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16 **UNITED STATES DISTRICT COURT**
 17 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**
 18 **(San Diego)**

19 AL OTRO LADO, Inc., *et al.*,
 20
 21 *Plaintiffs,*
 22
 23 v.
 24 Kirstjen NIELSEN, Secretary, U.S.
 25 Department of Homeland Security, in her
 26 official capacity, *et al.*,
 27
 28 *Defendants.*

Case No. 3:17-cv-02366-BAS-KSC
 Hon. Cynthia A. Bashant

**DEFENDANTS’ MEMORANDUM IN
 SUPPORT OF THEIR MOTION TO
 PARTIALLY DISMISS THE SECOND
 AMENDED COMPLAINT**

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21 U.S. Department of Homeland Security, Office of Inspector General,
22 *Special Review – Initial Observations Regarding Family*
23 *Separation Issues Under the Zero Tolerance Policy*, OIG-18-84
24 (Sept. 27, 2018).....5, 16
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INTRODUCTION

1
2 This case arises out of the Federal Government’s exercise of its inherent and
3 statutory authority to control the flow of travel across the U.S.-Mexico border. The
4 individual Doe Plaintiffs, all of whom are aliens who wish to apply for asylum in
5 the United States, claim a right in the Immigration and Nationality Act (“INA”),
6 Pub. L. No. 82-414, 66 Stat. 163 (1952), the Fifth Amendment, and various treaties
7 or international agreements to cross the border at a port of entry upon demand, at
8 any point in time, regardless of whether the port has the capacity to process their
9 applications for admission in accordance with federal law. No such right exists,
10 much less a right to cross when the port’s operational capacity is strained. By
11 asking the Court to apply federal immigration law to aliens physically outside the
12 United States, Plaintiffs seek to drastically reduce the scope of the Executive’s
13 broad authority to oversee the border and the ports of entry and jeopardize the safe,
14 humane, and efficient processing of all persons seeking to cross. The Court should
15 decline their request and dismiss the Second Amended Complaint (“SAC”) as set
16 forth below.

STATEMENT

17
18 Thirteen Doe Plaintiffs, all of whom are aliens from Mexico or Central
19 America, and one Organizational Plaintiff broadly allege on behalf of themselves
20 and a similarly situated putative class that the United States has “systematically
21 restricted the number of asylum seekers who can access the asylum process”
22 through ports of entry along the U.S.-Mexico border since 2016. ECF No. 189
23 ¶ 48. Organizational Plaintiff Al Otro Lado, Inc., a non-profit corporation, claims
24 that its mission has been “frustrated” by the Government’s alleged actions at ports
25 of entry along the U.S.-Mexico border. *Id.* ¶ 17. The five original Doe Plaintiffs—
26 Abigail, Beatrice, Carolina, Dinora, and Ingrid (the “Territorial Plaintiffs”)—claim
27 they physically crossed into the United States and asserted their intention to seek
28 asylum to a U.S. Customs and Border Protection (“CBP”) officer at the San Ysidro

1 or Otay Mesa ports of entry, but were “coerced” into withdrawing their
 2 applications for admission or told they could not apply for asylum and escorted
 3 back to Mexico. *See id.* ¶¶ 84–106, 119–52.

4 The SAC also includes new allegations that, “beginning around 2016,”
 5 Defendants implemented a “formal” “Turnback Policy,” by which CBP officials,
 6 in “coordina[ti]on” with the government of Mexico, prevent individuals in Mexico
 7 who wish to seek asylum in the United States from crossing the border. *Id.* ¶¶ 3, 7,
 8 50–83. Eight newly-added Plaintiffs—Roberto, Maria, Úrsula, Juan, Victoria,
 9 Bianca, Emiliana, and César (the “Extraterritorial Plaintiffs”)—allege they
 10 experienced the purported “Turnback Policy” when they approached the border to
 11 the territorial United States at the San Ysidro, Laredo, or Hidalgo ports of entry but
 12 were prevented by CBP officers or Mexican immigration officials from physically
 13 crossing the international boundary. *Id.* ¶¶ 50–83, 153–202. None of the Territorial
 14 Plaintiffs alleges they were subjected to the purported “Turnback Policy.”¹ *Id.*
 15 ¶ 83.

16 The SAC includes allegations that Defendants are “metering” at ports of
 17 entry along the U.S-Mexico border. “Metering” is a term used to describe an
 18 _____

19 ¹ Plaintiffs allege throughout the SAC that they “presented themselves” at ports of
 20 entry. Sometimes this phrase is used to describe when a Doe Plaintiff alleges she
 21 physically entered a port of entry in the United States, and sometimes it is used to
 22 describe when a Doe Plaintiff alleges she spoke to a CBP officer in the United
 23 States but never herself crossed the border. *Compare, e.g.*, ECF No. 189 ¶ 134
 24 (“Carolina and her daughters presented themselves at the San Ysidro POE,” where
 25 “CBP officials locked them in a room overnight.”) *with id.* ¶ 161–64 (“Maria and
 26 her children sought access to the asylum process by presenting themselves at the
 27 Laredo POE,” but “[a]s they approached the middle of the bridge, CBP officials
 28 stopped Maria and her children and asked to see her identification.”). Defendants
 refer to the former as “Territorial Plaintiffs” and the latter as “Extraterritorial
 Plaintiffs.” As discussed below, this distinction is critical because Defendants’
 duties under the INA are not triggered until an alien is physically present in the
 United States. *See infra* at I.A.

1 operational decision to control the flow of travel across the U.S.-Mexico border
2 based on operational constraints at the ports of entry. To support their metering
3 allegation, Plaintiffs cite to a selection of Defendants’ internal documents produced
4 during the initial round of discovery and to public statements from government
5 officials which refer or relate CBP’s operations at the ports. *See* Email from San
6 Ysidro Watch Commander (May 29, 2016)² (“Ex. 1”), at 1 (cited at ECF No. 189
7 ¶ 51) (referring to “increased workload in AEU [San Ysidro’s Admissibility
8 Enforcement Unit] and the changes made to increase our intake and processing
9 efforts”); Memorandum Regarding San Ysidro Operations (undated) (“Ex. 2”), at 1
10 (cited at ECF No. 189 ¶ 52) (noting that “the significant volume of arriving
11 undocumented travelers has surpassed the physical capacity of the port,” “has
12 resulted in a tremendous strain on all available local resources, to include
13 personnel,” and has “seriously compromised the port’s ability to safely and
14 humanely care for the basic necessities of the asylees in custody”); Email from
15 Branch Chief, Field Liaison Division, Office of Field Operations, CBP (Dec. 6,
16 2016) (“Ex. 3”), at 1 (cited at ECF No. 189 ¶ 53) (noting that “[m]etering
17 continues at both San Ysidro and Calexico POEs” and that “the numbers are
18 adjusted based on space availability and ERO [U.S. Immigration and Customs
19 Enforcement’s (“ICE”) Enforcement and Removal Operations] movement of
20 detainees from the ports”); Email from Assistant Director Field Operations –
21 Border Security, Laredo Field Office, Office of Field Operations, CBP (Nov. 12–
22 13, 2016) (“Ex. 4”), at 1 (cited at ECF No. 189 ¶ 55) (“For example, if you
23

24 ² Plaintiffs have incorporated these documents into the SAC by reference because
25 they quote from them to substantiate their allegations. *See* ECF No. 189 ¶¶ 50–83;
26 *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018); *Copelan*
27 *v. Techtronics Industries Co., Ltd.*, 95 F.Supp.3d 1230, 1236–37 (S.D. Cal. 2015)
28 (“[T]he court may consider the full text of . . . documents even when the complaint
quotes only selected portions.”); *see also* Fed. R. Evid. 106.

1 determine that you can only process 50 aliens at a time, you will request that INM
2 [Mexico’s immigration agency] release only 50.”); Email, “FW: Metering” (Nov.
3 22, 2016) (“Ex. 5”), at 1 (cited at ECF No. 189 ¶ 56) (noting that metering “is
4 being done for humanitarian reasons (health/safety) of everyone”); Memorandum
5 Regarding Laredo Operations (Jan. 13, 2017) (“Ex. 6”), at 1 (cited at ECF No. 189
6 ¶ 57) (noting that “[t]he Port of Laredo, Texas has metering procedures in place to
7 address any capacity, safety and health concerns at the Port of Entry”); ECF No.
8 189 ¶ 59 n.44 (“It was an issue of capacity and being able to put people into the
9 facility without being overrun or having unsafe and unsanitary conditions.”); *id.*
10 ¶ 65 (“We are ‘metering,’ which means that if we don’t have the resources to let
11 [aliens without travel documents] in on a particular day, they are going to have to
12 come back. They will have to wait their turn and we will process them as we can,
13 but that’s the way the law works. Once they come into the United States, we
14 process them.”); *id.* ¶ 68 n.56 (noting that “individuals [without travel documents]
15 may need to wait in Mexico as CBP officers work to process those already within
16 our facilities”); *id.* (“We’re not denying people approaching the U.S. border
17 without documentation. We’re asking them to come back when we have the
18 capacity to manage them.”).

19 Each port’s operational capacity is informed by a number of dynamic
20 factors, including, for example, the physical layout of each port, including the
21 constraints imposed by ongoing construction at some ports; the physical holding
22 space of each port; agency policies and court-imposed limitations governing short-
23 term holding; staff availability in light of other mission demands, such as trade
24 inspection; the logistics behind other non-party agencies’ implementation of their
25 statutory responsibilities; and the less-prevalent but still unpredictable
26 circumstances related to each alien’s arrival in the United States, such as, for
27 example, the occasional need to obtain obscure translation services or transport an
28 alien to a medical facility, which put additional strain on the ports’ resources. *See,*

1 e.g., Dkt. No. 63, *Padilla v. Nielsen*, No. 2:18-cv-928 (W.D. Wash.), Declaration
 2 of Sidney K. Aki (Sept. 24, 2018) (“Aki Decl.”) ¶¶ 5–13; U.S. Customs and Border
 3 Protection, National Standards on Transport, Escort, Detention, and Search § 4.3
 4 (Oct. 2015) [hereinafter TEDS], available at [https://www.cbp.gov/document/
 5 directives/cbp-national-standards-transport-escort-detention-and-search](https://www.cbp.gov/document/directives/cbp-national-standards-transport-escort-detention-and-search); U.S.
 6 Department of Homeland Security, Office of Inspector General, *Special Review –
 7 Initial Observations Regarding Family Separation Issues Under the Zero
 8 Tolerance Policy*, OIG-18-84, 6–7 (Sept. 27, 2018) [hereinafter OIG Report]; Ex.
 9 1, at 1; Ex. 2, at 2–3; Ex. 3, at 1–2; Ex. 4, at 1–2; Ex. 6, at 1.

10 ARGUMENT

11 The Extraterritorial Plaintiffs’ two claims under the Administrative
 12 Procedure Act (“APA”), Pub. L. No. 79-404, 60 Stat. 237 (1946), fail as a matter
 13 of law. Neither the INA, the Fifth Amendment, nor the cited treaties give an alien
 14 without appropriate travel documents the right to cross the border from Mexico
 15 into a U.S. port of entry upon demand. Defendants’ alleged practice of metering—
 16 to which Plaintiffs affix their own “Turnback Policy” label—is well within their
 17 inherent and statutory authority to control the flow of traffic across the
 18 international border.

19 Al Otro Lado’s two APA claims also fail as a matter of law. Although the
 20 Court previously ruled that the organization has constitutional and statutory
 21 standing, the INA and treaty provisions Al Otro Lado cites apply only to “aliens”
 22 or “refugees.” Al Otro Lado is neither, and so those provisions of law afford it no
 23 possibility of relief.

24 Finally, the Court should dismiss Abigail’s, Beatrice’s, and Carolina’s re-
 25 pleaded section 706(1) claims because they allege they withdrew their applications
 26 for admission. Although those withdrawals were purportedly “coerced,” these three
 27 Territorial Plaintiffs cite no provision of law under which CBP would continue to
 28 have a duty to “inspect,” “refer,” or “detain” them after an application for

1 admission is withdrawn. Further, the Territorial Plaintiffs again fail to adequately
 2 plead a section 706(2) claim. The allegations in the SAC and the documents
 3 incorporated by reference show that Defendants *have not* sanctioned a “widespread
 4 pattern or practice of denying and unreasonably delaying asylum seekers’ access to
 5 the asylum process.” With the exception of Dinora’s and Ingrid’s section 706(1)
 6 claims, the Court should dismiss the SAC in its entirety.

7 **I. The Extraterritorial Plaintiffs’ Claims Fail as a Matter of Law.**

8 The Extraterritorial Plaintiffs allege that Defendants began metering at ports
 9 of entry “around 2016” to “directly or constructively turn back asylum seekers at
 10 the border contrary to U.S. law.” ECF No. 189 ¶¶ 3, 50–83, 153–202. They assert
 11 APA claims that metering—which, as Plaintiffs’ allegations show, is an
 12 operational decision to allow aliens without appropriate travel documents to cross
 13 the border at a port of entry only as quickly as the port can safely and humanely
 14 process their applications for admission in accordance with federal law—violates
 15 the INA, the Fifth Amendment, and the non-*refoulement* obligations of various
 16 treaties and international agreements. *Id.* ¶¶ 244–303.

17 The Extraterritorial Plaintiffs’ APA claims fail as a matter of law. Nothing in
 18 the INA, the Fifth Amendment, or the cited treaties provides individuals in Mexico
 19 who lack appropriate travel documents with a right to cross the border upon
 20 demand. The Executive has inherent and express statutory authority to control the
 21 flow of travel across the border, and this authority may be exercised based on
 22 operational constraints and safety concerns. *See, e.g.*, 6 U.S.C. § 202(2), (8);
 23 8 U.S.C. § 1103(a)(1), 8 U.S.C. § 1103(a)(3). The Extraterritorial Plaintiffs’ APA
 24 claims based on the INA, Fifth Amendment, and cited treaties must accordingly be
 25 dismissed under Rule 12(b)(6).

26 **A. The Extraterritorial Plaintiffs’ Section 706(1) Claims Fail Because**
 27 **the INA Does Not Apply to Individuals in Mexico.**

28 The Extraterritorial Plaintiffs claim that metering reflects Defendants’

1 failure to “to take actions mandated” by the INA at 8 U.S.C. §§ 1225(a)(3),
 2 1225(b)(1)(A)(ii), 1225(b)(2)(A) and 8 C.F.R. § 235.3(b)(4). ECF No. 189 ¶¶ 256–
 3 69; 5 U.S.C. § 706(1). They are incorrect. Section 706(1) allows a court to “compel
 4 agency action unlawfully withheld or unreasonably delayed,” 5 U.S.C. § 706(1),
 5 but the Extraterritorial Plaintiffs must first show “that an agency failed to take a
 6 *discrete* agency action that it is *required* to take.” *Norton v. Southern Utah*
 7 *Wilderness Alliance*, 542 U.S. 55, 64 (2004); *Hells Canyon Preservation Council*
 8 *v. U.S. Forest Service*, 593 F.3d 923, 932 (9th Cir. 2010). Although the Court
 9 already ruled that the Territorial Plaintiffs and the putative class members they
 10 seek to represent (*i.e.*, aliens without appropriate travel documents who allegedly
 11 cross the border and indicate an intention to apply for asylum or a fear of
 12 persecution to a CBP officer but are escorted back to Mexico without further
 13 process) have identified such nondiscretionary duties, *see* ECF No. 166 at 34–41,
 14 that decision cannot be understood to apply here: the Territorial Plaintiffs were
 15 physically present in the United States when the INA was allegedly violated, but
 16 the Extraterritorial Plaintiffs were not. *See* ECF No. 166 at 5–7, 34–37; ECF No.
 17 189 ¶¶ 50–83, 153–202.

18 This distinction is critical. The plain text of the relevant statutes and
 19 regulations make clear that CBP’s duties to “inspect,” “refer,” or “detain” an alien
 20 are triggered *only* if the alien is on American soil. Section 1158(a)(1)³ states:

21 Any alien who is *physically present in* the United States or who *arrives*
 22 *in* the United States (whether or not at a designated port of arrival and
 23 including an alien who is brought to the United States after having been
 24 interdicted in international or United States waters), irrespective of such
 alien’s status, may apply for asylum in accordance with this section or,

25 ³ Although the Extraterritorial Plaintiffs do not cite section 1158(a)(1) as a basis
 26 for their section 706(1) claims, they raise it as part of their independent INA
 27 claims. *See* ECF No. 189 ¶¶ 245, 256–69. Defendants address it here for
 28 completeness, but note that the Court has already ruled that it “likely could not
 compel relief” under this provision. ECF No. 166 at 36 n.12.

1 where applicable, section 1225(b) of this title.

2 8 U.S.C. § 1158(a)(1) (emphasis added); *Sale v. Haitian Ctrs. Council, Inc.*, 509
 3 U.S. 155, 162 n.11 (1993); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1062
 4 (9th Cir. 2017) (“The Attorney General may, in his discretion, grant asylum to
 5 applicants *in the United States* who meet the definition of ‘refugee’ under 8 U.S.C.
 6 § 1101(a)(42)(A).” (emphasis added)). None of the Extraterritorial Plaintiffs
 7 alleges he or she was “physically present in” the United States or had “arrive[d] in”
 8 the United States when subjected to Defendants’ alleged conduct. *See* ECF No.
 9 189 ¶¶ 83, 85–86, 93–94, 95–97, 98–102, 103–05,⁴ 153–202. Defendants thus had
 10 no duty to the Extraterritorial Plaintiffs under section 1158(a)(1) that they failed to
 11 carry out, so section 1158(a)(1) cannot form the basis of a cognizable section
 12 706(1) claim.

13 Section 1225(a)(3) requires immigration officers to “inspect[]” “[a]ll
 14 aliens . . . who are applicants for admission or otherwise seeking admission or
 15 readmission to or transit through the United States.” 8 U.S.C. § 1225(a)(3). But the
 16 Extraterritorial Plaintiffs, because they were not physically present within the
 17 United States, were not “applicants for admission” at the time of their alleged
 18 injuries, nor were they “seeking admission” in the manner prescribed by statute
 19 and regulation. *See* 8 U.S.C. § 1225(a)(1) (“An alien *present in the United States*
 20 who has not been admitted or who arrives *in the United States* (whether or not at a
 21 designated port of arrival . . .) shall be deemed for purposes of this chapter an
 22 applicant for admission.” (emphasis added)); 8 C.F.R. § 235.1(a) (an application
 23 “to lawfully enter the United States shall be made in person to a U.S. immigration
 24 officer *at a U.S. port-of-entry*” (emphasis added)); ECF No. 189 ¶¶ 83, 85–86, 93–

25 _____
 26 ⁴ César alleges he experienced a “racially discriminatory denial[] of access,” ECF
 27 No. 189 ¶¶ 103–05, 198, but those allegations are raised against only Mexican
 28 government officials acting in Mexico. Mexico is not a defendant, and so those
 allegations do not form the basis of any cognizable legal claim.

1 94, 95–97, 98–102, 103–05, 153–202. Thus, Defendants had no duty to the
2 Extraterritorial Plaintiffs under section 1225(a)(3) that they failed to carry out, so
3 section 1225(a)(3) cannot form the basis of a cognizable section 706(1) claim.

4 Section 1225(b)(1) states:

5 If an immigration officer determines that an alien (other than an alien
6 described in subparagraph (F)) who is arriving *in the United States* or
7 is described in clause (iii) is inadmissible under section 1182(a)(6)(C)
8 or 1182(a)(7) of this title and the alien indicates either an intention to
9 apply for asylum under section 1158 of this title or a fear of persecution,
the officer shall refer the alien for an interview by an asylum officer
under subparagraph (B).

10 8 U.S.C. § 1225(b)(1)(A)(ii) (emphasis added); *id.* § 1225(a)(1). But none of the
11 Extraterritorial Plaintiffs alleges he or she had “arriv[ed] in the United States” at
12 the time of his or her alleged injuries. *See* ECF No. 189 ¶¶ 83, 85–86, 93–94, 95–
13 97, 98–102, 103–05, 153–202. Defendants accordingly had no duty to the
14 Extraterritorial Plaintiffs under section 1225(b)(1) that they failed to carry out, so
15 section 1225(b)(1) cannot form the basis of a cognizable section 706(1) claim.

16 Section 1225(b)(2)(A) states:

17 Subject to subparagraphs (B) and (C), in the case of an alien who is an
18 applicant for admission, if the examining immigration officer
19 determines that an alien seeking admission is not clearly and beyond a
20 doubt entitled to be admitted, the alien shall be detained for a
proceeding under section 1229a of this title.

21 8 U.S.C. § 1225(b)(2)(A). An applicant for admission is “[a]n alien present in the
22 United States.” *Id.* § 1225(a)(1); *see also* 8 C.F.R. § 235.1(a) (An application “to
23 lawfully enter the United States shall be made in person to a U.S. immigration
24 officer *at a U.S. port-of-entry*.” (emphasis added)). The Extraterritorial Plaintiffs
25 do not allege they were present in the United States, which means they were not
26 “applicants for admission” at the time of their alleged injuries. *See* ECF No. 189
27 ¶¶ 83, 85–86, 93–94, 95–97, 98–102, 103–05, 153–202. Defendants therefore had
28

1 no duty to the Extraterritorial Plaintiffs under section 1225(b)(2) that they failed to
2 carry out, so section 1225(b)(2) does not form the basis of a cognizable section
3 706(1) claim.

4 Finally, the regulation at section 235.3(b)(4) states in relevant part:

5 If an alien subject to the expedited removal provisions indicates an
6 intention to apply for asylum, or expresses a fear of persecution or
7 torture, or a fear of return to his or her country, the inspecting officer
8 shall not proceed further with removal of the alien until the alien has
9 been referred for an interview by an asylum officer in accordance with
10 8 C.F.R. § 208.30.

11 8 C.F.R. § 235.3(b)(4). The expedited removal provisions apply to certain aliens
12 who entered without inspection, which Plaintiffs do not allege they did, and to
13 certain “arriving aliens.” 8 C.F.R. § 235.3(b)(1). The regulations define an
14 “arriving alien” as:

15 an applicant for admission coming or attempting to come into the
16 United States at a port-of-entry, or an alien seeking transit through the
17 United States at a port-of-entry, or an alien interdicted in international
18 or United States waters and brought into the United States by any
19 means, whether or not to a designated port-of-entry, and regardless of
20 the means of transport.

21 8 C.F.R. § 1.2; *see also* 8 U.S.C. § 1225(a)(1) (“An alien present in the United
22 States who has not been admitted or who arrives in the United States . . . shall be
23 deemed for purposes of this chapter an applicant for admission.”). This definition
24 does not include an alien who is physically outside the United States, like the
25 Extraterritorial Plaintiffs. *See Sale*, 509 U.S. at 173 (explaining that “there is no
26 provision in the [INA] for the conduct of [deportation and former exclusion]
27 proceedings outside the United States”); *United States v. Barajas-Alvarado*, 655
28 F.3d 1077, 1081 (9th Cir. 2011) (“The expedited removal statute, § 1225(b),”
applies “when an alien seeks admission to the United States *after* arriving at a port
of entry” (emphasis added)). Rather, as the regulation says, an “arriving alien”

1 is an “applicant for admission” *at a port of entry*, all of which are located within
2 the territorial United States. 8 C.F.R. §§ 1.2, 235.3(b)(4); 8 U.S.C. § 1225(a)(1).
3 The Extraterritorial Plaintiffs allege they were outside the United States at the time
4 of their alleged injuries, which means they were not subject to the expedited
5 removal provisions under section 235.3(b)(4), which means Defendants had no
6 duty to them that they failed to carry out. *See* 8 C.F.R. § 235.3(b)(4); ECF No. 189
7 ¶¶ 83, 85–86, 93–94, 95–97, 98–102, 103–05, 153–202. Section 235.3(b)(4) does
8 not form the basis of a cognizable section 706(1) claim.

9 In sum, the Extraterritorial Plaintiffs were not physically in the United States
10 at the time of their alleged injuries. *See* ECF No. 189 ¶¶ 83, 153–202. They were
11 therefore not “applicants for admission,” or “arriving aliens,” or otherwise “subject
12 to the expedited removal provisions” of the INA, which means that Defendants’
13 duties to “inspect[,]” “refer,” or “detain” them had not been triggered. The
14 Extraterritorial Plaintiffs therefore fail as a matter of law to state any cognizable
15 claims for relief under section 706(1), so those claims must be dismissed under
16 Rule 12(b)(6). *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

17 **B. The Extraterritorial Plaintiffs’ Section 706(2) Claims Fail Because**
18 **Metering is Lawful.**

19 The Extraterritorial Plaintiffs claim Defendants, by metering, have exceeded
20 the scope of their statutory authority and acted without observance of procedures
21 required by law. ECF No. 189 ¶¶ 224, 270–82 (citing 5 U.S.C. § 706(2)(C), (D)).
22 They are incorrect. Defendants have the inherent and statutory authority to control
23 the flow of travel across the border.

24 As a matter of first principles, the authority to control the flow of travel
25 across the border is rooted in the Federal Government’s “undoubted[.]” power “to
26 exclude aliens from the country” in the first place. *Almeida-Sanchez v. United*
27 *States*, 413 U.S. 266, 272 (1973). As the Supreme Court has explained, “this power
28 can be effectuated by routine inspections and searches of individuals or

1 conveyances seeking to cross our borders.” *Id.* “Travelers may be so stopped in
2 crossing an international boundary because of national self-protection reasonably
3 requiring one entering the country to identify himself as entitled to come in[.]”
4 *Carroll v. United States*, 267 U.S. 132, 154 (1925). Controlling the manner and
5 pace of travel across the border is thus “a fundamental act of sovereignty. The right
6 to do so stems not alone from legislative power but is inherent in the executive
7 power to control the foreign affairs of the nation.” *United States ex rel. Knauff v.*
8 *Shaughnessy*, 338 U.S. 537, 542 (1950) (citing *United States v. Curtiss-Wright*
9 *Export Corp.*, 299 U.S. 304 (1936), and *Fong Yue Ting v. United States*, 149 U.S.
10 698, 711 (1893)); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210
11 (1953); *Kleindienst v. Mandel*, 408 U.S. 753, 765–67 (1972); *Galvan v. Press*, 347
12 U.S. 522, 531 (1954); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *Chae*
13 *Chan Ping v. United States*, 130 U.S. 581, 604 (1889) (“Jurisdiction over its own
14 territory . . . is an incident of every independent nation. It is a part of its
15 independence.”); *United States v. Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir.
16 2004).

17 Congress has also vested this authority in Defendants by statute. *See Knauff*,
18 338 U.S. at 543; *Cunningham v. Neagle*, 10 S. Ct. 658, 667–69 (1890). Relevant
19 here, Congress has “charged” the Secretary of Homeland Security with “the
20 administration and enforcement of [Title 8, Chapter 12] and all other laws relating
21 to the immigration and naturalization of aliens.” 8 U.S.C. § 1103(a)(1). The
22 Secretary “shall . . . perform such other acts as [she] deems necessary for carrying
23 out” that authority. *Id.* § 1103(a)(3). This power is “extremely broad.” *United*
24 *States v. Chen*, 2 F.3d 330, 333 (9th Cir. 1993). Congress has also made the
25 Secretary responsible for “[s]ecuring the borders, territorial waters, ports,
26 terminals, waterways, and air, land, and sea transportation systems of the United
27 States, including managing and coordinating those functions transferred to the
28 Department [of Homeland Security] at ports of entry.” 6 U.S.C. § 202(2). “In

1 carrying out [these] responsibilities,” the Secretary is responsible for “ensuring the
2 speedy, orderly, and efficient flow of lawful traffic and commerce.” *Id.* § 202(8).

3 Section 1103(a)(3)’s “such other acts” provision and section 202’s “port
4 management” and “orderly traffic” provisions allow CBP to permit an alien
5 without appropriate travel documentation to cross the border only if the port has
6 the capacity to safely and humanely process her application for admission and hold
7 her for further proceedings. 8 U.S.C. § 1103(a)(3); 6 U.S.C. § 202(2), (8); *Chen*, 2
8 F.3d at 333. As noted, port management is a complex task that is dependent on a
9 number of dynamic factors. *See supra* at pp. 1–5. CBP necessarily could not
10 “secure” or “manage” a port if, in addition to its other mission responsibilities, *any*
11 alien without appropriate travel documents could cross the border whenever she
12 chooses and immediately trigger Defendants’ statutory duties to “inspect[,]”
13 “refer,” or “detain[.]” her under section 1225. *See, e.g.*, Ex. 2, at 1 (“The significant
14 volume of arriving undocumented travelers has surpassed the physical capacity of
15 the port and has resulted in a tremendous strain on all available local resources, to
16 include personnel.”); TEDS §§ 4.1–4.16; *see also* 6 U.S.C. § 202(1)–(8) (setting
17 forth the Secretary’s additional border, maritime, and transportation
18 responsibilities); 8 U.S.C. § 1103(a)(1) (“charg[ing]” the Secretary “with the
19 administration and enforcement of . . . all other laws relating to the
20 immigration . . . of aliens”); Aki Decl. ¶¶ 5–6. Section 202 and section 1103(a)(3)
21 especially authorize CBP officers to keep the ports from being overwhelmed by an
22 unsafe number of pedestrians entering at a given time. *See Chen*, 2 F.3d at 333.
23 The Extraterritorial Plaintiffs are simply incorrect that metering is *ultra vires*,
24 exceeds the scope of Defendants’ authority, or occurs without observance of
25 procedures required by law.⁵ *See* ECF No. 189 ¶¶ 224, 270–82. Their section
26

27 ⁵ A number of other provisions, while not controlling or directly applicable to the
28 issues presented in this case, contemplate the Government’s authority to control

1 706(2) claims are insufficient as a matter of law and must be dismissed under Rule
2 12(b)(6). *See Navarro*, 250 F.3d at 732.

3 The Extraterritorial Plaintiffs also make no attempt in their legal background
4 section to square the breadth of Defendants’ authority to meter under these statutes
5 with the APA’s prohibition on judicial review of agency action “committed to
6 agency discretion by law.” 5 U.S.C. § 701(a)(2); *see* ECF No. 189 ¶¶ 203–35. As
7 noted, the statutes governing Defendants’ responsibility and authority to control
8 the flow of traffic across the border are “extremely broad.” *Chen*, 2 F.3d at 333.
9 Sections 1103(a) and 202 do not set forth any “unified process” by which the
10 Secretary must make border management decisions, nor do they require the
11 consideration of any specific “relevant factors” in making such decisions, nor do
12 they offer any other standard against which such decisions may be evaluated. *See*
13 *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, 586 U.S. — , 2018 WL
14 6174253, at *9–10 (2018). They simply lay out the Secretary’s responsibilities,

15 _____
16 the manner and pace of border crossings, which further rebuts the assertion that
17 metering is *ultra vires*. *See, e.g.*, 19 U.S.C. § 2 (authorizing the Secretary “from
18 time to time, as the exigencies of the service may require, to rearrange, by
19 consolidation or otherwise, the several customs-collection districts and to
20 discontinue ports of entry by abolishing the same or establishing others in their
21 stead”); *id.* § 1318(b)(2) (“Notwithstanding any other provision of law, the
22 Commissioner of U.S. Customs and Border Protection, when necessary to respond
23 to a specific threat to human life or national interests, is authorized to close
24 temporarily any Customs office or port of entry or take any other lesser action that
25 may be necessary to respond to the specific threat.”); 8 C.F.R. § 100.4
26 (establishing different classes of ports of entry as open to only certain classes of
27 aliens and authorizing the Commissioner, “whenever, in [his] judgment . . . , such
28 action is warranted,” to withdraw such designations); 8 U.S.C. § 1325 (establishing
criminal penalties for “[a]ny alien” who, *inter alia*, “enters or attempts to enter the
United States at any time or place *other than as designated by immigration
officers*” (emphasis added)). Again, these provisions have not been invoked here,
but they rest on the necessary premise that the Federal Government may dictate the
manner and pace of border traffic.

1 authorities, and duties, and, where relevant, require the Secretary to “perform such
 2 other acts” if she deems them “necessary for carrying out [her] authority.” 8 U.S.C.
 3 §§ 1103(a)(1), 1103(a)(3); 6 U.S.C. § 202(2), (8). The record before the Court
 4 shows clearly that the Secretary and her designees have deemed it necessary to
 5 manage the flow of pedestrian traffic when port resources are strained. *See* Ex. 1,
 6 at 1; Ex. 2, at 2–3; Ex. 3, at 1–2; Ex. 4, at 1–2; Ex. 6, at 1; TEDS §§ 4.1–4.16. The
 7 statutes themselves are drawn so broadly—and, as it pertains to the Extraterritorial
 8 Plaintiffs, are not otherwise bounded by the cited provisions of the INA, *see supra*
 9 at I.A—that there is no other “law to apply” to evaluate whether such a
 10 determination is lawful. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402,
 11 410 (1971); *cf. Chen*, 2 F.3d at 334 (explaining that “[i]t is apparent from the face
 12 of section 1103(a) and (b) that if the [Secretary] deemed it necessary, she could, by
 13 herself, undertake an undercover investigation of the type involved here, as long as
 14 her actions *did not directly contravene* any constitutional provision”). Thus,
 15 metering determinations are unreviewable under the APA. 5 U.S.C. § 701(a)(2).

16 **C. The Extraterritorial Plaintiffs’ Section 706(2) Claims Fail Because**
 17 **Defendants’ Have Not Taken Final Agency Action.**

18 The Extraterritorial Plaintiffs’ section 706(2) claims fail for the independent
 19 reason that the SAC does not show any final agency action to “deny” anyone the
 20 opportunity to cross the border at a port of entry. *See* 5 U.S.C. § 704; ECF No. 166
 21 at 49–55. Taking the Extraterritorial Plaintiffs’ factual allegations as true, the SAC
 22 and the documents incorporated by reference show that that Defendants *have not*
 23 sanctioned a “widespread pattern or practice of denying and unreasonably delaying
 24 asylum seekers’ access to the asylum process” and *do not* have a “formal” policy
 25 of “directly or constructively turn[ing] back asylum seekers at the border contrary
 26 to U.S. law.” ECF No. 189 ¶¶ 3, 258. Rather, as Secretary Nielsen stated, the ports
 27 “*will* process [aliens without appropriate travel documents] as [they] can Once
 28 [such persons] come into the United States, [Defendants] process them.” *Id.* ¶ 65

1 (emphasis added); *see also id.* ¶ 68 n.56 (“We’re not denying people approaching
2 the U.S border without documents. We’re asking them to come back when we have
3 the capacity to manage them.”); Ex. 1, at 2 (“SYS CBP personnel are not denying
4 anyone requesting asylum, however are directing potential applicants to Pedwest to
5 ensure a timelier and efficient intake process.”); Ex. 6, at 1 (“All foreign nationals
6 seeking a benefit [at a port of entry within the Laredo Field Office’s area of
7 responsibility] are given an appointment window to return for processing.
8 (*Processing is not denied to any applicant.*)” (emphasis added)); OIG Report at 6
9 (“When the ports of entry are full, CBP guidance states that officers should inform
10 individuals that the port is currently at capacity and that *they will be permitted to*
11 *enter once there is sufficient space and resources to process them.*” (emphasis
12 added)).

13 The Extraterritorial Plaintiffs point to a limited selection of “Defendants’
14 own statements and communications” in support of their assertion that Defendants
15 “ordered” and “implement[ed]” a formal, final “Turnback Policy.” ECF No. 189
16 ¶ 274; *see id.* ¶ 51 (citing Ex. 1, at 1); *id.* ¶ 52 (citing Ex. 2, at 1–3); *id.* ¶ 53 (citing
17 Ex. 3, at 1); *id.* ¶ 55 (citing Ex. 4, at 1–2). But those documents and public
18 statements do not show “an agency policy applicable to all CBP officials at POEs
19 along the U.S.-Mexico border.” ECF No. 166 at 50. They show, rather, that
20 Defendants are managing the ports of entry in a safe and humane manner in light
21 of their operational capacities. *See* Ex. 1, at 1; Ex. 2, at 1–3; Ex. 3, at 1; Ex. 4, at 1–
22 2. The Extraterritorial Plaintiffs “have attached a ‘policy’ label to their own
23 amorphous description of the [CBP’s] practices. But a final agency action requires
24 more.” *Bark v. U.S. Forest Service*, 37 F.Supp.3d 41, 50 (D.D.C. 2014); *Lujan v.*
25 *Nat’l Wildlife Federation*, 497 U.S. 870, 890 (1990) (“The term ‘land withdrawal
26 review program’ (which as far as we know is not derived from any authoritative
27 text) does not refer to a single [Bureau of Land Management] order or regulation,
28 or even to a completed universe of particular BLM orders and regulations. It is

1 simply the name by which petitioners have occasionally referred to the continuing
2 (and thus constantly changing) operations of the BLM in reviewing withdrawal
3 revocation applications and the classifications of public lands and developing land
4 use plans as required by the FLPMA. It is no more an identifiable ‘agency
5 action’—much less a ‘final agency action’—than a ‘weapons procurement
6 program’ of the Department of Defense or a ‘drug interdiction program’ of the
7 Drug Enforcement Administration.”); *cf. Lightfoot v. District of Columbia*, 273
8 F.R.D. 314, 326 (D.D.C. 2011) (“The question is not whether a constellation of
9 disparate but equally suspect practices may be distilled from the varying
10 experiences of the class; rather, Plaintiffs must first identify the ‘policy or custom’
11 they contend violates [the law] and then establish that the ‘policy or custom’ is
12 common to the class.”). That the Extraterritorial Plaintiffs have selectively
13 presented Defendants’ public statements and internal documents under a
14 “Turnback Policy” label is not enough for the Court to plausibly infer that there is
15 “an agency policy applicable to all CBP officials at POEs along the U.S.-Mexico
16 border” to “deny access to the asylum process.” ECF No. 166 at 50; *see also*
17 *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 680 (2009) (a broad legal conclusion
18 “couched as a factual allegation” is “not entitled to the assumption of truth”).

19 Further, any individual instances of metering do not constitute final agency
20 actions to “deny” anyone the opportunity to cross the border at a port of entry and
21 apply for admission. The Extraterritorial Plaintiffs’ allegations show only that an
22 alien without appropriate travel documents may be required to wait in Mexico for a
23 limited amount of time until resource constraints at the port allow her to cross and
24 present an application for admission in an orderly manner. *See, e.g.*, ECF No. 189
25 ¶ 3 (alleging the existence of a “‘metering,’ or *waitlist*, system” and that
26 individuals are instructed to “*wait* . . . until there is adequate space” (emphasis
27 added). That such an individual may be required to “wait” does not mean the
28 agency has reached “the ‘consummation’ of [its] decisionmaking process,” nor is it

1 an action “by which ‘rights or obligations have been determined,’ or from which
 2 ‘legal consequences will flow.’” *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997);
 3 *cf. Beshir v. Holder*, 10 F.Supp.3d 165, 173 (D.D.C. 2014) (“[T]o the extent that
 4 Beshir argues that the delay represents a ‘refusal’ to adjudicate her application,
 5 thus proffering a possibly nondiscretionary action over which the Court could have
 6 jurisdiction, her argument is unavailing.”). It may be a delay *until* final agency
 7 action can be taken, but challenges to “the manner and pace of agency compliance
 8 with . . . congressional directives is not contemplated by the APA.” *Norton*, 542
 9 U.S. at 67. Metering is not a final agency action, so the Extraterritorial Plaintiffs’
 10 section 706(2) claims must be dismissed under Rule 12(b)(6). *Navarro*, 250 F.3d at
 11 732; *Navajo Nation v. Dept. of the Interior*, 876 F.3d 1144, 1171 (9th Cir. 2017)
 12 (“§ 704’s requirement that to proceed under the APA, agency action must be final
 13 or otherwise reviewable by statute is an independent element without which courts
 14 may not determine APA claims.”).

15 **D. The Extraterritorial Plaintiffs Fail to State Due Process Claims.**

16 The Extraterritorial Plaintiffs claim a protected Fifth Amendment interest in
 17 certain INA provisions and argue that Defendants’ practice of metering violates
 18 their right to procedural due process. ECF No. 189 ¶¶ 225–26, 283–93 (claiming
 19 “the right to be processed at a POE and granted meaningful access to the asylum
 20 process” under 8 U.S.C. §§ 1158(a)(1), 1225(a)(3), 1225(b)(1)(A)(ii),
 21 1225(b)(1)(B), and 1225(b)(2), and 8 C.F.R. § 235.3(b)(4)); *see Goss v. Lopez*, 419
 22 U.S. 565, 572 (1975) (“Protected interests . . . are normally not created by the
 23 Constitution. Rather, they are created and their dimensions defined by an
 24 independent source such as state statutes or rules entitling the citizen to certain
 25 benefits.” (internal quotation marks omitted)). But the Fifth Amendment does not
 26 apply to aliens outside the United States, particularly where they do not allege they
 27 have any previous voluntary connection to the United States. *United States v.*
 28 *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (“[O]ur rejection of extraterritorial

1 application of the Fifth Amendment [in *Johnson v. Eisentrager*, 339 U.S. 763, 770
2 (1950),] was emphatic[.]”). Even if the Fifth Amendment applied, “the protections
3 of the Due Process Clause . . . extend only as far the plaintiffs’ statutory rights,”
4 *Graham v. Fed. Emergency Mgmt. Agency*, 149 F.3d 997, 1001 (9th Cir. 1998),
5 and the Extraterritorial Plaintiffs have no statutory rights while outside the United
6 States. *Supra* at I.A. Their due process claim fails as a matter of law.

7 The Due Process Clause states that “[n]o person shall . . . be deprived of life,
8 liberty, or property, without due process of law.” U.S. Const. amend. V. The
9 Clause’s reference to “person[s],” while broad, does not include non-resident
10 aliens outside the United States. *Eisentrager*, 339 U.S. at 770–71. It is an
11 “undoubted proposition that the Constitution does not create, nor do general
12 principles of law create, any juridical relation between our country and some
13 undefined, limitless class of noncitizens who are beyond our territory.” *Verdugo-*
14 *Urquidez*, 494 U.S. at 275 (Kennedy, J. concurring); *Zadvydas v. Davis*, 533 U.S.
15 678, 693–94 (2001). Certainly, when the government “reaches out” to take action
16 against “a *citizen* who is abroad,” that citizen does not lose his constitutional
17 protections simply because he is in a different country. *Reid v. Covert*, 354 U.S. 1,
18 6 (1957) (emphasis added). But no such presumption exists for aliens abroad who
19 do not allege any connection to the United States. *See Eisentrager*, 339 U.S. at
20 770. Although aliens “ha[ve] been accorded a generous and ascending scale of
21 rights as [they] increase[] [their] identity with our society,” the Supreme Court, “in
22 extending constitutional protections beyond the citizenry, . . . has been at pains to
23 point out that it was the alien’s presence within its territorial jurisdiction that gave
24 the Judiciary power to act.” *Id.* at 770, 771. While the question whether the
25 Constitution applies extraterritorially generally “turn[s] on objective factors and
26 practical concerns, not formalism,” or on whether the individual has a “significant
27 voluntary connection” to the United States, *see Ibrahim v. Dept. of Homeland*
28 *Security*, 669 F.3d 983, 997 (9th Cir. 2012) (citing *Boumediene v. Bush*, 553 U.S.

1 723, 764 (2008), and *Verdugo-Urquidez*, 494 U.S. 259), the Supreme Court’s
2 rejection of Plaintiffs’ due process argument has been “emphatic”: the Fifth
3 Amendment does not apply to aliens outside the United States. *Verdugo-Urquidez*,
4 494 U.S. at 269; *Zadvydas*, 533 U.S. at 694; *Mezei*, 345 U.S. at 215; *Wong Wing v.*
5 *United States*, 163 U.S. 228, 238 (1896); *cf. Knauff*, 338 U.S. at 542 (“[A]n alien
6 who seeks admission to this country may not do so under any claim of right.”).

7 Neither the Supreme Court’s other decisions pertaining to the constitutional
8 rights of aliens in the United States nor the Ninth Circuit’s *Ibrahim* decision
9 mandate a different conclusion. In *Verdugo-Urquidez*, a case about whether the
10 Fourth Amendment applies to the search and seizure of property located abroad
11 and owned by a nonresident alien, the Supreme Court explicitly rejected the
12 argument that its decisions in *Plyler v. Doe*, 457 U.S. 202 (1982), *Kwong Hai*
13 *Chew v. Colding*, 344 U.S. 590 (1953), *Bridges v. Wixon*, 326 U.S. 135 (1954),
14 *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931), *Wong Wing*, 163
15 U.S. 228, and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), showed that the Fourth
16 Amendment applied to the search of the respondent’s property abroad. *Verdugo-*
17 *Urquidez*, 494 U.S. at 270–71. Those decisions, the Court explained, “establish
18 only that aliens receive constitutional protections when they have come within the
19 territory of the United States and developed substantial ties with this country.” *Id.*
20 at 271. The respondent, however, was “an alien who has had no previous
21 significant voluntary connections with the United States, so these cases avail him
22 not.” *Id.* The Court saw no reason to deviate from its “emphatic” “rejection of
23 extraterritorial application of the Fifth Amendment.” *Id.* at 269 (citing *Eisentrager*,
24 339 U.S. at 770). The Extraterritorial Plaintiffs similarly do not claim they have
25 any “previous significant voluntary connection with the United States,” and so the
26 Fifth Amendment does not apply. *See id.*; ECF No. 189 ¶¶ 50–83, 153–202.

27 In *Ibrahim*, the Ninth Circuit considered whether the plaintiff, a Malaysian
28 citizen who was lawfully present in the United States as a Ph.D. student at Stanford

1 University, could raise a Fifth Amendment challenge to her placement on the
2 Government’s terrorist watch lists after she had flown to Kuala Lumpur for an
3 academic conference. *Ibrahim*, 669 F.3d 983. The Government argued that the
4 plaintiff had forfeited that option by voluntarily leaving the United States. *Id.* at
5 996. But the panel explained that “[u]nder *Verdugo-Urquidez*, the inquiry is
6 whether the alien has voluntarily established a connection with the United States,
7 not whether the alien has voluntarily left the United States.” *Id.* The plaintiff’s
8 Fifth Amendment challenge could therefore proceed, despite her lack of physical
9 presence. *Id.* at 997. The Extraterritorial Plaintiffs, in contrast, do not allege they
10 had any previous “significant voluntary connection” to the United States at the
11 time they were allegedly subjected to metering. *See* ECF No. 189 ¶¶ 153–202.
12 Thus, the Fifth Amendment did not apply to them under *Verdugo-Urquidez* or
13 *Ibrahim* at the time of their alleged injuries.

14 Even assuming *arguendo* that the Fifth Amendment applied to the
15 Extraterritorial Plaintiffs while they were outside the United States, they still fail to
16 state a cognizable Fifth Amendment claim. Where plaintiffs premise their
17 procedural due process challenge on having a protected interest in a statutory
18 entitlement, “the protections of the Due Process Clause . . . extend only as far as
19 the plaintiffs’ statutory rights.” *Graham*, 149 F.3d at 1001; *id.* at 1001 n.2; *Stanley*
20 *v. Gonzalez*, 476 F.3d 653, 660 (9th Cir. 2007) (“To assert a procedural due
21 process claim under the Fifth Amendment, a plaintiff must first establish a
22 constitutionally protected interest. The plaintiff must have more than a unilateral
23 expectation of it; instead, she must have a legitimate claim of entitlement.”); *see*
24 *Goss*, 419 U.S. at 572. The Extraterritorial Plaintiffs here claim protected interests
25 in being “processed at a POE and granted meaningful access to the asylum
26 process” according to 8 U.S.C. §§ 1158(a)(1), 1225(a)(3), 1225(b)(1)(A)(ii),
27 1225(b)(1)(B), 1225(b)(2), and 8 C.F.R. § 235.3(b)(4). ECF No. 189 ¶¶ 226, 283–
28 93. But as explained above, those statutory provisions do not apply to aliens

1 abroad. *See supra* at I.A. The Extraterritorial Plaintiffs do not claim a protected
2 interest in any other independent sources from which a protected interest might be
3 discerned. *See Goss*, 419 U.S. at 572; ECF No. 189 ¶¶ 225–26, 283–93. Thus, even
4 if the Fifth Amendment applied to them, any Extraterritorial Plaintiff who was
5 prevented from immediately crossing the border at the time and place of his or her
6 choosing was not deprived of a protected interest at all. *See* ECF No. 189 ¶¶ 153–
7 202; *Kerry v. Din*, 135 S. Ct. 2128, 2132 (2015) (Scalia, J., plurality) (“Although
8 the amount and quality of process that [the Supreme Court’s] precedents have
9 recognized as ‘due’ under the Clause has changed considerably since the founding,
10 it remains the case that *no* process is due if one is not deprived of ‘life, liberty, or
11 property.’” (internal citations omitted)); *Serra v. Lappin*, 600 F.3d 1191, 1196 (9th
12 Cir. 2010) (“[T]he Due Process Clause protects only against deprivation of existing
13 interests in life, liberty or property.”). The Extraterritorial Plaintiffs fail as a matter
14 of law to state a procedural due process claim under the Fifth Amendment. *See*
15 Fed. R. Civ. P. 12(b)(6); *Navarro*, 250 F.3d at 732.

16 **E. The Extraterritorial Plaintiffs Fail to State INA Claims or Non-**
17 ***Refoulement* Claims.**

18 The Extraterritorial Plaintiffs argue that Defendants’ alleged conduct is
19 independently actionable under various provision of the INA and Defendants’ non-
20 *refoulement* obligations under the Convention Relating to the Status of Refugees,
21 July 28, 1951, 189 U.N.T.S. 150 (“1951 Convention”), the Protocol Relating to the
22 Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (“1967 Protocol”), the
23 International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S.
24 171 (“ICCPR”), the Convention Against Torture and Other Cruel, Inhuman or
25 Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 114 (“CAT”),
26 and the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980). ECF No.
27 189 ¶¶ 244–255, 294–303. Plaintiffs also assert that “Defendants’ conduct is
28 actionable under the Alien Tort Statute, 28 U.S.C. § 1350, which authorizes

1 declaratory and injunctive relief.” *Id.* ¶ 298.

2 Neither their INA claims nor the non-*refoulement* claims are actionable as
 3 presented. As Court already ruled, Plaintiffs “may not” seek judicial review of
 4 Defendants’ conduct “independently” of the APA’s judicial review framework.
 5 ECF No. 166 at 44; *see id.* at 31 (“The Complaint asserts two APA claims against
 6 the Defendants.”); *id.* at 34–41 (evaluating Plaintiffs’ independent INA claim
 7 under the APA’s section 706(1) framework). Thus, the Extraterritorial Plaintiffs’
 8 INA claims must be evaluated under the APA, as the Court described, or not at all.
 9 *Id.* at 31; *see Webster v. Doe*, 486 U.S. 592, 607 n.* (1988) (Scalia, J., dissenting)
 10 (“While a right to seek judicial review of agency action may be created by a
 11 separate statutory or constitutional provision, once created it becomes subject to
 12 the judicial review provisions of the APA unless *explicitly* excluded.”); *Ninilchik*
 13 *Traditional Council v. United States*, 227 F.3d 1186, 1194 (9th Cir. 2000) (citing
 14 Justice Scalia’s *Webster* dissent approvingly and ruling that “§ 706 of the APA
 15 functions as the default judicial review standard”); ECF No. 166 at 45. Those INA
 16 claims fail for the reasons discussed above. *Supra* at I.A.

17 The Extraterritorial Plaintiffs’ non-*refoulement* claims also fail as a matter of
 18 law because the United States does not have a non-*refoulement* obligation to aliens
 19 outside its borders. *Sale*, 509 U.S. at 180–87. As to the treaties themselves, neither
 20 the 1967 Protocol, the ICCPR, nor the CAT are self-executing, which means none
 21 of them is independently enforceable.⁶ *See Medellin v. Texas*, 552 U.S. 491, 505
 22 n.2 (2008); *Sluss v. U.S. Dept. of Justice, Int’l Prisoner Transfer Unit*, 898 F.3d
 23 1242, 1249 (D.C. Cir. 2018) (“Non-self-executing treaties are much like federal
 24 statutes that do not supply a private cause of action.”); *see also Yuen Jin v.*

25
 26 ⁶ The United States has never acceded to the 1951 Convention, *see I.N.S. v. Stevic*,
 27 467 U.S. 407, 416 n.9 (1984), which means it is enforceable only to the extent that
 28 the 1967 Protocol is enforceable. Plaintiffs seem to acknowledge this. *See* ECF No.
 189 ¶ 230.

1 *Mukasey*, 538 F.3d 143, 159 (2d Cir. 2008) (“[E]ven if treaties were self-executing,
2 there is a strong presumption against inferring individual rights from international
3 treaties.”). The 1967 Protocol “is not self-executing” and therefore “does not have
4 the force of law in American courts.” *Khan v. Holder*, 584 F.3d 773, 783 (9th Cir.
5 2009). The ICCPR neither “confer[s] individual rights,” nor is it self-executing,
6 and it therefore “d[oes] not itself create obligations enforceable in the federal
7 courts.” *Serra*, 600 F.3d at 1196–97. The CAT “is not self-executing and by itself
8 does not have the status of law within the United States.”⁷ *Barapind v. Gov’t of*
9 *Republic of India*, 844 F.3d 824, 831 (9th Cir. 2016).

10 Further, while the Refugee Act of 1980 allows the Attorney General, and
11 subsequently the Secretary, to grant asylum to aliens physically present or arriving
12 in the United States, such claims may be adjudicated only defensively before an
13 immigration judge or affirmatively before USCIS. *See* Refugee Act of 1980, Pub
14 L. No. 96-212, § 201(b); 8 U.S.C. § 1252(a)(4); *Dhokal v. Sessions*, 895 F.3d 532,
15 536–37 (7th Cir. 2018) (overview of affirmative and defensive asylum claims);
16 ECF No. 189 ¶ 232. Thus, the Refugee Act of 1980 does not provide Plaintiffs any
17 independent cause of action enforceable in this Court. *Sale*, 509 U.S. at 172–74
18 (explaining that “there is no provision in the [INA] for the conduct of [removal and
19 former exclusion] hearings outside the United States”); *id.* at 175–76 (Refugee Act
20 of 1980 “did nothing to change the presumption that [covered] aliens would . . . be
21 found only within United States territory”). Neither the cited treaties nor the
22

23 ⁷ Article 3 of the CAT has been implemented domestically by regulation. *See*
24 Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”), Pub. L. No.
25 105-277, Div. G., Title XXII, § 2242(b), 112 Stat. 2681 (1998) (codified at
26 8 U.S.C. § 1231 note). But those regulations state that “there shall be no judicial
27 appeal or review of any action, decision, or claim raised under the [CAT] . . .
28 except as part of the review of a final order of removal pursuant to section 242 of
the [INA].” 8 C.F.R. § 208.18(e)(1); *id.* § (e)(2); *see also* 8 U.S.C. § 1252(a)(4).
Thus, the CAT does not create any cause of action enforceable in this Court.

1 Refugee Act of 1980 provides the Extraterritorial Plaintiffs with a private cause of
2 action enforceable in this Court. Any claim for relief based upon them must be
3 dismissed under Rule 12(b)(6). *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696,
4 699 (9th Cir. 1988) (“Dismissal [under Rule 12(b)(6)] can be based on the lack of a
5 cognizable legal theory or the absence of sufficient facts alleged under a
6 cognizable legal theory.”).

7 Finally, the Alien Tort Statute has no bearing on this case. The ATS gives
8 district courts “original jurisdiction of any civil action by an alien for a tort only,
9 committed in violation of the law of nations or a treaty of the United States.”
10 28 U.S.C. § 1350. But the Extraterritorial Plaintiffs have not brought a civil action
11 for a tort, and so the ATS does not give the Court jurisdiction over their claims.
12 *See* ECF No. 189 ¶¶ 244–303; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004)
13 (referring to the ATS as “strictly jurisdictional”); *Tobar v. United States*, 639 F.3d
14 1191, 1196 (9th Cir. 2011) (noting the ATS “has been interpreted as a jurisdiction
15 statute only”). Even if the Extraterritorial Plaintiffs had raised tort claims,
16 Defendants’ alleged conduct does not come close to the type of egregious
17 “violations of the law of nations” even potentially within the ATS’s grant of
18 jurisdiction. *Compare, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)
19 (allowing wrongful death claim to proceed against Paraguayan police supervisor
20 alleged to have “deliberate[ly] tortured” an individual in Paraguay “under color of
21 official authority”). Thus, the Extraterritorial Plaintiffs are incorrect that the ATS
22 confers the Court with jurisdiction over any part of the SAC.

23 **II. The Political Question Doctrine Precludes Consideration of Defendants’** 24 **Coordination with a Foreign Nation to Regulate Border Crossings.**

25 All Plaintiffs allege that Defendants have coordinated with the government
26 of Mexico to “prevent” individuals in Mexico from crossing into the United States.
27 *See* ECF No. 189 ¶¶ 3, 7, 50–83. Although it is unclear whether Plaintiffs intend to
28 predicate any of their claims on these allegations specifically, their requests for

1 relief, if granted, would prohibit Defendants from “coordinating” with Mexican
2 government officials as they carry out their statutory responsibility to manage the
3 flow of traffic across the border. *See, e.g.*, ECF No. 189 ¶¶ 50–60 (alleging
4 “collaboration with the Mexican government” as part of the alleged “Turnback
5 Policy”) and ¶¶ 304.f (requesting an order enjoining Defendants “from continuing
6 to implement the Turnback Policy”).

7 Such allegations and the corresponding relief Plaintiffs seek are squarely
8 predicated on a political question: whether and to what extent it is lawful for the
9 United States to (allegedly) collaborate with the government of Mexico to control
10 the flow of travel across the countries’ shared border. *E.g. id.* ¶ 7. That question
11 falls within the political question doctrine, and all claims and requests for relief
12 that would require resolution of that question are outside the Court’s jurisdiction.⁸
13 *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007).

14 The political question doctrine “excludes from judicial review those
15 controversies which revolve around policy choices and value determinations
16 constitutionally committed for resolution to the halls of Congress or the confines of
17 the Executive Branch,” *Japan Whaling Ass’n v. American Cetacean Society*, 478
18 U.S. 221, 230 (1986), as well as the “specific tactical measures allegedly taken” to
19 implement those policy choices, *Bancoult v. McNamara*, 445 F.3d 427, 436 (D.C.
20 Cir. 2006) (“[J]ust as we cannot review the decision to establish a base in the

21
22 ⁸ Plaintiffs also allege the government of Mexico has acted unlawfully. *See, e.g.*,
23 ECF No. 189 ¶¶ 44–45, 52–54, 74–75, 83, 96–97, 110, 156–59, 163–68, 175–76,
24 186, 197–200. But Mexico is not a defendant. Even if it were, the act of state
25 doctrine bars the issuance of declaratory or injunctive relief relating to those
26 allegations. *See Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *Sea Breeze*
27 *Salt, Inc. v. Mitsubishi Corp.*, 899 F.3d 1064, 1069 (9th Cir. 2018) (The act of state
28 doctrine bars suit where “(1) there is an official act of a foreign sovereign
performed within its own territory; and (2) the relief sought or the defense
interposed in the action would require a court in the United States to declare
invalid the foreign sovereign’s official act.”).

1 Indian Ocean . . . we cannot review the manner in which that decision was carried
2 out.”). The Supreme Court has identified six independent tests, “listed in
3 descending order of both importance and certainty,” to determine whether a
4 nonjusticiable political question exists:

5 Prominent on the surface of any case held to involve a political question
6 is found [1] a textually demonstrable constitutional commitment of the
7 issue to a coordinate political department; or [2] a lack of judicially
8 discoverable and manageable standards for resolving it; or [3] the
9 impossibility of deciding without an initial policy determination of a
10 kind clearly for nonjudicial discretion; or [4] the impossibility of a
11 court’s undertaking independent resolution without expressing lack of
12 the respect due coordinate branches of government; or [5] an unusual
need for unquestioning adherence to a political decision already made;
or [6] the potentiality of embarrassment from multifarious
pronouncements by various departments on one question.

13 *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Alperin v. Vatican Bank*, 410 F.3d 532,
14 545 (9th Cir. 2005); *see Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality).

15 Only one test, not all six, needs to be satisfied to establish the existence of a
16 nonjusticiable political question. *bin Ali Jaber v. United States*, 861 F.3d 241, 245
17 (D.C. Cir. 2017); *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005).

18 Here, Plaintiffs’ allegations and requests for relief are squarely outside the
19 Court’s jurisdiction under the first and most important *Baker* test: whether there is
20 a “textually demonstrable constitutional commitment of the issue to a coordinate
21 political department.” *Baker*, 369 U.S. at 217. Foreign-relations matters are clearly
22 committed by Constitution to the Executive Branch, particularly as they relate to
23 the United States’ efforts to manage the flow of travel across the border. *See*
24 *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (“Although the
25 source of the President’s power to act in foreign affairs does not enjoy any textual
26 detail, the historical gloss on the ‘executive Power’ vested in Article II of the
27 Constitution has recognized the President’s ‘vast share of responsibility for the
28

1 conduct of our foreign relations.”); *Harisiades v. Shaughnessy*, 342 U.S. 580,
 2 588–89 (1952) (“It is pertinent to observe that any policy toward aliens is vitally
 3 and intricately interwoven with contemporaneous policies in regard to the conduct
 4 of foreign relations”); *see supra* at I.B. Plaintiffs allege that the United States
 5 government has been and is “coordinating” with Mexican government officials to
 6 manage border crossings. *See, e.g.*, ECF No. 189 ¶¶ 3, 7, 50–83, 86–87, 96, 98–
 7 102, 108–10, 114, 116. But the decisions whether, when, why, and how to engage
 8 with another country are:

9 wholly confided by our Constitution to the political departments of the
 10 government, Executive and Legislative. They are delicate, complex,
 11 and involve large elements of prophecy. They are and should be
 12 undertaken only by those directly responsible to the people whose
 13 welfare they advance or imperil. They are decisions of a kind for which
 14 the Judiciary has neither aptitude, facilities nor responsibility and have
 long been held to belong in the domain of political power not subject to
 judicial intrusion or inquiry.

15 *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

16 In short, the Federal Government’s purported coordination with a foreign
 17 nation to control the flow of traffic on a shared border, including the underlying
 18 tactics taken to implement that decision, is a quintessential example of a policy
 19 choice that is “constitutionally committed” to a coordinate branch of government:
 20 the Executive. *Japan Whaling Ass’n*, 478 U.S. at 230; *Bancoult*, 445 F.3d at 436.
 21 The Court does not have jurisdiction to declare unlawful or enjoin that alleged
 22 conduct under the first *Baker* test. *See Corrie*, 503 F.3d at 982.

23 **III. Al Otro Lado’s Claims Fail as a Matter of Law.**

24 Al Otro Lado, a nonprofit legal services organization, raises Claims 1, 2, 3,
 25 and 5, in its own capacity. *See* ECF No. 189 ¶¶ 17–23, 244–82, 294–303. But the
 26 statutes, regulations, and treaties the organization cites pertain exclusively to
 27 “aliens” or “refugees.” *See* 8 U.S.C. §§ 1158(a)(1), 1225(a)(3), 1225(b)(1)(A)(ii),
 28 1225(b)(2); 8 C.F.R. § 235.3(b)(4); 1951 Convention, Art. 33. Al Otro Lado is

1 neither. *See* 8 U.S.C. § 1101(a)(3), (a)(42) (defining “alien” and “refugee” as “any
 2 *person*” who meets certain conditions (emphasis added)); 1951 Convention, Art.
 3 I.1 (defining a “refugee” as “any *person*” who meets certain conditions (emphasis
 4 added)). Thus, although the Court previously ruled that the organization has
 5 constitutional and statutory standing, all of Al Otro Lado’s claims must now be
 6 dismissed under Rule 12(b)(6). *See Jafarzadeh v. Nielsen*, 321 F.Supp.3d 19, 34–
 7 35 (D.D.C. 2018) (“[T]he question whether relief is in fact available under federal
 8 law is not part of the [Article III] redressability analysis. Rather, it is part of the
 9 Rule 12(b)(6) inquiry into whether plaintiffs have a valid cause of action.”).

10 **IV. The Territorial Plaintiffs’ Re-Pleaded Claims Fail as a Matter of Law.**

11 The Territorial Plaintiffs raise the same two APA claims as the
 12 Extraterritorial Plaintiffs, predicated on the same provisions of law but paired with
 13 different factual allegations: they each claim that CBP failed to refer them for
 14 further proceedings *after* they allegedly crossed the border and expressed an intent
 15 to seek asylum or a fear of return, rather than being allegedly subjected to metering
 16 while physically present in Mexico. ECF No. 189 ¶¶ 119–51, 244–303. The Court
 17 already addressed a motion to dismiss relating to these five Plaintiffs, so
 18 Defendants address only briefly why dismissal of their claims is warranted.⁹

19 **A. Abigail’s, Beatrice’s, and Carolina’s Section 706(1) Claims Fail as a** 20 **Matter of Law.**

21 Abigail’s, Beatrice’s, and Carolina’s re-pleaded section 706(1) claims
 22

23 ⁹ Although the Court indicated it would be inappropriate for Defendants to reargue
 24 claims and issues already addressed in the Court’s August 20 opinion outside of a
 25 timely motion for reconsideration, *see* ECF No. 188 at 2 n.1, Defendants note that
 26 they sought to preserve their right to file such a motion when Plaintiffs sought
 27 additional time to file their First Amended Complaint. *See* ECF No. 169 at 2 n.1.
 28 Defendants raise these arguments in good faith to address the Territorial Plaintiffs’
 claims in light of the Court’s August 20 opinion and to preserve those issues for
 appeal.

1 should be dismissed under Rule 12(b)(6) because they allege they withdrew their
 2 applications for admission. *See* ECF No. 189 ¶¶ 119–37; 8 C.F.R. § 235.4. Where
 3 an application for admission is withdrawn, CBP no longer has a duty to
 4 “inspect[],” “refer,” or “detain[]” the alien under 8 U.S.C. §§ 1225(a)(3),
 5 1225(b)(1)(A)(ii), and 1225(b)(2)(A). *See* 8 U.S.C. § 1225(a)(4); 8 C.F.R. § 235.4;
 6 *Norton*, 542 U.S. at 64; *Hells Canyon Preservation Council*, 593 F.3d at 932.
 7 While these three Territorial Plaintiffs allege their withdrawals were obtained by
 8 coercion, they do not identify any provision of law under which CBP would
 9 continue to have a duty to “inspect,” “refer,” or “detain” them after their
 10 applications were withdrawn.¹⁰ ECF No. 189 ¶¶ 203–23, 256–69. They
 11 accordingly fail to state a section 706(1) claim. *See Norton*, 542 U.S. at 64; *Hells*
 12 *Canyon Preservation Council*, 593 F.3d at 932.

13 **B. The Territorial Plaintiffs’ Section 706(2) Claims Fail Because**
 14 **Defendants Have Not Taken Final Agency Action.**

15 Like the Extraterritorial Plaintiffs, the Territorial Plaintiffs’ section 706(2)
 16 claims fail because Defendants have not taken final agency action to “deny”
 17 anyone the opportunity to cross the border. *See* 5 U.S.C. § 704; ECF No. 166 at
 18 49–55. The SAC and the documents incorporated by reference show that that
 19 Defendants *have not* sanctioned a “widespread pattern or practice of denying and
 20 unreasonably delaying asylum seekers’ access to the asylum process.” *See supra* at
 21 I.C; ECF No. 189 ¶¶ 65, 68 n.56; Ex. 2, at 2; Ex. 6, at 1; OIG Report at 6; *see also*
 22 ECF No. 166 at 50. The Territorial Plaintiffs’ section 706(2) claims fare no better
 23 than before and must accordingly be dismissed for lack of final agency action.
 24 5 U.S.C. § 704.

25 Defendants also note that this lack of a policy to “deny access to the asylum
 26

27 ¹⁰ Defendants continue to maintain their position that the law requires an alien’s
 28 decision to withdraw his or her application for admission to be voluntary.

1 process” and the differences in the Territorial Plaintiffs’ allegations of Defendants’
2 “practices” shows that their claims are not amenable to classwide adjudication. *See*
3 *Lightfoot*, 273 F.R.D. at 326 (“The question is not whether a constellation of
4 disparate but equally suspect practices may be distilled from the varying
5 experiences of the class; rather, Plaintiffs must first identify the ‘policy or custom’
6 they contend violates [the law] and then establish that the ‘policy or custom’ is
7 common to the class.”); ECF No. 189 ¶¶ 85–106 (failing to allege the existence of
8 an overarching agency action that joins together the various “practices”). Because
9 the individual claims are moot and the class allegations are insufficiently pleaded
10 with respect to those claims, dismissal is appropriate. Defendants will address
11 Plaintiffs’ class allegations further as appropriate.

12 **CONCLUSION**

13 This is not a case about preventing aliens from entering the United States. It
14 is a case about CBP’s exercise of its inherent and statutory authority to allow aliens
15 without travel documents to cross the border only if the port has the operational
16 capacity to process their applications for admission. CBP’s alleged actions are
17 lawful. The Court should dismiss the SAC for the reasons stated above.

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CERTIFICATE OF SERVICE

Case No. 3:17-cv-02366-BAS-KSC

I certify that on November 29, 2018, I served a copy of the foregoing document by filing it document with the Clerk of Court through the CM/ECF system, which will provide electronic notice and an electronic link to this document to all attorneys of record.

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