accepted 65 appointment holders and 15 non-appointment holders per day; and that the Nogales Port of Entry accepted 55 appointment holders and 15 non-appointment holders per day. *See* Defs.' Ex. 5 at 4–6, 9 (cited at Pl. Ex. 24, ¶ 11); *see also* Human Rights First, *et al.*, A Line That Barely Budges," at 7, 8 (June 2023) (report authored in part by Kino Border Initiative, cited at Pl. Ex. 11, ¶ 6, confirming that DeConcini "process[es] approximately 55 individuals with CBP One appointments per day" and "anywhere from 10-15 individuals [without appointments] . . . each day."), *available at* https://humanrightsfirst.org/wp-content/uploads/2023/06/A-Line-That-Barely-Budges_Nogales-Arizona-1.pdf. Thus, Plaintiffs' own evidence demonstrates there is no borderwide policy of turning back those without appointments. *See Al Otro Lado*, 327 F. Supp. at 1320–21; *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 174 (D.D.C. 2015) (declining to find that "DHS adopted a categorical policy . . . of denying release to all asylum-seeking Central American families" because "in some small number of cases" ICE granted bonds).

CBP's data confirms what Plaintiffs' own evidence already shows: A substantial number of noncitizens without CBP One appointments are regularly inspected and processed for admission at POEs along the U.S.-Mexico border. Ports that utilize CBP One appointments prioritize the processing of appointment holders with the aim of maximizing the number of appointments per day, but these and other Class A POEs continue to process individuals without appointments. Between May 12 and August 23, 2023, noncitizens who had not pre-scheduled their arrival made up approximately 29% of the total number of undocumented noncitizens processed by OFO at southwest border POEs. Defs.' Ex. 2, ¶ 10. At the eight POEs that process

CBP appointment holders, the percentage is approximately 26%. *See id*. Not only is CBP continuing to process non-appointment holders, but the use of CBP One appointments allows CBP to process "several times more migrants each day at [southwest border] POEs than the 2010-2016 average." 88 Fed. Reg. at 31,398; Defs.' Ex. 2, ¶ 9. Since May 11, CBP has increased—to more than 40,000 per month—the number of appointments available. *See CBP One Appointments Increased to 1,450 Per Day* (June 30, 2023), https://perma.cc/F3L4-48FB. In light of the evidence, Plaintiffs cannot demonstrate there exists a borderwide failure to follow agency guidance that could possibly warrant the extraordinary remedy they seek.

E. The *Accardi* Principle Does Not Permit The Injunction Plaintiffs Seek.

Even if the Court were inclined to issue a preliminary injunction, Plaintiffs cannot obtain their requested order to "enjoin[] [CBP] from turning back, or directing or encouraging others to turn back, non-citizens arriving or attempting to arrive at a Port of Entry on the U.S.-Mexico border, regardless of whether those arriving non-citizens have an appointment made on the CBP One App." Defs.' Ex. 1 (Pl. Proposed Order). The terms of the injunction must be defined by reference to the terms of CBP's policies. The *Accardi* principle permits a court to order an agency to follow its own rules "as long as the regulations remain operative." *Accardi*, 347 U.S. at 267; *id.* at 268 (ordering the government to provide a new hearing, which was "nothing more than what the regulations accord[ed] petitioner as a right"); *Damus*, 313 F. Supp. 3d at 343 (clarifying that the preliminary injunction "simply order[s] that Defendants do what they already admit is required—follow the ICE Directive"). But it does not permit a party to *reinterpret* the government's policy and secure a more favorable injunction than the policy on its face might allow, *see Carnation Co.*, 641 F.2d at 804 (declining to apply the *Accardi* doctrine where "it is not entirely clear that the regulations have the meaning which [the plaintiff] attributes to them" and "logic suggests that they cannot mean what [the plaintiff] says they mean"), or

to secure an injunction that requires Defendants to take actions regardless of whether the agency rule remains in effect.

Plaintiffs define "turning back" an undocumented noncitizen, Defs.' Ex. 1, as the "refus[al] to process asylum seekers at POEs who present without a CBP One appointment." Mot. 5. It is not entirely clear from the examples Plaintiffs cite what precise conduct they believe is encompassed in a "turnback" or "refus[al] to process." But to the extent that Plaintiffs contend that any wait time for intake and processing constitutes a "refusal" to process, that is not how the agency uses that term. CBP policy provides that an appointment is not required for processing and that officers may not turn back undocumented noncitizens, but the November 2021 memo and the Pathways Rule preamble do not require CBP officers to *immediately* inspect non-CBP One appointment holders whenever they approach a POE nor establish any particular timetable for them to be inspected. To the contrary, those documents necessarily leave such operational details to the discretion and judgment of CBP officers at each POE, to be exercised as circumstances may require. Those documents contemplate CBP officers will prioritize appointment holders over non-appointment holders and will conduct intake from the border line, and expressly require CBP officers to permit non-appointment holders to wait in line to be inspected and processed. *See* Pl. Ex. 1 at 5 ("In all cases . . . undocumented noncitizens who are encountered at the border line should be permitted to wait in line, if they choose, and proceed into the POE for processing as operational capacity permits."); 88 Fed. Reg. at 31,317–18 (explaining that the use of the CBP One app "keeps migrants from having to wait in long lines of unknown duration at the POEs'); *id.* at 31,358 ("While noncitizens seeking to enter a POE under Title 8 may experience some wait times, those wait times are not equivalent to rejections; CBP policy provides that in no instance will an individual be turned away or 'rejected' from a POE."); *id.* at 31,399 ("Processing times will vary based on capacity and available resources, and those without a CBP One app appointment may be subject to longer wait times before

being processed by a CBP officer.").

The November 2021 memo and Rule's preamble and "structure" are also silent as to independent actions taken by the Mexican government, and thus *Accardi* supplies no basis to address that independent sovereign's conduct.[6]

In sum, the most the Court could do is order CBP to comply with CBP's policy documents as written while they remain in effect.

F. The INA Prohibits The Classwide Injunction Plaintiffs Seek.

Additionally, the INA, at 8 U.S.C. § 1252(f)(1), prohibits the Court from issuing the classwide injunction Plaintiffs seek, because their requested order impermissibly seeks to compel CBP to discharge its obligations under 8 U.S.C. § 1225 to inspect and process undocumented noncitizens in a particular manner. Section 1252(f)(1) states:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1252(f)(1). "[T]the operation of" the covered statutes "is best understood to refer to the Government's efforts to enforce or implement" those provisions. *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2064 (2022). In other words, "the operation of" the covered provisions "is a reference not just to the statute itself but to the

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[6] Separately, any claimed injury allegedly caused by the Government of Mexico cannot be redressed because the effectiveness of relief depends entirely on unforeseeable actions of a foreign country. *Dellums v. U.S. Nuclear Regul. Comm'n*, 863 F.2d 968, 976 (D.C. Cir. 1988); *see also United States v. Texas*, 143 S. Ct. 1964, 1979 (2023) (Gorsuch, J., concurring). Likewise, under the act of state doctrine, the Court may not issue any injunction relating to the Government of Mexico's enforcement of its own immigration policy within its own borders. *See Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) ("[T]he courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.").

way that it is being carried out." *Id.* (punctuation marks omitted).

Section 1225 is one of "the provisions of part IV of this subchapter," 8 U.S.C. § 1252(f)(1), and thus is covered by Section 1252(f)(1). *See Al Otro Lado*, 619 F. Supp. 3d at 1045. Section 1225 includes the requirement that "[a]ll aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers." 8 U.S.C. § 1225(a)(3). It also includes the requirement that CBP officers refer certain noncitizens in expedited removal for a credible fear interview if the noncitizens "indicate[] either an intention to apply for asylum . . . or a fear of persecution." *Id.* § 1225(b)(1)(A)(ii). As the *AOL I* Court already held, any order that compels CBP to implement these obligations in any judicially mandated manner—including ordering CBP to discharge these obligations toward putative class members standing in Mexico—has the impermissible effect of "'enjoining or restraining the operation' of § 1225 because it would have the effect of 'interfering with the Government's efforts to operate § [1225].'" *Al Otro Lado*, 619 F. Supp. 3d at 1045 (quoting *Aleman Gonzalez*, 142 S. Ct. at 2066) (cleaned up).

Plaintiffs seek precisely such a prohibited order. They request an injunction that prohibits CBP "from turning back" undocumented noncitizens, which they define as "refus[ing] to process" those noncitizens. Defs.' Ex. 1; Mot. at 5. Plaintiffs may claim they are seeking an order directed at CBP's policy, rather than "at the operation of any part of the INA." Mot. 19; *see id.* at 18–20. But regardless of their legal theory, by requesting an order that enjoins the purported refusal to inspect an undocumented noncitizen who approaches a POE without a CBP One appointment, Plaintiffs seek an order compelling the government to inspect putative class members. Such an order "enjoins or restrains the operation of" Sections 1225(a)(3) and 1225(b)(1)(A)(ii), and thus is prohibited under Section 1252(f)(1). *Al Otro Lado*, 619 F. Supp. 3d at 1045. For this and the reasons discussed above, Plaintiffs' *Accardi* claim fails on its merits.

II. Plaintiffs Do Not Establish Irreparable Injury.

The Court should also deny a preliminary injunction because Plaintiffs fail to show that they or the putative class members are "likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20. A mere "possibility" of harm is not enough; the test is whether such injury is "*likely*." *Id.* at 20, 22 (emphasis added). That standard is not met here.

The Named Plaintiffs themselves are not likely to suffer harm absent an injunction, as they have all received the relief they seek—inspection and processing—and can no longer benefit from any injunction. As to putative class members, they are not, and will not be, permanently denied access to POEs or the ability to seek asylum in the United States. Instead, noncitizens like putative class members—both with and without appointments—are being inspected and processed at POEs across the U.S.-Mexico border and are able to pursue asylum and other protection claims. *See* Defs.' Ex. 2, ¶ 10. As noted, in May 2023, CBP anticipated processing "several times more migrants each day at [southwest border] POEs than the 2010-2016 average." 88 Fed. Reg. at 31,398. It has since increased the total number of CBP One appointments per day, *see supra* at 19, while continuing to process those who present at POEs without appointments. This is borne out by the experience of the current and former named Plaintiffs, four of whom received CBP One appointments in the ordinary course, not as a result of this litigation. Defs.' Ex. 2, ¶ 18. CBP thus continues to inspect noncitizens like Plaintiffs and putative class members—both with and without appointments—at a robust rate, and noncitizens are not likely to wait in Mexico for the same extended period of time many were required to wait while the Title 42 Orders were in effect. Accordingly, Plaintiffs cannot show that putative class members—including Mexican asylum-seekers—are *likely to* suffer irreparable harm due to conditions in Mexico if no preliminary injunction is entered.

Moreover, an injunction requiring Defendants to comply with the strict terms of their stated policy would not redress the source of the harm Plaintiffs claim—

waiting in Mexico. CBP's policy does not require *immediate* inspection and processing of those who present at POEs without appointments; it contemplates that individuals may, and likely will, have to wait in line, sometimes in Mexico, to await processing. There is thus not a "sufficient causal connection" between the claimed harm and the activity to be enjoined to satisfy this factor. *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 982 (9th Cir. 2011); *WildEarth Guardians v. Bail*, 2021 WL 1550567, at *6 (E.D. Wash. Apr. 20, 2021) (denying injunction where relief would likely not remedy claimed harm); *United States v. Texas*, 143 S. Ct. at 1979.

III. The Balance of The Equities and The Public Interest Favor The Denial of Preliminary Relief.

Finally, the balance of the equities and the public interest weigh in favor of giving CBP the full measure of discretion to perform its "daunting task" to "control the movement of people and goods across the border." *Hernandez v. Mesa*, 140 S. Ct. 735, 746 (2020). To the extent Plaintiffs seek an injunction that requires more than CBP policy requires and mandates *immediate* inspection of noncitizens who approach the border, such an order would be impossible to comply with and would functionally obliterate CBP's ability to implement any orderly processing scheme. Such an order may be beneficial to individual noncitizens in each individual case, but no broader interests are served.

An injunction that erases or undermines CBP's ability to prioritize appointments would have seriously disruptive consequences. The Executive predicted a continued increase in encounters at the southwest border after the end of the Title 42 Orders—which would have the effect of overwhelming the immigration system, incentivizing human trafficking, and risking lives—and the government took targeted measures to prevent that increase. *See* 88 Fed. Reg. at 31,445. The CBP One appointment system, in conjunction with the incentives in the Pathways Rule, facilitates an orderly system that assists to "protect against overcrowding in border facil-

ities; allow for the continued effective, humane, and efficient processing of noncitizens at and between ports of entry; and help to reduce reliance on dangerous human smuggling networks that exploit migrants for financial gain." 88 Fed. Reg. at 31,325.

Given this, the public interest and the interests of the putative class are served by encouraging noncitizens to avail themselves of orderly options for entering the country, including using appointments to schedule a time to present at a POE. The use of CBP One appointments allows CBP to safely, effectively, and humanely conduct inspection and processing at the border and "to process undocumented noncitizens at a volume greater than it would have been able to without the app." Defs.' Ex. 2, ¶¶ 8, 9, 12. The public interest would not be served by an injunction that requires *immediate* inspection and processing, which would undermine these efficiencies by effectively preventing CBP from prioritizing the processing of those with appointments and would likely *decrease* the overall number of undocumented noncitizens CBP is able to process at POEs, divert resources from other of CBP's important operational missions at significant cost to the economy and the public, and lead to overcrowded conditions. *See* Defs.' Ex. 2, ¶ 11. The requested injunction also undermines "sensitive and weighty interests of . . . foreign affairs," *Humanitarian Law Project v. Holder*, 561 U.S. 1, 33–34 (2010), as it would result in the "stark consequence," *Biden v. Texas*, 142 S. Ct. 2528, 2543 (2022), of chilling communications between the United States Government and the Government of Mexico regarding the management of their shared border.

In all events, injunctive relief "must be narrowly tailored to give only the relief to which plaintiffs are entitled." *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990). Any injunction must be limited to the actual contours of any CBP policy at issue. Further, any injunction must be limited to the San Ysidro, Otay Mesa, and El Paso POEs—the only ports where Plaintiffs allege actual injuries.

CONCLUSION

This Court should deny Plaintiffs' Motion for a Preliminary Injunction.

DATED: September 13, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served a copy of this document on the Court and all parties by filing this document with the Clerk of the Court through the CM/ECF system, which will provide electronic notice and an electronic link to this document to all counsel of record.

DATED: September 13, 2023

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