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

AL OTRO LADO, INC., a California Corporation; ABIGAIL DOE, BEATRICE DOE, CAROLINA DOE, DINORA DOE, INGRID DOE, and JOSE DOE, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

KIRSTJEN NIELSEN, Secretary, U.S. Department of Homeland Security, in her official capacity; KEVIN K. MCALEENAN, Acting Commissioner, U.S. Customs and Border Protection, in his official capacity; TODD C. OWEN, Executive Assistant Commissioner, Officer of Field Operations, U.S. Customs and Border Protection, in his official capacity,

Defendants.

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

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS THE COMPLAINT**

[ECF No. 135]

This case concerns an alleged practice in which U.S Customs and Border Protection (“CBP”) officials at ports of entry (“POE”) along the U.S.-Mexico border deny asylum seekers access to the U.S. asylum process. The Defendants in this case are Kirstjen Nielsen, the Secretary of the U.S. Department of Homeland Security; Kevin K. McAleenan, Acting Commissioner of CBP; and Defendant Todd C. Owen, the Executive Assistant Commissioner of the Office of Field Operations for CBP.

1 Each Defendant has a role in the direction and oversight of CBP and each is sued in
2 his or her official capacity. Defendants move to dismiss the Complaint in its entirety
3 pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (ECF No. 135.)
4 Plaintiffs oppose (ECF No. 143) and Defendants have replied in support (ECF No.
5 145). For the reasons herein, the Court grants in part and denies in part Defendants’
6 motion to dismiss.

7 **I. BACKGROUND**

8 **A. Relevant Statutory and Regulatory Background¹**

9 At the heart of this case are several provisions of the Immigration and
10 Nationality Act (“INA”) and its implementing regulations which elaborate a
11 procedure by which asylum seekers who arrive at POEs may seek asylum in the
12 United States—a procedure Plaintiffs refer to as “access to the U.S. asylum process.”²
13 (*See generally* ECF No. 1, Compl.) The INA generally provides that “[a]ny alien who
14 is physically present in the United States or who arrives in the United States [],
15 irrespective of such alien’s status, may apply for asylum in accordance with . . . where
16 applicable, section 1225(b)[.]” 8 U.S.C. § 1158(a)(1).

17 An alien who arrives in the United States, including at a designated POE, is
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19
20 ¹ The Court relies on portions of the statutory and regulatory background
21 identified in the Complaint and the parties’ briefing to outline the relevant background
22 for the purposes of this opinion. (*See* Compl. ¶¶ 104–118; ECF No. 135-1; ECF No.
23 143.) The Court does not include all aspects of the statutory and regulatory scheme
24 concerning asylum.

25 ² Defendants take issue with Plaintiffs’ use of the phrase “access to the asylum
26 process,” asserting that “Plaintiffs misstate the law” because the INA does not use
27 that phrase. (ECF No. 135-1 at 5 n.2.) However, Defendants themselves use the
28 phrase “asylum process” to refer to the statutory provisions identified in the
Complaint. (ECF No. 67-3 Ex. B.) The Court does not understand the phrase “access
to the asylum process” as a statement of the law itself, but rather as a shorthand to
collectively describe certain provisions of the INA and its implementing regulations
at issue in this case. The Court similarly uses this shorthand in this opinion.

1 deemed an “applicant for admission,” who “shall be inspected by immigration
2 officers,” and may be removed “without further hearing” “if an immigration officer
3 determines” that the alien “is inadmissible.” *See* 8 U.S.C. § 1225(a)(1); 8 U.S.C. §
4 1225(a)(3); 8 U.S.C. § 1182(a). The INA, however, treats asylum seekers differently.

5 An “alien [who] indicates either an intention to apply for asylum under section
6 1158 . . . or a fear of persecution” is excepted from this summary removal. 8 U.S.C.
7 § 1225(b)(1)(A)(i). Instead, “[i]f an immigration officer determines that an alien . . .
8 who is arriving in the United States . . . is inadmissible . . . and the alien indicates
9 either an intention to apply for asylum under section 1158 of this title or a fear of
10 persecution, the officer shall refer the alien for an interview by an asylum officer[.]”
11 8 U.S.C. § 1225(b)(1)(A)(ii). An implementing regulation similarly requires that if a
12 noncitizen in expedited removal proceedings asserts an intention to apply for asylum
13 or a fear of persecution, “the inspecting officer shall not proceed further with removal
14 of the alien until the alien has been referred for an interview by an asylum officer[.]”
15 8 C.F.R. § 235.3(b)(4). The regulation further mandates that “the examining
16 immigration officer shall record sufficient information in the sworn statement to
17 establish and record that the alien has indicated such intention, fear, or concern, and
18 to establish the alien’s inadmissibility.” *Id.*

19 An alien seeking asylum is subsequently referred to an “asylum officer,” who
20 is statutorily required to be “an immigration officer who has had professional training
21 in country conditions, asylum law, and interview techniques comparable to that
22 provided to full-time adjudicators of applications under section 1158 of this title,” and
23 “is supervised by an officer who,” *inter alia*, “has had substantial experience
24 adjudicating asylum applications.” 8 U.S.C. § 1225(b)(1)(E). The INA further
25 elaborates the conduct of asylum officers in the interview and a process for removal
26 if the officer determines that an alien does not have a credible fear of persecution. 8
27 U.S.C. § 1225(b)(1)(B).

28 At any point during this process, “[a]n alien applying for admission may, in the

1 discretion of the Attorney General and at any time, be permitted to withdraw the
2 application for admission and depart immediately from the United States.” 8 U.S.C.
3 § 1225(a)(4). An implementing regulation further provides that “the alien’s decision
4 to withdraw his or her application for admission must be made voluntarily[.]” 8
5 C.F.R. § 235.4.

6 **B. Factual Synopsis**

7 The Plaintiffs are six individuals, Plaintiffs Abigail Doe, Beatrice Doe,
8 Carolina Doe, Dinora Doe, Ingrid Doe, and Jose Doe (collectively, the “Individual
9 Plaintiffs”), and organizational Plaintiff Al Otro Lado, Inc. (“Al Otro Lado”).³ They
10 allege that CBP officials have “systematically violated U.S. law and binding
11 international human rights law by refusing to allow individuals . . . who present
12 themselves at POEs along the U.S.-Mexico border and assert their intention to apply
13 for asylum or a fear of returning to their home countries—to seek protection in the
14 United States.” (Compl. ¶¶ 1–6, 37.) Plaintiffs allege that “[b]y refusing to follow
15 the law, Defendants are engaged in an officially sanctioned policy or practice[.]” (*Id.*
16 ¶ 5.)

17 Plaintiffs point to several reports from non-governmental organizations
18 working in the U.S.-Mexico border region and Al Otro Lado’s firsthand account,
19 which describe instances in which CBP officials denied asylum seekers who
20 presented themselves at POEs along the border access to the U.S. asylum process
21 between December 2015 and June 2017. (*Id.* ¶¶ 37–39, 96–103.) Plaintiffs allege
22 that CBP officials have carried out this practice through misrepresentations, threats
23 and intimidation, verbal and physical abuse, and coercion. (*Id.* ¶¶ 84–103.) For
24 example, CBP officials are alleged to turn away asylum seekers by falsely informing
25

26 ³ The Court granted each of the Individual Plaintiffs permission to proceed
27 pseudonymously in this litigation due to their asserted fears for their physical safety.
28 (ECF No. 138.) Accordingly, each of these names is a fictitious name used by an
Individual Plaintiff solely for the purposes of this litigation.

1 them that the U.S. is no longer providing asylum, that President Trump signed a new
2 law ending asylum, that a law providing asylum to Central Americans ended, that
3 Mexican citizens are not eligible for asylum, and that the U.S. is no longer accepting
4 mothers with children for asylum. (*Id.* ¶ 85.) CBP officials are alleged to intimidate
5 asylum seekers by threatening to take away their children if they do not renounce a
6 claim for asylum and to deport the asylum seekers. (*Id.* ¶ 87.) CBP officials are also
7 alleged to force asylum seekers to sign forms in English, without translation, in which
8 the asylum seekers recant their fears of persecution. (*Id.* ¶ 92.) CBP officials are
9 further alleged to instruct the asylum seekers to recant their fears of persecution while
10 being recorded on video. (*Id.* ¶ 92.) The Court briefly sets forth the Individual
11 Plaintiffs’ and Al Otro Lado’s experiences of these alleged practices.

12 The Individual Plaintiffs

13 Plaintiffs Abigail Doe (“A.D.”), Beatrice Doe (“B.D.”), and Carolina Doe
14 (“C.D.”) are natives and citizens of Mexico, each of whom fled with their families to
15 Tijuana, Mexico, where they attempted to access the U.S. asylum process. (Compl.
16 ¶¶ 19–21.) Plaintiff A.D. sought to flee Mexico in May 2017 after her husband
17 disappeared at the hands of a Mexican drug cartel. A cartel member threatened her
18 with death. (*Id.* ¶¶ 19, 39–40.) She alleges that CBP officials at the San Ysidro POE
19 coerced her into signing a form which falsely stated that she did not have a fear of
20 returning to Mexico and withdrew her application for admission to the U.S., and
21 forced her and her children to return to Mexico. (*Id.* ¶¶ 41–45.) Plaintiff B.D. sought
22 to flee Mexico in May 2017 with her nephew and three children after the Zetas, a
23 Mexican drug cartel in southern Mexico, targeted her nephew, and after she suffered
24 severe domestic violence from her husband. (*Id.* ¶¶ 20, 46–47.) She presented herself
25 at the Otay Mesa POE and twice at the San Ysidro POE, where CBP officials coerced
26 her into signing a form in which she stated that she and her children have no fear of
27 returning to Mexico and withdrew her application for admission. (*Id.* ¶¶ 48–54.)
28 Plaintiff C.D. sought to flee Mexico in May 2017 with her three children after a drug

1 cartel kidnapped and dismembered her brother-in-law and subsequently targeted her
2 family with death and severe harm. (*Id.* ¶¶ 21, 55–56.) She alleges that CBP officials
3 coerced her into recanting her fear on video and into signing a form withdrawing her
4 application for admission to the U.S. (*Id.* ¶¶ 57–60.)

5 Plaintiffs Dinora Doe (“D.D.”), Ingrid Doe (“I.D.”), and Jose Doe (“J.D.”) are
6 natives and citizens of Honduras. (*Id.* ¶¶ 22–24.) Plaintiff D.D. alleges that MS-13
7 gang members threatened to kill her and her 17-year old daughter if they did not leave
8 their home, and subsequently repeatedly raped her and her daughter over a three-day
9 period. (*Id.* ¶¶ 22, 61–62.) D.D. and her daughter fled to Mexico where MS-13 gang
10 members threatened them again. (*Id.* ¶ 63.) On three occasions in August 2016, D.D.
11 and her daughter sought asylum in the United States at the Otay Mesa POE, but CBP
12 officials told her that “there was no asylum in the United States,” including
13 specifically “for Central Americans,” and that she “would be handed over to Mexican
14 authorities and deported to Honduras.” (*Id.* ¶¶ 64–69.) Plaintiff I.D. alleges that 18th
15 Street gang members in Honduras murdered her mother and three siblings and that
16 the gang threatened her with death. (*Id.* ¶¶ 23, 71.) She also alleges that her partner
17 in Honduras severely abused her and her three children for several years, and
18 regularly raped her, including in front of her children. (*Id.* ¶¶ 23, 72.) In June 2017,
19 I.D. and her children fled to Tijuana and sought asylum at the Otay Mesa and the San
20 Ysidro POEs, where CBP officers told them that they could not seek asylum in the
21 U.S. (*Id.* ¶¶ 73–77.) Plaintiff J.D. alleges that 18th Street gang members murdered
22 several of his family members in Honduras. He further alleges that gang members
23 attacked him and threatened to kidnap and harm his two daughters. (*Id.* ¶¶ 24, 78–
24 79.) J.D. fled Honduras in June 2017 and sought asylum at the Laredo, Texas POE,
25 but CBP officers told him he could not get asylum in the United States. (*Id.* ¶¶ 80–
26 82.)

27 At the time the Complaint was filed, the Individual Plaintiffs alleged that they
28 “would like to present themselves again to seek asylum, but based on their experience

1 and the experience of others with CBP’s practice at POEs, [they] understand that they
2 would likely be turned away again[.]” (*Id.* ¶¶ 44, 53, 59, 68, 76, 81.) They also allege
3 that they are not alone. Rather, CBP officials are alleged to have a “prevalent and
4 persistent” illegal practice since summer 2016 of denying other asylum seekers who
5 present themselves at POEs along the U.S.-Mexico border access to the U.S. asylum
6 system. Accordingly, the Individual Plaintiffs seek to represent a class of individuals
7 with similar claims. (*Id.* ¶¶ 131–138 (class allegations).)

8 Al Otro Lado

9 Al Otro Lado is a non-profit California legal services organization established
10 in 2014, which provides services to indigent deportees, migrants, refugees, and their
11 families. (Compl. ¶ 12; Decl. of Erika Pinheiro, ECF No. 90–1 (“Pinheiro Decl.”) ¶
12 2.) Al Otro Lado’s mission is to coordinate and to provide screening and legal
13 representation for individuals in asylum and other immigration proceedings, seek
14 redress for civil rights violations, and provide assistance with other legal and social
15 services. (Compl. ¶ 12; Pinheiro Decl. ¶ 2.) Since December 2015, its representatives
16 have accompanied asylum seekers to the San Ysidro POE and witnessed the alleged
17 conduct of CBP officials. (Compl. ¶ 101.) In response to the alleged practices of
18 CBP officials, Al Otro Lado has diverted significant time and resources from its L.A.
19 operations and several of its non-refugee programs to send representatives to Tijuana.
20 (*Id.* ¶¶ 14, 16–17; Pinheiro Decl. ¶¶ 4, 6–7.) Al Otro Lado has altered its previous
21 “large-scale, mass-advisal legal clinics” in Tijuana that provided a general overview
22 on asylum laws and procedures to provide individualized assistance and direct
23 representation of asylum seekers, which has required Al Otro Lado to recruit and train
24 more attorneys. (Compl. ¶¶ 13–14; Pinheiro Decl. ¶¶ 3–4.) Al Otro Lado expends
25 significant time and resources to provide individual screenings and in-depth trainings
26 to educate asylum seekers about CBP’s conduct and challenge the alleged practices.
27 (*Id.* ¶ 14; Pinheiro Decl. ¶ 4.)
28

1 **C. Relevant Procedural Background**

2 Plaintiffs filed the putative class action Complaint in the Central District of
3 California on July 12, 2017. (ECF No. 1.) The Complaint presses three claims against
4 the Defendants related to the INA provisions. Plaintiffs allege that (1) Defendants
5 have violated various provisions of the INA that together constitute a “right to seek
6 asylum under the [INA],” (Compl. ¶¶ 139–150); (2) the INA statutory violations also
7 violate the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.* (Compl. ¶¶
8 151–164) (asserting claims under Sections 706(1) and 706(2) of the APA); and (3)
9 Defendants have violated Plaintiffs’ Fifth Amendment procedural due process rights
10 based on the alleged failure to comply with the INA’s statutory protections (*id.* ¶¶
11 165–176). Plaintiffs also assert claims pursuant to the Alien Tort Statute (“ATS”),
12 28 U.S.C. § 1350, for Defendants’ alleged “violation of the *non-refoulement*
13 doctrine,” a doctrine which Plaintiffs contend is a “specific, universal, and obligatory
14 norm,” “which has also achieved the status of a *jus cogens* norm.” (Compl. ¶¶ 177–
15 185). Plaintiffs seek declaratory and injunctive relief for their claims. (*Id.* at 52–53.)

16 **II. LEGAL STANDARDS**

17 **A. Rule 12(b)(1) and Federal Court Jurisdiction**

18 Pursuant to Rule 12(b)(1), a party may move to dismiss based on the court’s
19 lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A defendant may
20 challenge the court’s subject-matter jurisdiction in several ways, two of which are
21 raised by Defendants’ motion to dismiss: mootness and sovereign immunity. When
22 a defendant challenges the Article III standing of a plaintiff or the related issue of
23 mootness, Rule 12(b)(1) is the appropriate standard of review because it is the court’s
24 subject-matter jurisdiction which is challenged. *White v. Lee*, 227 F.3d 1214, 1242
25 (9th Cir. 2000) (“Mootness . . . pertain[s] to a federal court’s subject-matter
26 jurisdiction under Article III, [so it is] properly raised in a motion to dismiss under
27 [Rule] 12(b)(1).”). A Rule 12(b)(1) motion is also “a proper vehicle for invoking
28 sovereign immunity from suit.” *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir.

1 2015). When the United States is sued or a suit implicates its sovereign immunity, a
2 waiver of sovereign immunity is deemed a prerequisite for jurisdiction. *FDIC v.*
3 *Meyer*, 510 U.S 471, 475 (1994) (“Absent a waiver, sovereign immunity shields the
4 Federal Government and its agencies from suit.”); *Jachetta v. United States*, 653 F.3d
5 898, 903 (9th Cir. 2011) (“It is axiomatic that the United States may not be sued
6 without its consent and that the existence of consent is a prerequisite for jurisdiction.”)
7 (quoting *United States v. Mitchell*, 463 U.S. 206, 212 (1983)). When sovereign
8 immunity is invoked as the basis for the absence of subject-matter jurisdiction, “[a]s
9 the party asserting a claim against the United States, [the plaintiff] has the burden of
10 ‘demonstrating an unequivocal waiver of immunity.’” *United States v. Park Place*
11 *Associates, Ltd.*, 563 F.3d 907, 924 (9th Cir. 2009) (quoting *Cunningham v. United*
12 *States*, 786 F.2d 1445, 1446 (9th Cir. 1986)).

13 **B. Rule 12(b)(6) and the Sufficiency of the Complaint**

14 Federal Rule of Civil Procedure 8(a)(2) requires that a complaint set forth “a
15 short and plain statement of the claim showing that the pleader is entitled to relief,”
16 in order to “give the defendant fair notice of what the . . . claim is and the grounds
17 upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting
18 *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A defendant may move to dismiss a
19 complaint on the ground that its allegations fail to state a claim upon which relief may
20 be granted. Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion tests the sufficiency of
21 a complaint’s allegations. *N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581
22 (9th Cir. 1983). To survive such a motion, a plaintiff is required to set forth “enough
23 facts to state a claim for relief that is plausible on its face.” *Twombly*, 550 U.S. at
24 570. “A claim has facial plausibility when the plaintiff pleads factual content that
25 allows the court to draw reasonable inferences that the defendant is liable for the
26 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).
27 Factual allegations must be enough to raise a right to relief above the speculative
28 level. *Twombly*, 550 U.S. at 556. In assessing the sufficiency of a complaint, a court

1 accepts as true the complaint’s factual allegations and construes them in the light most
2 favorable to the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Yet,
3 the court need not accept as true legal conclusions pled in the guise of factual
4 allegations. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994).
5 A pleading is insufficient if it offers only “labels and conclusions” or “a formulaic
6 recitation of the elements of a cause of action,” without adequate factual allegations.
7 *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 676. Generally, a court assesses a
8 complaint’s sufficiency based on its allegations, but a court may consider materials
9 properly submitted as part of the complaint to resolve a Rule 12(b)(6) motion to
10 dismiss. *Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001).

11 **III. DISCUSSION**

12 **A. Mootness**

13 In the days following the filing of the Complaint, Defendants agreed to process
14 the Individual Plaintiffs for inspection and to permit them to access the asylum
15 process. The agreement provides that: “[t]he government agrees to allow the class
16 representatives and their children to present themselves at the San Ysidro and Laredo
17 ports of entry and access the credible fear, withholding-only, or asylum process as
18 appropriate under the [INA].” (ECF No. 67-3 Ex. B.) Three Individual Plaintiffs
19 were processed at the San Ysidro POE on July 15, 2017 and another was processed
20 on July 18, 2017. (ECF No. 135-2 Ex. A ¶ 4.) A fifth Individual Plaintiff was
21 processed at the Laredo, Texas POE on July 18, 2017. (ECF No. 135-3 Ex. B. ¶ 4.)
22 According to the Defendants, these five Individual Plaintiffs have been either referred
23 to the asylum process or placed in removal proceedings. (ECF No. 135-1 at 1, 3.)

24 The parties have different views about what this means for the Court’s
25 jurisdiction. Defendants contend that the Individual Plaintiffs’ Section 706(1) claims
26 are now moot and so the Court should dismiss the entire case. (*Id.* at 1, 4–9.)
27 Defendants assert that the Individual Plaintiffs have received “all the relief the Court
28 could have granted” on their Section 706(1) claims: “the verifiable opportunity to be

1 processed as applicants for admission” at a POE along the U.S.-Mexico border
2 consistent with the INA’s provisions. (*Id.* at 3, 6.) Plaintiffs argue that the Section
3 706(1) claims are not moot because (1) Plaintiff Beatrice Doe has not been processed
4 for admission and therefore has not “actually received” the relief and (2) the
5 Individual Plaintiffs who have been processed for admission only received “partial
6 relief.” (ECF No. 143 at 11.) Plaintiffs further argue that all Individual Plaintiffs
7 who “crossed the U.S.-Mexico border” have a “continuing interest in pursuing a Rule
8 23 class action” for the conduct challenged in this case. (*Id.* at 11, 14.)

9 Article III limits the jurisdiction of the federal courts to “cases” or
10 “controversies.” U.S. Const. art. III, § 2; *see also Allen v. Wright*, 468 U.S. 737, 750
11 (1984). Because of this Article III limitation, a plaintiff must show the “irreducible
12 constitutional minimum” of standing to invoke the federal judicial power: (1) an
13 “injury in fact,” (2) fairly traceable to the challenged action of the defendant, (3)
14 which is “likely” to be redressed by a favorable judicial decision. *Lujan*, 504 U.S. at
15 560–61. “This requirement ensures that the Federal Judiciary confines itself to its
16 constitutionally limited role of adjudicating actual and concrete disputes, the
17 resolution of which have direct consequences on the parties involved.” *Genesis*
18 *Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013). Standing frames mootness.
19 Mootness is “the doctrine of standing set in a time frame: the requisite personal
20 interest that must exist at the commencement of litigation (standing) must continue
21 throughout its existence (mootness).” *U.S. Parole Comm’n v. Geraghty*, 445 U.S.
22 388, 397 (1980). To avoid mootness, “an actual controversy must be extant at all
23 stages of review, not merely at the time the complaint is filed.” *Arizonans for Official*
24 *English v. Arizona*, 520 U.S. 43, 67 (1997) (internal quotation marks and citation
25 omitted). When a case becomes moot, a federal court must dismiss it for lack of
26 jurisdiction. *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1086–87 (9th Cir. 2011).

27 To resolve Defendants’ mootness challenge, the Court first considers whether
28 the Individual Plaintiffs’ receipt of Section 706(1) relief could alone moot this case—

1 it does not—and, second, whether the Individual Plaintiffs’ Section 706(1) claims
2 asserted on behalf of a putative class warrant a mootness exception—they do. In
3 considering these issues, the Court keeps in mind that “[t]he party asserting mootness
4 has a heavy burden to establish that there is no effective relief remaining for a court
5 to provide.” *In re Palmdale Hills Property*, 654 F.3d 868, 874 (9th Cir. 2011); *San*
6 *Luis & Delta-Mendota Water Auth. v. United States DOI*, 870 F. Supp. 2d 943, 953
7 (E.D. Cal. 2012).

8 **1. This Case is Not Moot**

9 Defendants’ argument that this case is moot ignores organizational Plaintiff Al
10 Otro Lado’s presence in this case and the Individual Plaintiffs’ other requests for
11 relief. “A case becomes moot only when it is impossible for a court to grant any
12 effectual relief whatever to the prevailing party.” *Knox v. SIEU, Local 1000*, 567 U.S.
13 298, 307 (2012); *Johnson v. Rancho Santiago Cmty. College Dist.*, 623 F.3d 1011,
14 1018 (9th Cir. 2010) (internal quotations and citation omitted) (a case is moot when
15 there is no “present controversy as to which effective relief can be granted”). “[A]s
16 long as the parties have a concrete interest, however small, in the outcome of the
17 litigation, the case is not moot.” *Knox*, 567 U.S. at 307–08 (quoting *Ellis v. Railway*
18 *Clerks*, 466 U.S. 435, 442 (1984)). Setting aside whether the Individual Plaintiffs’
19 Section 706(1) claims are moot, this case is not moot given that it remains possible
20 for the Court to grant effectual relief to Al Otro Lado and the Individual Plaintiffs.

21 **a. Al Otro Lado**

22 Faced with Al Otro Lado’s argument that it possesses Article III standing,
23 Defendants assert that they do not “yet dispute[] Al Otro Lado’s Article III standing.”
24 (ECF No. 145 at 8.) Despite Defendants’ assertion, the Court has an independent
25 duty to assess whether Al Otro Lado satisfies Article III’s “irreducible constitutional
26 minimum” of standing. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990)
27 (“The federal courts are under an independent obligation to examine their own
28 jurisdiction, and standing ‘is perhaps the most important of [the jurisdictional]

1 doctrines.” (quoting *Allen*, 468 U.S. at 750)). The Court readily concludes that Al
2 Otro Lado has Article III standing.

3 An organizational plaintiff like Al Otro Lado may have Article III standing to
4 sue in its own right. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).
5 “An organization has ‘direct standing to sue [when] it show[s] a drain on its resources
6 from both a diversion of its resources and frustration of its mission.’” *Valle Del Sol,*
7 *Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) (quoting *Fair Hous. Council of*
8 *San Fernando Valley v. Roomate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012)).
9 Of course, “[a]n organization cannot manufacture the injury by incurring litigation
10 costs or simply choosing to spend money fixing a problem that would not otherwise
11 affect the organization[.]” *La Asociacion de Trabajadores de Lake Forest v. Lake*
12 *Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). Al Otro Lado satisfies this test.

13 Al Otro Lado is a non-profit that provides services to indigent deportees,
14 migrants, refugees, and their families in Los Angeles, California and Tijuana, Mexico.
15 Its core mission is, *inter alia*, to coordinate and provide screening, advocacy, and
16 legal representation for individuals in asylum and other immigration proceedings.
17 (Compl. ¶ 12.) As a result of CBP officers’ conduct at POEs along the U.S.-Mexico
18 border since 2016, Al Otro Lado alleges that it has diverted significant time and
19 resources from its L.A. operations and its non-refugee programs to send
20 representatives to Tijuana to provide individualized assistance and coordination of
21 legal and social services, including individual screenings and in-depth trainings to
22 educate asylum seekers about CBP’s alleged conduct of denying the most basic form
23 of access to the asylum process. (*Id.* ¶¶ 14, 16–18.) These alleged harms are
24 sufficient for Article III standing. See *Valle Del Sol Inc.*, 732 F.3d at 1018
25 (organization had standing because its diverted resources from its core mission to
26 address constituents’ concerns); *Smith v. Pac. Props & Dev. Corp.*, 358 F.3d 1097,
27 1105 (9th Cir. 2004) (finding standing where an organization alleged that “[it] has
28 had . . . to divert its scarce resources from other efforts . . . to benefit the disabled

1 community in other ways”). Accordingly, Al Otro Lado has an interest in this case
2 that is not mooted by Defendants’ post-Complaint conduct.⁴

3 **b. The Individual Plaintiffs’ Other Claims for Relief**

4 For the Individual Plaintiffs, Defendants’ mootness challenge is narrow. It
5 concerns only one form of relief in the Complaint on only one of the Plaintiffs’ four
6 claims. (*See* Compl. ¶¶ 152–153.) But the Individual Plaintiffs request other forms
7 of relief, including: (1) “relief prohibiting Defendants” and their agents “from
8 engaging in the unlawful policies, practices, acts and/or omissions . . . at POEs along
9 the U.S.-Mexico border” and (2) “relief requiring Defendants to implement
10 procedures to provide effective oversight and accountability in the inspection and
11 processing of individuals who present themselves at POEs along the U.S.-Mexico
12 border and indicate an intention to apply for asylum or assert a fear of persecution in
13 their home countries.” (*Id.* at 52–53.) The Complaint also requests a declaratory
14 judgment that “Defendants’ policies, practices, acts and/or omissions . . . violate” the
15 INA, the APA, the Due Process Clause of the Fifth Amendment, and/or the “duty of
16 *non-refoulement* under international law.” (*Id.* at 52.) Defendants make no
17 meaningful attempt to argue that their agreement to process the Individual Plaintiffs
18 moots these requests for injunctive and declaratory relief.

19 Rather, Defendants’ mootness argument treats these requests as irrelevant on
20 the ground that Plaintiffs’ other claims fail because the Plaintiffs do not plausibly
21 allege that Defendants have a policy or practice. But a “party’s prospects of success
22 on a claim are not pertinent to the mootness inquiry.” *Looks Filmproduktionen GmbH*
23 *v. CIA*, 199 F. Supp. 3d 153, 179 (D.D.C. 2016) (internal quotations and alterations
24

25 ⁴ “The general rule applicable to federal court suits with multiple plaintiffs is
26 that once the court determines that one of the plaintiffs has standing, it need not decide
27 the standing of the others.” *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993).
28 However, because the parties dispute the ability of the Individual Plaintiffs to seek
Section 706(1) relief for the putative class in this case, the Court does not limit its
mootness analysis to organizational Plaintiff Al Otro Lado.

1 omitted) (quoting *Schnitzler v. United States*, 761 F.3d 33, 39 (D.C. Cir. 2014)); *see*
2 *also Aracely, R. v. Nielsen*, No. 17-cv-1976-RC, —F. Supp. 3d—, 2018 WL 3243977,
3 at *15 (D.D.C. July 3, 2018); *Ramirez v. ICE*, 310 F. Supp. 3d 7, 18 (D.D.C. 2018).
4 Defendants’ argument that Plaintiffs’ other claims are moot because there is no policy
5 or practice “confuses mootness with the merits.” *Chafin v. Chafin*, 568 U.S. 165, 166
6 (2013). “[J]urisdiction . . . is not defeated . . . by the possibility that the averments
7 might fail to state a cause of action[.]” *Bell v. Hood*, 327 U.S. 678, 682 (1946); *see*
8 *also Verizon Md., Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 642–43 (2002)
9 (“It is firmly established in our cases that the absence of a valid (as opposed to
10 arguable) cause of action does not implicate subject-matter jurisdiction.” (quoting
11 *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 89 (1998))); *Eubanks v. McCotter*,
12 802 F.2d 790, 793 (5th Cir. 1986) (“If federal jurisdiction turned on the success of a
13 plaintiff’s federal cause of action, no such case could ever be dismissed on the
14 merits.”).

15 Even on the merits, Defendants’ argument cannot show that this entire case is
16 moot because it conflates whether the Complaint plausibly shows the existence of a
17 policy with whether the Complaint plausibly shows the existence of a practice. As
18 the Court later explains, although the Complaint fails to show the existence of a
19 policy, it plausibly shows the existence of a pattern or practice of denials faced by
20 some asylum seekers. Accordingly, the Court cannot find that this entire case is moot
21 by virtue of Defendants’ agreement to process the Individual Plaintiffs.

22 2. The Section 706(1) Claims Are Not Moot

23 Although this *case* is not moot, Defendants’ narrow mootness argument
24 squarely raises the issue whether the Section 706(1) *claims* for relief asserted in the
25 Complaint are. “A lawsuit—or an individual claim—becomes moot when a plaintiff
26 actually receives all of the relief he or she could receive on the claim through further
27 litigation.” *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1144 (9th Cir. 2016) (emphasis
28 added). The Court must consider whether the agreement moots all the Section 706(1)

1 claims asserted in this case and concludes that it does not. Al Otro Lado asserts APA
2 claims, including a Section 706(1) claim, yet the agreement does not purport to
3 provide any relief to Al Otro Lado. The Individual Plaintiffs also assert Section
4 706(1) claims on behalf of a putative class—a point Defendants’ motion to dismiss
5 elides. *See Pitts*, 653 F.3d at 1087 (“The distinction between issues that have become
6 moot and parties whose interest in the issue may have become moot is especially
7 visible in the context of class actions.”).

8 **a. Al Otro Lado’s APA Claims**

9 Defendants’ Section 706(1) mootness challenge contains a key omission:
10 Plaintiff Al Otro Lado’s Section 706(1) claim. (Compl. ¶¶ 151, 159–164.)
11 Defendants omit discussion of any of Al Otro Lado’s APA claims by assuming the
12 merits of their separate argument that Al Otro Lado fails the zone of interests test
13 applicable to claims asserted pursuant to the APA. (ECF No. 135 at 10–11.) The
14 Court does not find that argument to be meritorious.⁵

15 “In addition to [Article III’s standing] requirements, a plaintiff bringing suit
16 under the [APA] for a violation of [a statute] must show that his alleged injury falls
17 within the ‘zone of interests’ that [the statute] was designed to protect.” *Cantrell v.*
18 *City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001). “[T]he breadth of the zone of
19 interests varies according to the provisions of law at issue[.]” *Bennett v. Spear*, 520
20 U.S. 154, 163 (1997). Courts “presume that a statutory cause of action extends only
21 to plaintiffs whose interests ‘fall within the zone of interests protected by the law
22 invoked.’” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129
23

24 ⁵ The Court recognizes that the zone of interests test does not itself implicate
25 the Court’s subject matter jurisdiction, but rather whether a particular plaintiff has a
26 statutory cause of action. *Pit River Tribe v. Bureau of Land Mgmt.*, 793 F.3d 1147,
27 1155 (9th Cir. 2015) (citing *Lexmark Int’l, Inc. v. Static Control Components*, 572
28 U.S. 118, 127–28 (2014)). Because Defendants’ mootness argument concerns the
Plaintiffs’ Section 706(1) claims, however, the Court addresses whether Al Otro Lado
may assert any APA causes of action in this case as part of its mootness analysis.

1 (2014) (quoting *Allen*, 468 U.S. at 751). The APA’s “‘zone of interests’ test is ‘not
2 meant to be especially demanding,’ and a court should deny standing only ‘if the
3 plaintiff’s interests are *so marginally related to or inconsistent with* the purposes
4 implicit in the statute that it cannot reasonably be assumed that Congress intended to
5 permit the suit.’” *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1177 (9th Cir. 2004)
6 (quoting *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987)) (emphasis added).
7 The test does not require a specific congressional purpose to benefit the would-be
8 plaintiff. *Clarke*, 479 U.S. at 399–400. And the “benefit of any doubt goes to the
9 plaintiff.” *Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak*,
10 567 U.S. 209, 225 (2012).

11 Defendants first argue that Al Otro Lado fails the zone of interests test because
12 it does not cite any INA provision permitting it to sue. (ECF No. 135 at 10–11.) This
13 argument is unavailing. “The APA confers a general cause of action upon persons
14 ‘adversely affected or aggrieved by action within the meaning of the relevant statute,’
15 but withdraws that cause of action to the extent the relevant statute ‘preclude[s]
16 judicial review.’” *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984); see also
17 *Reeb v. Thomas*, 636 F.3d 1224, 1226 (9th Cir. 2011) (same); *Defenders of Wildlife*
18 *v. Tuggle*, 607 F. Supp. 2d 1095, 1098 (D. Ariz. 2009) (same). Defendants do not
19 purport to argue that the INA itself precludes judicial review in this case.

20 Defendants’ second argument is that Al Otro Lado “ha[s] failed to plead
21 sufficient facts to demonstrate that [it] has statutory standing as a legal advocacy
22 group to pursue a claim under 8 U.S.C. §§1158 or 1225.” (ECF No. 145 at 8.)
23 Defendants ground this argument in an opinion decided by a single Supreme Court
24 justice, which granted the government’s application to stay a district court’s
25 injunction order entered in favor of several legal organizations pending appeal. See
26 *INS v. Legalization Assistance Project of L.A. Cty. Fed’n of Labor*, 510 U.S. 1301
27 (1993) (O’Connor, J.) [hereinafter “*L.A.P.*”]. *L.A.P.* concerned the Immigration
28 Reform and Control Act of 1986 (“IRCA”), a statute which created a limited amnesty

1 period for certain undocumented aliens to seek legalization. Considering whether to
2 grant a stay, Justice O’Connor “predict[ed]” that “this Court would grant certiorari
3 and conclude that the respondents”—organizations “that provide legal help to
4 immigrants”—“are outside the zone of interests IRCA seeks to protect, and that
5 therefore they had no standing to seek the order entered by the District Court.” *Id.* at
6 1302, 1305. She reasoned that although IRCA provided a role for legal help
7 organizations during the amnesty period in the role of “so-called ‘qualified designated
8 entities,’” there was “no indication” that IRCA was addressed to the interests of the
9 organizations, but rather it was “clearly meant to protect” the interests of
10 undocumented aliens. *Id.* at 1305 (citing 8 U.S.C. § 1255(a)(2)). Defendants argue
11 that, like the respondent organizations who Justice O’Connor predicted the Supreme
12 Court would find as outside IRCA’s zone of interests, Al Otro Lado falls outside the
13 INA’s zone of interests. The Court rejects this argument.

14 As an initial matter, the precedential value of Justice O’Connor stay opinion is
15 questionable. Justice O’Connor recognized that her task in deciding whether to grant
16 a stay was a “difficult and speculative inquiry” that required her “to predict whether
17 four Justices would vote to grant certiorari and whether the Court would then set the
18 order aside.” *L.A.P.*, 510 U.S. at 1304. In relevant part, her zone of interests answer
19 to that concededly speculative inquiry did not prove true. The Court granted certiorari
20 and, instead of adopting Justice O’Connor’s merits reasoning, it vacated the judgment
21 below and remanded to the Ninth Circuit for further consideration in light of, *inter*
22 *alia*, *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993). *See INS v. L.A.P.*,
23 510 U.S. 1007 (1993). Given the posture of Justice O’Connor’s opinion and the
24 Supreme Court’s ultimate disposition, this Court does not view *L.A.P.* as binding. *See*
25 *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 502 & n.2 (M.D. Pa. 2007)
26 (“Because of the nature of [*L.A.P.*]—a speculative opinion by one Supreme Court
27 Justice sitting as a Circuit Court Justice—and the fact the decision served only to
28 delay implementation of an order pending appeal, we do not consider that opinion as

1 binding, but rather as persuasive authority.”), *aff’d in part and rev’d in part on other*
2 *grounds by*, 620 F.3d 170 (3d Cir. 2010), *vacated and remanded on other grounds*
3 *by*, 563 U.S. 1030 (2011).

4 Setting aside its questionable precedential value, the Court does not find
5 *L.A.P.*’s reasoning helpful because *L.A.P.* concerned IRCA’s zone of interests—not
6 the INA. This distinction is important. Justice O’Connor’s analysis cannot be
7 isolated from the cases her opinion discussed, which narrowly interpreted standing to
8 sue under IRCA even as applied to undocumented aliens. For example, Justice
9 O’Connor began her opinion with a discussion of *Reno*, decided some five months
10 earlier and which the INS argued required vacating the district court’s order. *L.A.P.*,
11 510 U.S. at 1303. In *Reno*, the Supreme Court held that “the only people who could
12 ask for injunctive or declaratory relief under IRCA” from an alleged administrative
13 INS “front-desking policy” of discouraging legalization applications were those to
14 whom that policy was directly applied. *L.A.P.*, 510 U.S. at 1303 (quoting *Reno*, 509
15 U.S. at 61–67). *Reno*’s view of standing was adopted in *Ayuda, Inc. v. Reno*, 7 F.3d
16 246 (D.C. Cir. 1993), a decision with which Justice O’Connor viewed the decisions
17 of the district court and Ninth Circuit in *L.A.P.* as in “conflict.” *L.A.P.*, 510 U.S. at
18 1305. In *Ayuda, Inc.*, the D.C. Circuit held that “in light of the [*Reno*] analysis, it is
19 now quite clear that the organizational plaintiffs did not have standing to raise their
20 claims challenging INS policies or regulations that interpreted aliens’ rights to
21 legalization under IRCA.” *Ayuda, Inc.*, 7 F.3d at 251 (citing *Reno*, 509 U.S. at 61)
22 (vacating district court orders for lack of jurisdiction).⁶ Placed in context, Justice
23

24 ⁶ The INS’s petition for a writ of certiorari in *L.A.P.* is also illuminative. The
25 INS argued that the Ninth Circuit’s treatment of the organizational standing question
26 was “in substantial tension” with the D.C. Circuit’s earlier opinion in *Ayuda, Inc.*
27 *L.A.P.*, Petition for Writ of Certiorari, 510 U.S. 1007 (1993) (No. 93-73), 1993 WL
28 13076006, at *8 (citing *Ayuda, Inc. v. Thornburgh*, 880 F.3d 1325, 1339 (D.C. Cir.
1989), *vacated on other grounds by*, 498 U.S. 1117 (1991)). The earlier *Ayuda*
opinion determined that “qualified designated entities” (“QDEs”) established by

1 O'Connor's view of IRCA's zone of interests says much about the restrictive judicial
2 treatment of challenges concerning IRCA and little about the INA's zone of interests.

3 Courts have not interpreted the INA's zone of interests as narrowly as IRCA's
4 and non-alien plaintiffs, including organizational plaintiffs, have been permitted to
5 assert claims based on the INA.⁷ *See Hawaii v. Trump*, 859 F.3d 741, 766 (9th Cir.
6 2017) (finding that plaintiff states' "efforts to enroll students and hire faculty
7 members who are nationals from six countries" affected by president order fell within
8 zone of interests), *vacated on other grounds by Trump v. Hawaii*, 138 S. Ct. 377
9 (2017); *Doe v. Trump*, 288 F. Supp. 3d 1045, 1067–68 (W.D. Wash. 2017) (relying
10 on *Hawaii* to conclude that two organizational plaintiffs fell within the zone of
11 interests of the INA and the Refugee Act of 1980 because of their "core mission"
12 involved "[m]aking provisions for the resettlement and absorption of refugees"); *V.*
13 *Real Estate Group, Inc. v. United States Citizenship & Immigration Servs.*, 85 F.

14
15
16 IRCA fell outside IRCA's zone of interests because "Congress, at most, intended the
17 QDEs to act as intermediaries, not litigating ombudsmen. And even if the QDEs are
18 thought of as agents for the aliens, we doubt Congress intended the agents to have
19 broader rights to seek judicial review than do the principals." *Ayuda, Inc.*, 880 F.3d
20 at 1339.

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⁷ Other district courts have found that organizational plaintiffs like Al Otro
Lado can fall within the INA's zone of interests when it has members or clients
targeted by the government action. *See Vidal v. Nielsen*, 291 F. Supp. 3d 260, 269
n.3 (E.D.N.Y. 2018) (determining that organizational plaintiff met zone of interests
test to challenge DACA rescission because it had members, clients, and employees
who received DACA); *see also NAACP v. Trump*, 298 F. Supp. 3d 209, 235 (D.D.C.
2018) (determining that organizational plaintiffs falls within INA's zone of interests
because "each has members who are DACA beneficiaries and whose interests
consequently fall within the zone of interests regulated by the INA"). Although Al
Otro Lado has not expressly invoked representative standing as the basis for its Article
III standing in this case, the asylum seekers Al Otro Lado serves and represents are
ostensibly its clients. *Vidal* and *NAACP* provide a persuasive basis for the conclusion
that Al Otro Lado would likely also fall within the INA's zone of interests on this
basis as well.

1 Supp. 3d 1200, 1209 (D. Nev. 2015) (company could sue for USCIS’s revocation of
2 an EB-5 foreign investor visa because its “interest . . . is more than just marginally
3 related to the statutes’ purpose since the company was actually founded with the intent
4 that its model would satisfy the requirements of the EB-5 program and bring Chinese
5 investors to the country.”).

6 The specific INA provisions in this case evince a congressional intent that
7 aliens—including those arriving at POEs and those facing expedited removal—have
8 “an opportunity . . . to have the merits of his or her claim promptly assessed by
9 officers.” *Castro v. United States Dep’t of Homeland Sec.*, 163 F. Supp. 3d 157, 161
10 (E.D. Pa. 2016) (quoting H.R. Rep. No. 104-828, at 209–10 (1996) (Conf. Rep.)); *see*
11 *also* 8 U.S.C. § 1158; 8 U.S.C. § 1225. Al Otro Lado alleges that part of its mission
12 is to serve and represent asylum and refugee seekers. (Compl. ¶ 12.) In furtherance
13 of this mission, Al Otro Lado established and operates its Refugee Program in
14 Tijuana, Mexico, which services individuals who wish to seek asylum in the United
15 States. (*Id.* ¶ 13.) The alleged conduct of CBP officers has caused Al Otro Lado to
16 expend significant time and resources to assist asylum seekers in responding to CBP
17 officials’ alleged conduct of foreclosing even the most basic aspect of the INA’s
18 asylum procedures—the opportunity to be processed in the first place. (*Id.* ¶¶ 12–
19 15.) This Court finds Al Otro Lado’s interests in this case “are related to the basic
20 purposes of the INA[’s]” goal of permitting aliens to apply for asylum in the United
21 States at POEs and not so marginally related that its interests fall outside the INA’s
22 zone of interests. *Hawaii*, 859 F.3d at 766; *Doe v. Trump*, 288 F. Supp. 3d at 1067–
23 68. Accordingly, the Court rejects Defendants’ challenge to Al Otro Lado’s INA-
24 based claims.

25 **b. The Individual Plaintiffs’ Section 706(1) Claims**

26 Five of the six Individual Plaintiffs have received the requested relief from
27 Defendants’ agreement to process these “class representatives and their children” at
28 POEs. Thus, their Section 706(1) claims are moot unless an exception applies.

1 Plaintiffs contend, however, that the Section 706(1) claim of Beatrice Doe is not moot
2 because she has not “actually received” the relief provided in the agreement. (ECF
3 No. 143 at 11.) The Court does not share Plaintiffs’ view.

4 Plaintiffs’ argument relies solely on case law holding that a rejected or
5 unaccepted Rule 68 offer of judgment does not moot a plaintiff’s individual claims
6 even when that offer would provide full relief. *See Chen*, 819 F.3d at 1136; *Diaz v.*
7 *First. Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 954–55 (9th Cir. 2013) (“[A]n
8 unaccepted offer that would . . . fully satisf[y] a plaintiff’s claim does not render that
9 claim moot.”). This is true of an unaccepted settlement offer as well. *See Campbell-*
10 *Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016).

11 Defendants’ agreement, however, is not a Rule 68 offer of judgment or a
12 settlement offer and thus *Chen* and *Diaz* are not directly applicable. Even if the
13 reasoning of these cases extends to less formal offers, what is before the Court is not
14 an *offer* which Beatrice Doe has yet to accept or reject, but rather an *agreement*. The
15 agreement permits her to be processed by CBP officials at a POE in accordance with
16 the INA and has no expiration. The evidence shows that five of the six Individual
17 Plaintiffs were processed pursuant to the agreement and there is no basis for the Court
18 to find that Beatrice Doe will be treated any differently. Defendants readily concede
19 that Beatrice Doe “can return to a port of entry to be processed as an arriving alien at
20 any time, should she choose to do so” pursuant to the agreement. (ECF No. 135-1 at
21 3.) And they “fully expect that ‘she would be processed as an applicant for
22 admission[.]’” (ECF No. 145 at 2 (quoting ECF No. 135-2 Ex. A ¶ 4)). Beatrice
23 Doe is in no different a position than she would be with a court order compelling
24 agency action. Accordingly, her individual Section 706(1) claim, like those of the
25 other Individual Plaintiffs, is moot unless an exception applies.

26 Even when a claim becomes moot due to subsequent events after the
27 commencement of a lawsuit, “the flexible character of the Art[icle] III mootness
28 doctrine” may warrant the exercise of jurisdiction over the claim. *United States*

1 *Parole Comm’n v. Geraghty*, 445 U.S. 388, 401 (1980); *see also San Luis & Delta-*
2 *Mendota Water Auth.*, 870 F. Supp. 2d at 958 (“Even if a case is technically moot, it
3 may nevertheless be judiciable if one of three exceptions to the mootness doctrine
4 applies,” including “‘for wrongs capable of repetition yet evading review.’”) (quoting
5 *Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 964–66 (9th Cir. 2007)). Under
6 the “capable of repetition, yet evading review” exception, a claim is justiciable
7 notwithstanding mootness if: (1) there is “a ‘reasonable expectation’ that the same
8 party will confront the same controversy again” and (2) if the underlying dispute is
9 “inherently limited in duration such that it is likely always to become moot before
10 federal court litigation is completed.” *W. Coast Seafood Processors Ass’n v. NRDC*,
11 643 F.3d 701, 704 (9th Cir. 2011) (quoting *Feldman v. Bomar*, 518 F.3d 637, 644
12 (9th Cir. 2008)), *id.* at 705 (quoting *Ctr. for Biological Diversity*, 511 F.3d at 965
13 (internal quotations omitted)). The parties dispute whether this exception applies.

14 Defendants argue that it does not. (ECF No. 135-1 at 8.) In Defendants’ view,
15 “[t]here is no reason to anticipate that the Doe Plaintiffs . . . will return to a [POE] as
16 applicants for admission in the future, or that, upon doing so, they will not be properly
17 processed, especially considering the low percentage rate of improper processing[.]”
18 (*Id.*) It is unclear what basis there is for Defendants’ assertion. Unless the Individual
19 Plaintiffs are granted asylum, there is nothing in the Complaint that suggests that they
20 will not attempt to seek asylum again and, if so, that CBP officers will not turn them
21 away from a POE. Each Individual Plaintiff has alleged that he or she does not wish
22 to return to his or her home country because of a fear of violence. Each Individual
23 Plaintiff has also alleged being turned away by CBP officials on multiple occasions
24 and a practice of such conduct. Even if Defendants are correct that the Complaint
25 fails to show a blanket policy of turning away asylum seekers at POEs, “the ‘capable
26 of repetition yet evading review’ exception is not so narrowly circumscribed.” *San*
27 *Luis & Delta-Mendota Water Auth.*, 870 F. Supp. 2d at 960. Based on the limited
28 nature of the Court’s review of the pleadings at this stage, the Court cannot say that

1 the Individual Plaintiffs’ allegations do not show a reasonable expectation that they
2 would again be subjected to the conduct they have alleged experiencing.

3 Furthermore, contrary to Defendants’ argument (ECF No. 135-1 at 9), the
4 putative class action nature of this case does change the Court’s analysis regarding
5 the effect of their agreement.⁸ Courts are sensitive to assertions of mootness in the
6 class action context. *See Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51–52 (1991);
7 *Sosna v. Iowa*, 419 U.S. 393, 401 (1975); *Gerstein v. Pugh*, 420 U.S. 103, 110 (1975).
8 The “capable of repetition, yet evading review” mootness exception has a particular
9 application in the class action context when the defendant’s actions after the filing of
10 the complaint moot the proposed class representative’s individual claims. Courts are
11 sensitive to a defendant’s tactics of “picking off lead plaintiffs” so as “to avoid a class
12 action,” even when a proposed class representative’s “claims are not ‘inherently
13 transitory as a result of being time sensitive.’” *Pitts*, 653 F.3d at 1091 (quoting *Weiss*
14 *v. Regal Collections*, 385 F.3d 337, 347 (3d Cir. 2004)). “The end result is the same:
15 a class transitory by its very nature and one transitory by virtue of the defendant’s
16 litigation strategy share the reality that both claims would evade review.” *Id.* Even
17 if the named plaintiff in a putative class action receives “complete relief on [his or
18 her] individual claims . . . before class certification, fully satisfying those individual
19 claims, [the plaintiff] still would be entitled to seek certification.” *Chen*, 819 F.3d at
20 1142.

21 Defendants acknowledge *Pitts* and *Chen*, yet they contend that unlike the
22 defendants in those cases, they have not sought to “buy-off” the Plaintiffs in this case
23 to avoid a class action. (ECF No. 135-1 at 9; ECF No. 145 at 4.) However, Plaintiffs
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25 ⁸ Central to Defendants’ argument is the notion that “[t]he styling of the
26 Complaint as a putative class action does not change this analysis.” (ECF No. 135-1
27 at 9) Contrary to this characterization of the Complaint, the Complaint contains class
28 action allegations and the conduct at issue is alleged to affect the putative class.
(Compl. ¶¶ 131–138 (the “class action allegations”).) Defendants have not moved to
strike these allegations; they remain an integral feature of the Complaint in this case.

1 seek only declaratory and injunctive relief. The fact that Defendants have provided
2 one form of the injunctive relief solely to the “class representatives” (ECF No. 67-3
3 Ex. B) after the filing of this case is no less a potential “buy-off” strategy that
4 effectively renders transitory the claims they seek to assert on behalf of a putative
5 class. The government could simply render moot any class action Section 706(1)
6 claims concerning the conduct at issue in this case by affording relief to any individual
7 plaintiffs who seek to challenge such conduct as soon as the case is filed and long
8 before a court could reasonably be expected to rule on a motion for class certification.
9 *See Haro v. Sebelius*, 747 F.3d 1099, 1110 (9th Cir. 2014) (determining that the
10 expiration of the plaintiff’s claim one month after filing the lawsuit did not moot the
11 class’s claim for injunctive relief because “the district court could not have been
12 expected to rule on a motion for class certification in that period”).

13 Defendants possess the authority to direct CBP officials to process aliens who
14 present themselves at POEs along the U.S.-Mexico border in accordance with the
15 requirements of the INA and implementing regulations. Defendants’ agreement to
16 exercise that authority occurred a mere two days after the filing of the Complaint and
17 only when confronted with the possibility that Plaintiffs would file an *ex parte* request
18 for a temporary restraining order that all Individual Plaintiffs be processed at a POE.
19 (ECF No. 67-1 ¶¶ 2–7.) Under these circumstances, the Court is convinced that the
20 Section 706(1) claims the Individual Plaintiffs assert on behalf of themselves and the
21 putative class fall within an exception from mootness.

22 **B. Sovereign Immunity**

23 Defendants’ motion to dismiss also raises the issue of sovereign immunity.
24 (ECF No. 135-1 at 21; ECF No. 145 at 1.) “Sovereign immunity is a threshold
25 question that is sometimes described as ‘jurisdictional.’” *Forester v. Chertoff*, 500
26 F.3d 920, 925 n.5 (9th Cir. 2007) (citing *Irwin v. Dep’t of Veterans Affairs*, 498 U.S.
27 89, 94 (1990)); *see also Reed v. Dep’t of Homeland Sec.*, No. CV 16-7170 CJC (JC),
28 2017 WL 2701940, at *3 (C.D. Cal. May 25, 2017) (“Sovereign immunity is a

1 threshold issue [that] goes to the court’s subject matter jurisdiction.”) (quoting
2 *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1026 (9th Cir. 2010) (en banc), *cert.*
3 *denied*, 564 U.S. 1037 (2011)).

4 Plaintiffs sue the named Defendants in their official capacity as United States
5 officers, each of whom is alleged to oversee the enforcement and administration of
6 U.S. immigration laws, including oversight of CBP. (Compl. 1–2 (caption); *id.* ¶¶
7 25–27.). “An action against an officer, operating in his or her official capacity as a
8 United States agent, operates as a claim against the United States.” *Ministerio Roca*
9 *Solida v. McKelvey*, 820 F.3d 1090, 1095 (9th Cir. 2016) (citing *Farmer v. Perrill*,
10 275 F.3d 958, 963 (10th Cir. 2001)); *see also Kentucky v. Graham*, 473 U.S. 159,
11 165–66 (1985). Plaintiffs must therefore contend with the sovereign immunity of the
12 United States. *See Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985) (“It has
13 long been held that the bar of sovereign immunity cannot be avoided by naming
14 officers and employees of the United States as defendants.”); *Allen v. United States*,
15 871 F. Supp. 2d 982, 988 (N.D. Cal. 2012) (the issue of sovereign immunity “includes
16 suits against federal officers in their official capacities to compel them to act”) (citing
17 *Dugan v. Rank*, 372 U.S. 609, 620 (1963)).

18 “The United States, as a sovereign, is immune from suit *unless* it has waived
19 its immunity.” *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*,
20 482 F.3d 1157, 1173 (9th Cir. 2007) (emphasis added) (citing *Dep’t of Army v. Blue*
21 *Fox, Inc.*, 525 U.S. 255, 260 (1999)); *United States v. Mitchell*, 445 U.S. 535, 538
22 (1980)). “When the United States consents to be sued, the terms of its waiver of
23 sovereign immunity define the extent of the court’s jurisdiction.” *United States v.*
24 *Mottaz*, 476 U.S. 834, 841 (1986) (citing *United States v. Sherwood*, 312 U.S. 584,
25 586 (1941)); *see also Cent. Sierra Envtl. Res. Ctr. v. Stanislaus Nat’l Forest*, 304 F.
26 Supp. 3d 916, 932–33 (E.D. Cal. 2018) (same) (quoting *Balser v. Dep’t of Justice,*
27 *Office of U.S. Tr.*, 327 F.3d 903, 907 (9th Cir. 2003)). Thus, consistent with sovereign
28 immunity and any waiver of it, a court may only exercise jurisdiction over claims

1 against the United States within the parameters set by Congress.

2 **1. The APA Supplies the Relevant Waiver**

3 The APA “contains a specific waiver of the United States’ sovereign
4 immunity.” *Matsuo v. United States*, 416 F. Supp. 2d 982, 988 (D. Haw. 2006) (citing
5 *Bowen v. Massachusetts*, 487 U.S. 879, 891–92 (1988)). As a general matter, the
6 APA permits suits against the United States by “[a] person suffering legal wrong
7 because of the agency action, or adversely affected or aggrieved by agency action
8 within the meaning of relevant statute.” 5 U.S.C. § 702. This portion of Section 702
9 constitutes the APA’s judicial review provision and dates to the APA’s original
10 enactment in 1946. *See* Administrative Procedure Act, Pub. L. No. 79-404 § 10(a),
11 60 Stat. 237, 243 (1946) (codified as amended at 5 U.S.C. § 702); *see also Navajo*
12 *Nation v. Dep’t of the Interior*, 876 F.3d 1144, 1168 (9th Cir. 2017). Claims asserted
13 pursuant to the APA must satisfy Section 702’s “agency action” requirement and the
14 further requirement under Section 704 of the APA that a plaintiff must identify a
15 “final agency action” to obtain judicial review. 5 U.S.C. § 704.

16 Apart from Section 702’s judicial review provision for APA claims is the
17 APA’s waiver of sovereign immunity, also located in Section 702. The waiver
18 provides that: “[a]n action in a court of the United States seeking relief other than
19 money damages and stating a claim that an agency or an officer or employee thereof
20 acted or failed to act in an official capacity . . . shall not be dismissed nor relief therein
21 be denied on the ground that it is against the United States.” 5 U.S.C. § 702. This
22 waiver of sovereign immunity was enacted as a 1976 amendment to the APA, which
23 aimed “to clear up a morass of federal sovereign immunity jurisprudence” and “aimed
24 to ‘broaden the avenues for judicial review of agency action by eliminating the
25 defense of sovereign immunity in cases covered by the amendment.’” *Navajo Nation*,
26 876 F.3d at 1168 (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 891–92 (1988)).
27 Unlike Section 702’s judicial review provision, which is textually limited to “agency
28 action,” Section 702’s waiver of sovereign immunity contains no such textual

1 limitation. 5 U.S.C. § 702; *see also Navajo Nation*, 876 F.3d at 1171. Accordingly,
2 as amended, the APA “waives sovereign immunity broadly for all causes of action
3 that meet its terms” irrespective of whether the claims satisfy the APA’s requirements
4 for judicial review of an agency action. *Navajo Nation*, 876 F.3d at 1172; *see also*
5 *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989)
6 (Section 702 is “an unqualified waiver of sovereign immunity in actions seeking
7 nonmonetary relief”).⁹ Thus, a plaintiff need only seek nonmonetary relief against
8 the government in order to avail himself of the APA’s waiver of sovereign immunity.
9 In this case, Plaintiffs invoke the APA’s waiver and seek only non-monetary relief
10 against Defendants, based on claims regarding the purported actions and failures to
11 act of CBP officials and the named Defendants. (Compl. ¶ 10; *id.* at 52–53.)
12 Accordingly, Plaintiffs’ claims for relief fall squarely within the broad waiver of
13 sovereign immunity reflected in Section 702.

14 Because the APA supplies the relevant waiver of the sovereign immunity in
15

16 ⁹ There is Ninth Circuit precedent which suggests that the APA’s sovereign
17 immunity waiver is tethered to the APA’s requirements for judicial review of APA
18 causes of action. *See Gallo Cattle Co. v. U.S. Dep’t of Agric.*, 159 F.3d 1194, 1198
19 (9th Cir. 1998) (determining that the APA’s waiver of sovereign immunity contains
20 several limitations,” including Section 704’s limitations to review of only “final
21 agency action” and “agency action otherwise reviewable by statute”); *Tucson Airport*
22 *Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998) (referring to
23 Sections 702 and 704 to conclude that “the APA waives sovereign immunity for [a
24 plaintiff’s] claims only if three conditions are met: (1) its claims are not for money
25 damages, (2) an adequate remedy for its claims is not available elsewhere and (3) its
26 claims do not seek relief expressly or impliedly forbidden by another statute.”). In
27 the face of Ninth Circuit precedent that grafts the APA’s review requirements onto
28 Section 702’s waiver, the *Navajo Nation* panel attempted to clarify that the APA’s
waiver exists independently of the APA’s requirements for APA causes of action. *See*
Navajo Nation, 876 F.3d at 1171; *id.* at 1172 (summing up conclusion as “the second
sentence of § 702 waives sovereign immunity broadly for all causes of action that
meet its terms, while § 704’s ‘final agency action’ limitation applies only to APA
claims”). This Court finds *Navajo Nation*’s reading of Section 702 persuasive and
appropriate, and applies it in this case.

1 this case, the Court can easily reject Defendants’ argument that “Congress has not
2 waived sovereign immunity to create a private right of action for a *per se* ‘pattern or
3 practice’ claim against federal law enforcement.” (ECF No. 135-1 at 21; ECF No.
4 145 at 1.) Setting aside that the Complaint does not separately plead such a claim and
5 that the Plaintiffs disavow bringing one (*see generally* Compl.; *see also* ECF No. 143
6 at 19 n.6), Defendants’ argument fails under *Navajo Nation*. Because Plaintiffs’
7 claims fall within the scope of Section 702’s waiver, they do not need to identify a
8 separate waiver of sovereign immunity for “pattern or practice” claims against the
9 government. *See Navajo Nation*, 876 F.3d at 1172 (“§ 702 waives sovereign
10 immunity broadly for all causes of action that meet its terms[.]”). To the extent
11 Defendants are arguing that pattern or practice claims are not cognizable under the
12 APA, that is an issue that concerns the sufficiency of such claims, not whether the
13 United States or its officers are immune from such claims. *See id.*; *see also Trudeau*
14 *v. FTC*, 456 F.3d 178, 187 (D.C. Cir. 2006) (concluding that Section 702’s waiver of
15 sovereign immunity applies regardless of whether the challenged conduct itself
16 satisfies the APA’s review provisions).

17 **2. The APA’s Waiver Extends to Plaintiffs’ ATS Claims**

18 The APA’s waiver of sovereign immunity also resolves one of Defendants’
19 challenges to Plaintiffs’ ATS claims. The Complaint alleges ATS claims against the
20 Defendants for “violation of the *non-refoulement* doctrine” under international law.
21 (Compl. ¶ 180.) Defendants argue that the ATS “does not constitute a waiver of
22 sovereign immunity and therefore does not create a cause of action against the
23 government.” (ECF No. 135-1 at 11–12 n.5.)¹⁰ Defendants thus appear to suggest
24

25 ¹⁰ Defendants also argue that although Plaintiffs refer to the “duty of *non-*
26 *refoulement*” as the basis for their ATS claims, Plaintiffs “fail to explain how it
27 imposes relevant legal obligations on the government beyond the obligations captured
28 in 8 U.S.C. § 1225(b)(1)(A)(ii).” (ECF No. 135-1 at 12 n.5.) To the extent that
Defendants contend that the ATS claims must be dismissed because a remedy is
available under domestic law, the Court rejects that argument. “Contrary to

1 that this Court lacks jurisdiction over the ATS claims asserted against the Defendants
2 as a matter of sovereign immunity.

3 Defendants are correct that the ATS does not waive the sovereign immunity of
4 the United States. The ATS provides only that “the district courts shall have original
5 jurisdiction of any civil action by an alien for a tort only, committed in violation of
6 the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. The text of the
7 ATS says nothing about sovereign immunity and, thus, it cannot be construed as a
8 waiver. *See Lane v. Pena*, 518 U.S. 187, 192 (1996) (internal citations omitted)
9 (stating that “[a] waiver of the Federal Government’s sovereign immunity must be
10 unequivocally expressed in statutory text and will not be implied”). Specifically, the
11 ATS does not waive the government’s sovereign immunity. *Tobar v. United States*,
12 639 F.3d 1191, 1196 (9th Cir. 2011) (“[T]he Alien Tort Statute has been interpreted
13 as a jurisdiction statute only—it has not been held to imply any waiver of sovereign
14 immunity.”).

15 However, at least one appellate court has suggested that the APA is “arguably
16 available” as a waiver of sovereign immunity for claims asserted against federal
17 officers sued in their official capacity for nonmonetary relief. *See Sanchez-Espinoza*
18 *v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985) (recognizing the possibility that ATS
19 suits seeking non-monetary relief may proceed against the Secretary of Defense and
20 the Director of the CIA under the APA’s waiver of sovereign immunity). The D.C.
21 Circuit ultimately declined to apply the APA’s waiver to the ATS claims in *Sanchez-*
22 *Espinoza* because it did not believe that the alien plaintiffs in that case who challenged
23

24 defendants’ argument, there is no absolute preclusion of international law claims by
25 the availability of domestic remedies for the same alleged harm.” *See Hawa Abdi*
26 *Jama v. United States INS*, 22 F. Supp. 2d 353, 364 (D.N.J. 1998). Defendants raise
27 no other arguments showing that dismissal of Plaintiffs’ ATS claims is warranted and
28 neither side has briefed the sufficiency of the claims. Accordingly, the Court
expresses no further view on them in this opinion aside from the sovereign immunity
issue.

1 “support for military operations” were entitled to the discretionary declaratory and
2 injunctive relief available under the APA in an area “so sensitive a[s] foreign affairs.”
3 *Id.* at 208. The notion that the APA’s waiver of sovereign immunity should not apply
4 to permit equitable relief in military matters or sensitive foreign affairs cases has been
5 echoed by other courts. *See, e.g., Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 41–43
6 (D.D.C. 2010) (questioning “whether the APA should be interpreted as a waiver of
7 sovereign immunity for an ATS claim like plaintiff’s” against the U.S. Secretary of
8 Defense and Director of the CIA which requested “discretionary relief that would
9 prohibit military and intelligence activities against an alleged enemy abroad”).

10 This case, however, does not involve military matters, nor do Defendants argue
11 that it involves sensitive foreign affairs. At least one district court has applied the
12 APA’s waiver of sovereign immunity for international law claims asserted against the
13 U.S. government for non-monetary relief in such circumstances. *See Rosner v. United*
14 *States*, 231 F. Supp. 2d 1202, 1211–12 (S.D. Fla. 2002). In line with the APA’s broad
15 waiver of sovereign immunity for claims against the United States for nonmonetary
16 relief, the Court finds that the APA’s unqualified waiver of sovereign immunity
17 supplies a waiver for the ATS claims asserted in this case. *See* 5 U.S.C. § 702; *Navajo*
18 *Nation*, 876 F.3d at 1171.

19 C. The Sufficiency of the APA Claims

20 The Complaint asserts two APA claims against the Defendants. First, the
21 Complaint raises Section 706(1) claims “to compel agency action unlawfully
22 withheld or unreasonably delayed.” (Compl. ¶ 152 (citing 5 U.S.C. § 706(1).) The
23 basis of these claims is CBP officials’ alleged “failure to take actions mandated” by
24 various provisions of the INA and implementing regulations. (*Id.* ¶ 153; *see also id.*
25 ¶ 157 (referring to “Defendants’ repeated and pervasive failure to act”).) The
26 Complaint also alleges a Section 706(2) claim to “hold unlawful and set aside agency
27 action.” 5 U.S.C. § 706(2). The basis of this claim is that “CBP officials have acted
28 in excess of their statutorily proscribed authority and without observance of the

1 procedures required by law in violation of the APA.” (*Id.* ¶ 154 (citing 5 U.S.C.
2 §§706(2)(C), (D)), *id.* ¶ 155 (alleging that “in turning Class Plaintiffs . . . away at
3 POEs along the U.S.-Mexico border without following the procedures mandated by
4 the INA, CBP officials have acted in excess of the authority granted them by
5 Congress”); *id.* ¶ 157 (referring to Defendants’ “action taken in excess of their
6 authority”).)

7 In moving to dismiss, Defendants argue that (1) Plaintiffs’ “only well-pleaded”
8 claims are the Section 706(1) claims and (2) Plaintiffs have failed to identify a “final
9 agency action” necessary to seek review of Defendants’ alleged policy pursuant to
10 Section 706(2). (ECF No. 135-1 at 4–9 (mootness for Section 706(1) claims), 11–20
11 (failure to state a Section 706(2) claim).) In opposition, Plaintiffs argue that they have
12 pleaded Section 706(1) claims and not brought a Section 706(2) claim. (ECF No. 143
13 at 19–21.) Independently of their Section 706(1) claims, however, the Plaintiffs
14 contend that they have plausibly pleaded that Defendants have “an illegal policy or
15 practice.” (*Id.* at 21–23.) To resolve the parties’ dispute, the Court first outlines the
16 APA’s framework for judicial review of agency action. The Court then considers the
17 sufficiency of Plaintiffs’ Section 706(1) claims. Finally, the Court determines that
18 Defendants’ alleged policy must be reviewed pursuant to Section 706(2) and
19 concludes that Plaintiffs have failed to identify a final agency action subject to judicial
20 review.

21 1. Judicial Review of Agency Action Pursuant to the APA

22 As a general matter, the APA provides that “[a] person suffering legal wrong
23 because of agency action, or adversely affected or aggrieved by agency action within
24 the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. §
25 702. This judicial review provision “is not so all-encompassing as to authorize . . .
26 judicial review over everything done by an administrative agency.” *Wild Fish*
27 *Conservancy v. Jewell*, 703 F.3d 791, 800–01 (9th Cir. 2013). The APA confines
28 what is subject to judicial review by limiting review to an “agency action,” which is

1 in turn defined to only “include[] the whole or a part of an agency rule, order, license,
2 sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. §
3 551(13); 5 U.S.C. § 701(b)(2) (incorporating Section 551’s definition of “agency
4 action”).

5 The APA also places limits on when agency action is subject to judicial review.
6 “Agency action made reviewable by statute and final agency action for which there
7 is no other adequate remedy in a court are subject to judicial review.” 5 U.S.C. § 704;
8 *see also Navajo Nation*, 876 F.3d at 1171 (“[Section] 704’s requirement that to
9 proceed under the APA, agency action must be final or otherwise reviewable by
10 statute is an independent element without which courts may not determine APA
11 claims.”). “Where no other statute provides a private right of action, the ‘agency
12 action’ complained of must be ‘final agency action.’” *Norton v. S. Utah Wilderness*
13 *Alliance*, 542 U.S. 55, 61–62 (2004) [hereinafter “*SUWA*”] (quoting 5 U.S.C. § 704);
14 *see also Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586, 591
15 (9th Cir. 2008) (referring to “final agency action” as a “jurisdictional requirement
16 imposed by statute”); *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 266 (9th Cir.
17 1990) (same).

18 Section 706 of the APA further defines the “scope of review” for an agency
19 action that is subject to judicial review. As a general matter, a court “shall decide all
20 relevant questions of law” and “interpret constitutional and statutory provisions” as
21 part of its review of agency action “[t]o the extent necessary to decision and when
22 presented.” 5 U.S.C. § 706. In addition, a court may provide relief from agency
23 action in one of two ways. Under Section 706(1), a court “shall . . . compel agency
24 action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). Under
25 Section 706(2), a court “shall hold unlawful and set aside agency action . . . found to
26 be,” *inter alia*, “in excess of statutory jurisdiction, authority, or limitations, or short
27 of statutory rights” or “without observance of procedure required by law.” 5 U.S.C.
28 § 706(2). A challenge to an agency’s alleged failure to act is more appropriately

1 channeled through Section 706(1). *See Rosario v. United States Citizenship*, No.
2 C15-0813JLR, 2017 WL 3034447, at *7 n.6 (W.D. Wash. July 18, 2017); *Leigh v.*
3 *Salazar*, No. 3:13-cv-00006-MMD-VPC, 2014 WL 4700016, at *4 (D. Nev. Sept. 22,
4 2014) (construing a Section 706(2) claim regarding an agency’s alleged failure to act
5 as in fact a Section 706(1) claim). Section 706(2) is typically reserved for completed
6 agency actions whose validity can be assessed according to the bases for setting aside
7 agency action set forth in that provision. *See Nw. Envtl. Defense Ctr. v. Bonneville*
8 *Power Admin.*, 477 F.3d 668, 680–81 & n.10 (9th Cir. 2007). With these general
9 principles in mind, the Court turns to the APA claims in this case.

10 **2. The Complaint States Section 706(1) Claims for “Unlawfully**
11 **Withheld” Access to the U.S. Asylum Process**

12 The Court turns first to the Individual Plaintiffs’ Section 706(1) claims that
13 CBP officials have failed permit asylum seekers to access the U.S. asylum process.
14 Defendants concede that the Individual Plaintiffs’ Section 706(1) claims are “well-
15 pleaded.” (ECF No. 135-1 at 4–5; ECF No. 145 at 1.) Defendants, however, suggest
16 that such claims are not cognizable insofar as they concern a putative class of other
17 asylum seekers who have experienced the alleged pattern of denials. Plaintiffs in turn
18 argue that they have stated Section 706(1) claims for Defendants’ alleged “failure to
19 act” and that they can challenge a pattern of violations. (ECF No. 143 at 19–20, *id.*
20 at 19 n.6.) Because Section 706(1) claims may be dismissed if the plaintiff fails to
21 show an entitlement to agency action that a court can properly compel, the Court
22 addresses the sufficiency of the Complaint’s Section 706(1) claims as they pertain to
23 the Individual Plaintiffs and the putative class.¹¹ *See Alvarado v. Table Mountain*
24 *Rancheria*, 509 F.3d 1008, 1019–20 (9th Cir. 2007) (“a Section 706(1) claim may be
25 dismissed for lack of jurisdiction” when plaintiff fails to show he is entitled to relief
26

27
28 ¹¹ Defendants do not raise an issue as to whether Al Otro Lado has plausibly
stated a claim for Section 706(1) relief.

1 under the provision); *Gros Ventre Tribe v. United States*, 469 F.3d 801, 814 (9th Cir.
2 2006).

3 **a. The Individual Plaintiffs**

4 Section 706(1) grants a court authority to “compel agency action unlawfully
5 withheld.” 5 U.S.C. §706(1). Under this provision, a court’s “ability to ‘compel
6 agency action’ is carefully circumscribed to situations where an agency has ignored
7 a specific legislative command.” *Hells Canyon Pres. Council v. United States Forest*
8 *Serv.*, 593 F.3d 923, 932 (9th Cir. 2010). When a plaintiff challenges an agency’s
9 alleged failure to act, that challenge must satisfy certain limitations. The APA’s use
10 of the phrase “failure to act” means “a failure to take an *agency action*—that is, a
11 failure to take one of the agency actions (including their equivalents) earlier defined
12 in § 551(13),” *i.e.*, an “agency rule, order, license, sanction, or relief.” *SUWA*, 542
13 U.S. at 62–63; *see also* 5 U.S.C. §551(13). Thus, a Section 706(1) claim “can only
14 proceed where a plaintiff asserts that an agency failed to take a *discrete* agency action
15 that it is *required* to take.” *SUWA*, 542 U.S. at 64 (emphasis in original).

16 These requirements to obtain Section 706(1) relief from a court are mutually
17 reinforcing. The discrete agency action “limitation” precludes a “broad programmatic
18 attack” against an agency. *Id.* As such, it “protect[s] agencies from undue judicial
19 interference with their lawful discretion” and “avoid[s] entanglement in abstract
20 policy disagreements which courts lack both expertise and information to resolve.”
21 *Id.* at 66–67. Thus, a plaintiff “cannot seek wholesale improvements of [a] program
22 by court decree” under the guise of a Section 706(1) claim. *Lujan v. Nat’l Wildlife*
23 *Fed’n*, 497 U.S. 871, 891 (1990); *Public Lands for the People, Inc. v. U.S. Dep’t of*
24 *Agric.*, 733 F. Supp. 2d 1172, 1183 (E.D. Cal. 2010) (“This interpretation effectively
25 precludes enforcement of broad statutory mandates under section 706(1), insofar as a
26 broad mandate typically is not one that requires discrete agency action.”). The
27 “limitation to required agency action rules out judicial direction of even discrete
28 agency action that is not demanded by law.” *SUWA*, 542 U.S. at 65. Because of that

1 limitation, courts “have no authority to compel agency action merely because the
2 agency is not doing something we may think it should do.” *Zixiang Li v Kerry*, 710
3 F.3d 995, 1004 (9th Cir. 2013) (Smith, M.D., J.). Thus, a plaintiff seeking relief under
4 Section 706(1) must identify an actual legal obligation for the agency to take some
5 action. *Id.*

6 The gravamen of Plaintiffs’ Section 706(1) claims is that CBP officials failed
7 to take actions that the INA requires when a noncitizen asserts an intent to seek
8 asylum. The Complaint grounds these claims in various statutory and regulatory
9 provisions, including 8 U.S.C. § 1225(a)(1)(3), 8 U.S.C. § 1225(b)(1)(A)(ii), 8 U.S.C.
10 § 1225(b)(2)(A), and 8 C.F.R. § 235.3(b)(4). (Compl. ¶¶ 104–121, 153.)¹² There is
11 no dispute between the parties regarding the sufficiency of the Individual Plaintiffs’
12 Section 706(1) claims under these provisions. Defendants agree that “APA relief
13 under section 706(1)” is “an appropriate remedy” for the failures to act the Individual
14 Plaintiffs allege. (ECF No. 145 at 1.)¹³ These concessions buttress the Court’s
15

16 ¹² The Complaint’s Section 706(1) claim invokes 8 U.S.C. § 1158(a)(1).
17 (Compl. ¶ 153.) The Court observes that it likely could not compel relief for this
18 statutory provision. 8 U.S.C. § 1158(a)(1) does not identify any specific obligations
19 placed on an immigration officer and, therefore, may not serve as the basis for Section
20 706(1) relief. *See Public Lands for the People, Inc.*, 733 F. Supp. 2d at 1183
21 (“[W]here a statutory directive does not require action, that statute may be so ‘broad’
22 that it cannot be enforced under section 706(1)[.]”). Plaintiffs do not invoke 8 U.S.C.
23 § 1158 in discussing the sufficiency of their Section 706(1) claims and so the Court
24 deems any claims premised on it as waived. The Complaint also invokes 8 C.F.R. §
25 235.4, a regulation which provides that “[t]he alien’s decision to withdraw his or her
application admission must be made voluntarily[.]” (Compl. ¶ 153.) As the Court
discusses separately, Plaintiffs cannot seek Section 706(1) relief with respect to this
regulation and any Section 706(1) claims seeking to compel agency action based on
it are subject to dismissal.

26 ¹³ However, Defendants argue that because the parties agree on what the law
27 requires, “Plaintiffs have failed to identify any legal dispute between the parties,” and
28 thus there is no “live case or controversy.” (ECF No. 135-1 at 19 & n.9.) Defendants’
argument is an inartful attempt to attack Plaintiffs’ Article III standing. To have

1 conclusion that Plaintiffs have stated Section 706(1) claims for discrete and legally
2 required agency actions.

3 **b. The Putative Class and Practice Allegations**

4 A salient aspect of the Complaint are the allegations that there is a “practice”
5 of CBP officials refusing to permit asylum seekers who present themselves at POEs
6 along the U.S.-Mexico border to access the asylum process in the United States. (*See*
7 *generally* Compl.) Plaintiffs’ Section 706(1) claims incorporate these allegations.
8 (*Id.* ¶ 157 (“Defendants’ repeated and pervasive failure to act . . . , which denied Class
9 Plaintiffs access to the statutorily prescribed asylum process . . . mandates relief under
10 the APA.”); *id.* ¶ 163 (alleging that “Defendants’ conduct and practices, as alleged in
11 this Complaint, violate the APA.”).) Defendants primarily take issue with these
12 pattern allegations as a matter of sovereign immunity. As the Court has already
13 concluded, that argument lacks merit. Even so, Defendants’ argument that there is
14 “no cause of action” for pattern or practice claims raises a different issue: whether
15 and how pattern and practice claims are cognizable under the APA.

16 Two courts have considered this issue in the context of Section 706(1) claims
17 based on an agency’s alleged failure to act. These courts concluded that pattern and
18 practice challenges to an agency’s alleged failure to act are not legally cognizable
19 under the APA. *See Californians v. United States EPA*, No. C 15-3292 SBA, 2018
20 WL 1586211, at *19 (N.D. Cal. Mar. 30, 2018) (dismissing separately pleaded claim
21

22 standing, a plaintiff must allege: (1) an injury in fact (2) “fairly traceable to the
23 challenged action of the defendant” (3) that may be “redressed by a favorable
24 decision” from a court. *Lujan*, 504 U.S. at 560–61 (internal citations and quotations
25 omitted). The Complaint plainly shows that the Plaintiffs have standing based on the
26 injuries caused by CBP officials at POEs along the U.S.-Mexico border in violation
27 of the INA and its implementing regulations. This Court has the authority to redress
28 those injuries. *See* 5 U.S.C. § 706(1). The parties’ apparent agreement in their legal
memoranda submitted to this Court on what the INA and its implementing regulations
require cannot vitiate Plaintiffs’ standing based on the harms resulting from CBP
officials’ alleged violations of those provisions.

1 against EPA for an alleged pattern or practice of failing to timely act on administrative
2 complaints); *Del Monte Fresh Produce N.A., Inc. v. United States*, 706 F. Supp. 2d
3 116 (D.D.C. 2010) (dismissing claim against FDA for an alleged unlawful pattern and
4 practice of delay in sampling and inspecting food imported by plaintiff). The
5 reasoning underlying these conclusions turns on Section 706(1)'s discrete agency
6 action limitation. See *Californians*, 2018 WL 1586211, at *19 (citing *Lujan*, 497 U.S.
7 at 891; *SUWA*, 542 U.S. at 66–67); *Del Monte*, 706 F. Supp. 2d at 119 (citing *SUWA*,
8 542 U.S. at 64, 66–67). As the Court has previously discussed, that limitation
9 precludes a plaintiff from using Section 706(1) to launch a “programmatic attack” or
10 seek “wholesale improvement” of an agency’s procedures. *SUWA*, 542 U.S. at 64.
11 Both the *Del Monte* and *Californians* courts determined that the “pattern or practice”
12 claims in those cases were impermissible attacks on the relevant agency.

13 For example, in *Del Monte*, the court concluded that the plaintiffs could not
14 pursue a claim against the FDA for its alleged pattern and practice of not inspecting
15 Del Monte products within a reasonable time period. The *Del Monte* court reasoned
16 that such a claim would require the court to “consider the procedures by which the
17 FDA inspects samples and makes decisions as to their suitability for import” as a
18 general matter. *Del Monte*, 706 F. Supp. 2d at 119. As such, the court would have
19 engaged in “broad review of agency operations” of “just the sort of ‘entanglement’ in
20 daily management of the agency’s business that the Supreme Court has instructed is
21 in appropriate.” *Id.* The *Del Monte* plaintiff never challenged, nor sought relief for
22 specific instances of the FDA’s alleged failure to act or unreasonable delay in taking
23 action despite referring to several such instances. *Id.* at 120 n.6. In *Californians*, the
24 court similarly determined that the plaintiffs’ separately pleaded pattern and practice
25 claim against “the EPA’s general practice in handling [administrative] complaints, as
26 opposed to seeking relief on a specific complaint” was “in effect” “a programmatic
27 attack” on the EPA’s procedures and therefore “impermissible.” *Californians*, 2018
28 WL 1586211, at *19. The court, however, reached this conclusion even as it

1 determined that the plaintiffs’ other five claims “seek[ing] relief based on the EPA’s
2 failure to act on each of the Plaintiffs’ respective [administrative] complaints”
3 “clearly satisf[ied] the discrete agency action requirement.” *Id.* *Del Monte* and
4 *Californians*, as well as their reliance on *SUWA* and *Lujan*, caution this Court to take
5 a closer look at the practice allegations in this case to ensure that they do not constitute
6 an impermissible broad-based programmatic attack against CBP.

7 Plaintiffs assert that they have not “attempt[ed] to bring a so-called ‘pattern or
8 practice’ claim as an independent cause of action.” (ECF No. 143 at 19 n.6.) This
9 assertion is supported by the Complaint, which does not facially plead independent
10 Section 706(1) claims for Defendants’ alleged practice of denying asylum seekers
11 who present themselves at POEs along the U.S.-Mexico border access to the asylum
12 process. Instead of raising an independent pattern or practice claim, the Section
13 706(1) claims incorporate the practice allegations as part of Plaintiffs’ request for
14 relief from “Defendants’ repeated and pervasive failure to act.” (Compl. ¶ 157.)
15 Plaintiffs challenge not only alleged agency failures to act in their particular cases,
16 they challenge CBP officials’ failures to act experienced by other individuals.
17 (*Compare id.* ¶¶ 39–82 (allegations of each Individual Plaintiff’s experiences) *with*
18 *id.* ¶¶ 83, 85–91, 96(a)–(d), 97, 98(b), (d), 99, 100, 101(a)–(e), 102 (allegations that
19 “CBP officials have systematically denied numerous other asylum seekers access to
20 the asylum process”) *and id.* ¶¶ 131–138 (setting forth “class action allegations”).)
21 Neither *Del Monte*, which involved an attempt to bring a freestanding pattern or
22 practice claim, nor *Californians*, which involved an attempt to plead a pattern or
23 practice claim independently of claims targeting discrete agency actions, is thus on
24 point.

25 The Court does not view the incorporation of these pattern allegations as an
26 impermissible “programmatic” attack. Unlike this case, *SUWA*, *Lujan*, *Del Monte*,
27 and *Californians*, did not involve Section 706(1) claims asserted on behalf of a
28 putative class of individuals. The Section 706(1) relief is no less discrete and lawfully

1 required simply because it is requested on behalf of a putative class. *See Ramirez*,
2 310 F. Supp. 3d at 21 (“Defendants confuse aggregation of similar, discrete purported
3 injuries—claims that many people were injured in similar ways by the same type of
4 agency action—for a broad programmatic attack.”) (rejecting challenge to Section
5 706(1) relief sought on behalf of class). This conclusion is reinforced by the fact that
6 Section 706(1) claims to compel agency action may be asserted on behalf of a class.
7 *See, e.g., Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068, 1971 (9th Cir. 2016)
8 (affirming district court preliminary injunction in a case involving Section 706(1)
9 claims asserted on behalf of a class of all current or former members of the armed
10 forces who were test subjects in certain government programs during their service);
11 *Ramirez*, 310 F. Supp. 3d at 21; *Venantius Nkafor Ngwanyia v. Gonzales*, 376 F.
12 Supp. 2d 923, 925 (D. Minn. 2005) (approving settlement in a class action suit
13 involving allegations that federal immigration agencies improperly administered the
14 system by which asylees become lawful permanent residents).

15 Defendants suggest that Section 706(1) relief is not available on a class-wide
16 basis, arguing that “Plaintiffs’ ‘pattern or practice’ allegations are too speculative to
17 otherwise establish a live case or controversy” and, thus, “the Court should dismiss
18 any ‘pattern or practice’ claims under Rule 12(b)(1).” (ECF No. 135-1 at 22, 24.)
19 Central to this argument is Defendants’ contention that “Plaintiffs have not alleged
20 that all CBP officers at [POEs] always deny asylum seekers access to the asylum
21 process.” (*Id.* at 24.) Like Defendants’ misguided attack on the Individual Plaintiffs’
22 Article III standing based on the parties’ agreement about what the INA requires,
23 Defendants’ targeting of the pattern allegations as “too speculative” to establish a
24 “live case or controversy” misses the mark.

25 Defendants readily concede that the Complaint identifies incidents in which
26 asylum seekers who presented themselves at POEs along the U.S.-Mexico border
27 have been denied access to the asylum process. (ECF No. 135-1 at 24.) Even in the
28 absence of Defendants’ concession, the Complaint incorporates numerous reports

1 from non-governmental organizations operating in the U.S.-Mexico border region,
2 which document hundreds of examples of asylum seekers who CBP officials denied
3 access to the U.S. asylum process. (Compl. ¶¶ 37–38, 96–102.) While Defendants
4 may seek to minimize those allegations by selectively casting doubt on the reliability
5 of those portions of the reports that reflect negatively on CBP and by characterizing
6 the reports as showing only “an alleged 1.6% denial rate,” (ECF No. 135-1 at 14), the
7 volume of denials is irrelevant to whether the Complaint concretely alleges that other
8 individuals have been subjected to the same alleged failures to act by CBP officials.
9 The Complaint plainly alleges such failures, which the Court is required to take as
10 true at this stage. Because the Individual Plaintiffs have standing in their own right
11 to seek Section 706(1) relief to compel the Defendants to inspect and process them
12 for admission, they may request that relief for a putative class of others asylum
13 seekers who have allegedly experienced the same failures to act. *See O’Shea v.*
14 *Littleton*, 414 U.S. 488, 494 (1974). Accordingly, the Court rejects Defendants’
15 challenge to the Complaint’s practice allegations, which are merely a feature of the
16 class action nature of this case.

17 **3. The Complaint Fails to State a Section 706(1) Claim for Relief**
18 **Pursuant to 8 C.F.R. § 235.4**

19 Although the Complaint states Section 706(1) claims regarding the alleged
20 failures of CBP officials to permit the Individual Plaintiffs to access the U.S. asylum
21 process, certain Individual Plaintiffs also seek relief regarding alleged coercion by
22 CBP officials. As the Court has discussed, all Plaintiffs argue that they only press
23 Section 706(1) claims to compel agency action unlawfully withheld. (ECF No. 143
24 at 19.) The Court will therefore consider these Plaintiffs’ coercion allegations within
25 the Section 706(1) framework.

26 Plaintiffs A.D., B.D., and C.D. each allege that on of one of the occasions they
27 sought asylum, CBP officials coerced them to into signing documents which stated
28 that they lacked a fear of persecution. (Compl. ¶¶ 42–43, 50–51, 56–58.) A.D. and

1 C.D. further allege that CBP officials forced them to recant their fears in video
2 recorded statements. (*Id.* ¶¶ 42–43, 56–58.) They further refer to their allegations
3 regarding CBP’s alleged coercion of certain Individual Plaintiffs in discussing their
4 Section 706(1) claims. (ECF No. 143 at 20.) Both sides further agree that “the law
5 requires an alien’s decision to withdraw his or her application for admission be
6 voluntary” under 8 C.F.R. § 235.4. (ECF No. 135-1 at 20; ECF No. 143 at 20.) That
7 the parties agree on the text of the INA’s provisions and certain implementing
8 regulations, however, does not mean that the Court in fact has authority to provide
9 Section 706(1) relief based on 8 C.F.R. § 235.4. The Court concludes that it does not.

10 The Court has the authority to compel an agency action pursuant to Section
11 706(1) only when there is “a specific, unequivocal command” placed on the agency
12 to take a “discrete agency action,” and the agency has failed to take that action.
13 *SUWA*, 542 U.S. at 63–64. The obligation placed on the agency action must be “so
14 clearly set forth that it could traditionally have been enforced through a writ of
15 mandamus.” *Hells Canyon Pres. Council*, 593 F.3d at 932. The action must be a
16 “precise, definite act.” *Id.* The only provision Plaintiffs cite in the Complaint and
17 their opposing papers regarding the alleged coercion of withdrawal statements is 8
18 C.F.R. § 235.4, a regulation which states that “[t]he alien’s decision to withdraw his
19 or her application [for admission] must be made voluntarily[.]” 8 C.F.R. § 235.4.
20 This language is an insufficient basis for the Court to grant any Section 706(1) relief
21 pursuant to the regulation.

22 Although the clear objective of 8 C.F.R. § 235.4 is to ensure that an alien’s
23 withdrawal of an application for admission is made voluntarily, the regulation’s plain
24 text “does not instruct [the Defendants] to do anything.” *San Luis Unit Food*
25 *Producers v. United States*, 709 F.3d 798, 807 (9th Cir. 2013). The regulation does
26 not require CBP officers to determine whether a withdrawal was made voluntarily,
27 and it does not specify what CBP officers must do if a withdrawal was not. The
28 regulation thus “leaves [the agency] a great deal of discretion in deciding how to

1 achieve” its objective and, in turn, lacks “the clarity necessary to support judicial
2 action under § 706(1).” *SUWA*, 542 U.S. at 66; *see also San Luis Unit Food*
3 *Producers*, 709 F.3d at 803 (“Statutory goals that are ‘mandatory as to the object to
4 be achieved; but that leave the agency ‘with discretion in deciding how to achieve’
5 those goals are insufficient to support a ‘failure to act claim because such
6 discretionary actions are not ‘demanded by the law.’”).

7 Although Plaintiffs’ allegations may show that there are “[g]eneral deficiencies
8 in compliance,” *SUWA*, 542 U.S. at 66, there is nothing this Court can permissibly
9 compel from Defendants pursuant to with 8 C.F.R. § 235.4 to correct those
10 deficiencies. Accordingly, the Court dismisses Plaintiff A.D., B.D., and C.D.’s
11 Section 706(1) claims without prejudice *only insofar* as these Plaintiffs seek relief
12 pursuant to this regulation. This determination does not affect the Court’s conclusion
13 that these Plaintiffs have otherwise stated Section 706(1) claims regarding their
14 alleged denial of access to the asylum process in the United States.

15 **4. The Complaint Fails to State a Section 706(2) Claim** 16 **Regarding Defendants’ Alleged Policy**

17 The Complaint alleges that CBP officials have systematically prevented
18 asylum seekers arriving at POEs along the U.S.-Mexico border from accessing the
19 U.S. asylum process since summer 2016. (Compl. ¶¶ 1, 5, 37.) Plaintiffs allege that
20 this conduct has been documented “in hundreds of cases” at POEs along the border.
21 (*Id.* ¶¶ 37–38.) The bulk of Defendants’ motion to dismiss concerns whether
22 Plaintiffs have stated a Section 706(2) claim regarding an alleged “policy” of the
23 Defendants to deny asylum seekers who present themselves at POEs along the U.S.-
24 Mexico border access to the asylum process. (ECF No. 135-1 at 11–20.) Defendants
25 argue that “[w]hile the Complaint does not expressly seek judicial review of a final
26 agency action, it alleges that CBP has adopted an ‘officially sanctioned policy’[.]”
27 (*Id.* at 11 (citing Compl. ¶¶ 5, 154).) Defendants contend that “to the extent the Court
28 construes those references as a request for judicial review of an alleged unlawful

1 policy under the APA” pursuant to Section 706(2), the Court should dismiss that
2 request because: (1) Plaintiffs fail to identify an agency action and, even if Plaintiffs
3 have done so, (2) the Complaints fails to show a final agency action. (*Id.* at 12.)

4 Plaintiffs assert that “Defendants’ critique is misplaced” because “the review
5 of ‘final agency action’ . . . under [] § 706(2) is distinct from the analysis for APA
6 claims to compel agency action under § 706(1), and Plaintiffs brought the latter APA
7 claim.” (ECF No. 143 at 19.) Normally, the Court would construe Plaintiffs’
8 response as a concession that they do not press a Section 706(2) claim and would not
9 address the issue further. However, two points convince the Court that further
10 analysis warranted. For one, the Complaint expressly invokes Section 706(2) as a
11 basis for judicial review of Defendants’ alleged conduct. (Compl. ¶¶ 151–164.)
12 Plaintiffs’ requested injunctive relief in turn includes “prohibiting Defendants . . .
13 from engaging in the unlawful policies . . . described herein at POEs along the U.S.-
14 Mexico border.” (*Id.* at 52–53.) Therefore, contrary to Plaintiffs’ assertion, the
15 Complaint appears to include a Section 706(2) claim. Second, in opposing
16 Defendants’ motion, Plaintiffs assert that they “have alleged an illegal policy or
17 practice” because they “have pled sufficient facts . . . to support a reasonable inference
18 of liability” of the named Defendants. (ECF No. 143 at 21.) Plaintiffs’ assertion is
19 made *independently* of the APA’s basis for judicial review of agency action.
20 (*Contrast id.* at 19–20 (arguing that Section 706(1) APA claim is plausible) *with id.*
21 at 21–23 (arguing that Defendants’ policy is plausible).)

22 The Complaint and Plaintiffs’ assertions raise two issues. First, the Court must
23 consider whether Plaintiffs may seek review of Defendants’ alleged policy
24 independently of the APA. The Court concludes that they may not. Second, because
25 Plaintiffs must seek review of any alleged policy pursuant to Section 706(2), the Court
26 must consider whether the Plaintiffs have satisfied the APA’s requirements for
27 judicial review and, specifically, the final agency action requirement. The Court
28 concludes they have not.

1 **a. Judicial Review of Defendants’ Alleged Policy Must**
2 **Proceed Under the APA**

3 Plaintiffs assert that Defendants may be held liable for an alleged policy of
4 denying asylum seekers who present themselves at POEs along the U.S.-Mexico
5 border access to the U.S. asylum process. And they make that assertion by relying
6 solely on cases in which courts considered Section 1983 and *Bivens* challenges.
7 Neither Section 1983, nor *Bivens*, however, provides a basis for holding the
8 Defendants liable. Nor does either supply the appropriate legal framework for review
9 of Defendants’ alleged policy. Based on the pleadings, the APA supplies the
10 appropriate framework for judicial review of the alleged policy.

11 As a general matter, “[t]he APA governs the conduct of federal administrative
12 agencies,” *Aracely, R.*, —F. Supp. 3d—, 2018 WL 3243977, at *5, and it provides a
13 “default judicial review standard” for agency action, *Ninilchik Traditional Council*
14 *v. United States*, 227 F.3d 1186, 1194 (9th Cir. 2000). “While a right to judicial
15 review of agency action may be created by a separate statutory or constitutional
16 provision, once created it becomes subject to the judicial review provisions of the
17 APA unless specifically excluded.” *Webster v. Doe*, 486 U.S. 592, 607 n* (1988)
18 (Scalia, J., dissenting); *Ninilchik Traditional Council*, 227 F.3d at 1194 (citing
19 Scalia’s *Webster* dissent approvingly). In this case, the Complaint challenges agency
20 action pursuant to the APA. (Compl. ¶¶ 151–164.) Although the Complaint purports
21 to bring a separate claim for violation of the Plaintiffs’ “procedural due process rights
22 under the Fifth Amendment,” that claim expressly incorporates the alleged APA
23 violations. (*Id.* ¶¶ 166, 171.) Plaintiffs allege that “the INA and its implementing
24 regulations provide Class Plaintiffs the right to be processed at a POE and granted
25 access to the asylum process” and that “CBP officials have denied Class Plaintiffs
26 access to the asylum process and failed to comply with procedures set forth in the
27 INA and its implementing regulations.” (*Id.* ¶¶ 168, 169.) “Insofar as [Plaintiffs]
28 have such an entitlement” under the INA and its implementing regulations, Plaintiffs

1 “may obtain all the relief they request under the provisions of the APA.” *Graham v.*
2 *Fed. Emergency Mgmt. Agency*, 149 F.3d 997, 1001 n.2 (9th Cir. 1998). Obtaining
3 such relief from Defendants’ alleged policy of course requires Plaintiffs to satisfy the
4 APA’s judicial review requirements. *See Navajo Nation*, 876 F.3d at 1171 (“§ 704’s
5 requirement that to proceed under the APA, agency action must be final or otherwise
6 reviewable by statute is an independent element without which court may not
7 determine APA claims.”). Plaintiffs’ reliance on Section 1983 and *Bivens* case law
8 does not convince the Court otherwise.

9 Liability under Section 1983 is inapt in this case. The Complaint does not
10 invoke Section 1983 as a basis for holding the named Defendants liable. Even if it
11 did, liability would not lie against the Defendants. Defendants Nielsen, McAleenan,
12 and Owen are Federal Executive officers or officials sued in their official capacity for
13 their duties pursuant to federal law. (Compl. ¶¶ 25–27.) As Defendants recognize
14 (ECF No. 145 at 9–10), Section 1983’s plain terms do not provide a cause of action
15 against federal officers acting in their official capacity. *See* 42 U.S.C. § 1983; *see*
16 *also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854 (2017) (“[Section 1983] entitles an
17 injured person to money damages if a state official violates his or her constitutional
18 rights. Congress did not create an analogous statute for federal officials.”); *Pangacos*
19 *v. Towery*, 782 F. Supp. 2d 1983, 1189 (W.D. Wash. 2011) (“Federal officers are
20 exempt from the proscription of § 1983) (citing *District of Columbia v. Carter*, 409
21 U.S. 418, 424–25 (1973); *McCloskey v. Mueller*, 446 F.3d 262, 271 (1st Cir. 2006));
22 *Comm. for Immigrant Rights v. Cty. of Sonoma*, 644 F. Supp. 2d 1177, 1203 (N.D.
23 Cal. 2009) (“Federal officers acting under federal authority are immune from suit
24 under § 1983 unless the state or its agents significantly participated in the challenged
25 activity). Plaintiffs’ reliance on Section 1983 to assert that the Defendants may be
26 held liable is thus inappropriate. *See Morse v. North Coast Opportunities, Inc.*, 118
27 F.3d 1338, 1343 (9th Cir. 1997) (“Lest there be any continuing confusion, we take
28 this opportunity to remind the Bar that by its very terms, § 1983 precludes liability in

1 federal government actors.”).

2 Taking for granted that Section 1983 does not apply to federal officers,
3 Plaintiffs further assert that their “allegations of a policy or practice are analogous to
4 claims brought under *Monell*[.]” (ECF No. 143 at 21 n.7.) *Monell* permits a Section
5 1983 plaintiff to establish municipal liability for an alleged constitutional violation in
6 certain circumstances, including by showing that a municipal employee committed
7 an alleged constitutional violation pursuant to a formal government policy or a
8 longstanding practice or custom which constitutes the standard operating procedure
9 of the local governmental entity. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701,
10 737(1989); *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992). To the extent
11 Plaintiffs are arguing that an alleged policy is subject to judicial review because their
12 allegations could establish *Monell* liability, the Court rejects this argument. *Monell*
13 arose in the context of a statute that is fundamentally different from the APA. Most
14 relevant here are two limitations: (1) whereas the APA is limited to “agency action,”
15 Section 1983 reaches the conduct of “[e]very person” alleged to have violated federal
16 law, and (2) whereas the APA permits judicial review of only a “final agency action”
17 unless another statute makes the action reviewable, Section 1983 contains no identical
18 or analogous limitation on review. *Contrast* 5 U.S.C. §§ 702, 704 *with* 42 U.S.C. §
19 1983. Given these key differences, analogizing to Section 1983 liability is not
20 helpful.

21 The remaining cases cited by both parties involve *Bivens* actions against federal
22 officers sued in their individual capacity for alleged constitutional violations. (ECF
23 No. 135-1 at 11, 17; ECF No. 143 at 23.) In *Bivens*, the Supreme Court fashioned a
24 judicial cause of action for damages to redress constitutional violations committed by
25 a federal officer by treating such an action as one against the officer in his or her
26 individual capacity and thus not barred by sovereign immunity. *Bivens*, 403 U.S. 388,
27 409–10 (1971) (Harlan, J, concurring). By its nature, a *Bivens* suit is limited to
28 *damages* claims against a federal officer in his or her *individual capacity*. *See*

1 *Ministerio Roca Solida*, 820 F.3d at 1093–94; *see also Consejo de Desarrollo*
2 *Economico de Mexicali, A.C.*, 482 F.3d at 1173; *Vaccaro v. Dobre*, 81 F.3d 854, 857
3 (9th Cir. 1996) (a *Bivens* action “can be maintained against a defendant in his or her
4 individual action only, and not in his or her official capacity.”). A *Bivens* action “does
5 not encompass injunctive and declaratory relief where . . . the equitable relief requires
6 official government action.” *Ministerio Roca Solida*, 820 F.3d at 1093–94; *Consejo*
7 *de Desarrollo Economico de Mexicali, A.C.*, 482 F.3d at 1173. In such cases, “*Bivens*
8 is both inappropriate and unnecessary” in large part “because the Administrative
9 Procedure Act waives sovereign immunity for such claims” and thus provides a
10 mechanism for judicial review. *Ministerio Roca Solida*, 820 F.3d at 1095, 1096.

11 Much of the dispute between the parties regarding Plaintiffs’ policy allegations
12 concerns whether Defendants may be held liable for the alleged conduct of some CBP
13 officials along the U.S.-Mexico border, liability which requires some connection
14 between the conduct of those officials and the named Defendants in this case.
15 (*Compare* ECF No. 135-1 at 11, 17 *with* ECF No. 143 at 23.)¹⁴ This dispute
16 overlooks a key point: the *Bivens* framework for holding federal government officials
17 liable for alleged constitutional violations has no application in this case. This case is
18 far from a *Bivens* action in form and substance. The Complaint names the Defendants
19 in their official capacity and seeks declaratory and injunctive relief that undoubtedly
20 requires official government action. Thus, *Bivens* liability is not appropriate.

21
22 ¹⁴ For example, Defendants rely on *Perez v. United States*, 103 F. Supp. 3d
23 1180, 1200 (S.D. Cal. 2015), to argue that Plaintiffs have failed to allege “any factual
24 connection between the alleged misconduct of a handful of officers and a policy” of
25 the named Defendants and thus cannot show a “broadly sanctioned policy.” (ECF
26 No. 135-1 at 11, 17.) In contrast, Plaintiffs argue that the Complaint demonstrates an
27 alleged “high-level knowledge and acquiescence in the unlawful conduct,” of CBP
28 officials by the named Defendants for which the latter may be held liable. (ECF No.
143 at 23.) The assumption underlying each of these arguments is that *Bivens*
supervisory liability for the allegedly unconstitutional conduct of low-level officers is
applicable in this case. It is not.

1 With neither Section 1983, nor *Bivens* providing a framework applicable to
2 Defendants’ alleged policy, the Court affirms that the APA supplies the relevant
3 framework for considering Defendants’ alleged policy. *See Am. Fin. Benefits Ctr. v.*
4 *Fed. Trade Comm’n*, No. 17-04817, 2018 WL 3203391, at *5 (N.D. Cal. May 29,
5 2018) (analyzing plaintiffs’ claims under the APA because “although Plaintiffs assert
6 that the APA is inapplicable, they fail to identify any other basis for judicial review
7 or the exercise of this Court’s jurisdiction”).

8 **b. The Complaint Does Not Identify a Final Agency Policy**

9 The APA limits judicial review to agency action in the form of “the whole or
10 part of an agency rule, order, license, sanction, relief, or the equivalent or denial
11 thereof, or failure to act.” 5 U.S.C. § 551(13). An agency action must be “reviewable
12 by statute or a “final agency action for which there is no other adequate remedy[.]” 5
13 U.S.C. § 704. Two conditions must be satisfied for an agency action to be final: (1)
14 “the action must mark the consummation of the agency’s decisionmaking process—
15 it must not be of a merely tentative or interlocutory nature” and (2) “the action must
16 be one by which rights or obligations have been determined, or from which legal
17 consequences will flow.” *United States Army Corps of Engineers v. Hawkes Co.*, 136
18 S. Ct. 1807, 1813 (2016) (quoting *Bennett*, 520 U.S. at 177–78). Although the finality
19 requirement is “flexible” and must be applied in a “pragmatic way,” it is nevertheless
20 a requirement that a plaintiff seeking review of agency action must satisfy.¹⁵ *See*

21
22 ¹⁵ The Ninth Circuit has previously referred to the final agency action
23 requirement as a jurisdictional requirement. *See City of San Diego v. Whitman*, 242
24 F.3d 1097, 1102 (9th Cir. 2001). However, this view of the final agency requirement,
25 as applicable to courts in the Ninth Circuit, has been questioned. *See Pebble Ltd.*
26 *P’ship v. United States EPA*, 604 Fed. App’x 623, 625–26 (9th Cir. 2015) (Watford,
27 J., concurring) (“[I]n my view the D.C. Circuit has persuasively explained why our
28 court’s precedent on this point is wrong. As that court held in *Trudeau v. FTC*, 456
F.3d 178 (D.C. Cir. 2006), § 704 is not a jurisdiction-conferring statute.”). The
Navajo Nation panel at least suggested that Section 704’s finality requirement should
not be viewed as jurisdictional. *See Navajo Nation*, 876 F.3d at 1171 (“[Section]

1 *Oregon Natural Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006).

2 The Complaint contains a single allegation that Defendants have an “officially
3 sanctioned policy” of denying asylum seekers who present themselves at POEs along
4 the U.S.-Mexico border access to the U.S. asylum process. (Comp. ¶ 5.) The only
5 formulation of the alleged policy suggested by Plaintiffs is that CBP officials have a
6 categorical policy of denying asylum seekers who present themselves at POEs along
7 the U.S.-Mexico border access to the U.S. asylum system. (*Id.* ¶¶ 1–6.) A further
8 variant of this policy is one in which CBP officials deny access through tactics of
9 misrepresentations, harassment, coercion, threats, and physical violence. (*Id.* ¶¶ 95–
10 101, ECF No. 143 at 23.) But the Court cannot locate a single agency action reflecting
11 Defendants’ alleged policy, let alone one that is final.

12 Neither the Complaint, nor Plaintiffs’ opposition to the motion to dismiss
13 “refer[s] to a single . . . order or regulation” of the Defendants’ which constitutes or
14 reflects an agency policy applicable to all CBP officials at POEs along the U.S.-
15 Mexico border for the challenged conduct. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S.
16 871, 890 (1990) (rejecting plaintiffs’ challenge to the Bureau of Land Management’s
17 alleged “land withdrawal program” because there was no agency action on which to
18 base their challenge under the APA); *ONRC Action v. BLM*, 150 F.3d 1132, 1136 (9th
19 Cir. 1998) (rejecting APA claims because “this case presents a situation where there
20 is no identifiable agency order, regulation, policy or plan that may be subject to
21 challenge as a final agency action”).

22 Plaintiffs observe in opposition that a policy need not be in written form to
23 exist, thus suggesting that the Court should infer the existence of a policy even if the
24 Court cannot locate one reduced to writing. (ECF No. 143 at 21.) The Court readily
25 acknowledges that “agency action . . . need not be in writing to be final and judicially
26

27 704’s requirement that to proceed under the APA, agency action must be final or
28 otherwise reviewable by statute is an *independent element* without which courts may
not determine APA claims.”).

1 reviewable” pursuant to the APA. *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 184
2 (D.D.C. 2015). An unwritten policy can still satisfy the APA’s pragmatic final agency
3 action requirement. *See Venetian Casino Resort LLC v. EEOC*, 530 F.3d 925, 929
4 (D.C. Cir. 2008) (reviewing challenge to an agency’s “decision . . . to adopt [an
5 unwritten] policy of disclosing confidential information without notice” because such
6 a policy was “surely a consummation of the agency’s decisionmaking process” that
7 impacted the plaintiff’s rights); *R.I.L.-R*, 80 F. Supp. 3d at 174–176 (determining that
8 plaintiffs had shown a reviewable unwritten “DHS policy direct[ing] ICE officers to
9 consider deterrence of mass migration as a factor in their custody determinations” as
10 underlying the plaintiffs’ detention). “[A] contrary rule ‘would allow an agency to
11 shield its decisions from judicial review simply by refusing to put those decisions in
12 writing.’” *R.I.L.-R*, 80 F. Supp. at 184 (quoting *Grand Canyon Tr. v. Pub. Serv. Co.*
13 *of N.M.*, 283 F. Supp. 2d 1249, 1252 (D.N.M. 2003)); *see also Aracely R.*, —F. Supp.
14 3d—, 2018 WL 3243977, at *16 (“Despite Defendants’ assertions to the contrary,
15 agency action need not be in writing to be judicially reviewable as a final action.”).

16 Recent cases provide examples of challengeable unwritten agency policies in
17 the immigration context. For example, in *R.I.L.-R*, the plaintiffs challenged two
18 variants of an alleged DHS detention policy affecting Central American mothers
19 accompanied by minor children. In sustaining the “narrower formulation of the
20 relevant policy,” the court rejected the government’s APA finality argument that the
21 plaintiffs had failed to identify a regulation, policy memoranda, or any other
22 document memorializing the challenged policy. *R.I.L.-R*, 80 F. Supp. 3d at 174. The
23 court determined that the plaintiffs had shown the existence of a “DHS policy
24 direct[ing] ICE officers to consider deterrence of mass migration as a factor in their
25 custody determinations” through firsthand knowledge and data showing that “ICE has
26 been largely denying release to Central American mothers accompanied by minor
27 children since June 2014.” *Id.* These denials were “contrary to past practice” of DHS
28 and, while claiming there was no policy document, Defendants had “essentially

1 conceded that the recent surge in detention during a period of mass migration . . .
2 reflects a design to deter such migration.” *Id.* at 175. The plaintiffs in *Aracely, R. v.*
3 *Nielsen* challenged prolonged detention of asylum seekers who present themselves at
4 POEs. They alleged a “de facto immigration policy promulgated by high-level
5 officials in Washington D.C.,” which began in 2014 and was “re-emphasized . . . after
6 the 2016 Presidential election.” *Aracely, R.*, —F. Supp. 3d—, 2018 WL 3243977, at
7 *4. The alleged policy was “designed to serve as a deterrent to asylum seekers” by
8 “ordering local officials to heavily weight immigration deterrence in deciding parole
9 and similar forms of release.” *Id.* The plaintiffs pointed to data showing that the
10 parole release rate of the asylum seekers who crossed a U.S. POE was 80% in 2012,
11 but dropped to 47% in 2015. *Id.* The *Aracely* court found this sufficient to show a
12 final agency policy subject to APA review. *Id.* at *16.

13 To assess whether the Complaint shows an unwritten policy, the Court turns to
14 the Complaint’s pattern allegations. Plaintiffs rely on those allegations to defend the
15 existence of an alleged policy and argue that they “have pled sufficient facts to show
16 a widespread pattern or practice of denial of access to the asylum process[.]” (ECF
17 No. 143 at 21.) The Court, however, is not convinced that the Complaint’s disparate
18 “examples”—in Plaintiffs’ words—of conduct by CBP officials supports the
19 inference that there is an overarching policy. *See Pearl River Union Free Sch. Dist.*
20 *v. King*, 214 F. Supp. 3d 241 (S.D.N.Y. 2016) (“[T]his is not a case where a policy of
21 some kind was plainly adopted and illuminated, albeit imperfectly . . . rather, at best,
22 Plaintiff has alleged that Defendants took certain action with respect to it and asks the
23 Court to surmise therefrom the existence of a broader policy.”); *Bark v. U.S. Forest*
24 *Serv.*, 37 F. Supp. 3d 41, 50 (D.D.C. 2014) (“Plaintiffs appear to have attached a
25 ‘policy’ label to their own amorphous description of the [defendant government
26 agency’s] practices. But a final agency action requires more.”).

27 Unlike the unwritten policies challenged in *R.I.L.-R* and *Aracely*, the Complaint
28 does not plausibly show the existence of the unwritten policy the Plaintiffs ask this

1 Court to infer. As an initial matter, while the Complaint contains allegations about
2 the tactics employed by various CBP officials (Compl. ¶¶ 83–103), there are no
3 allegations connecting any of that conduct with an unwritten policy created by the
4 Defendants. In fact, Plaintiffs do not even allege that the Defendants were involved
5 in the development of any policy in this case. *Aracely, R.*, —F. Supp. 3d—, 2018
6 WL 3243977, at *4. The Complaint’s pattern allegations also fail to show a
7 categorical unwritten policy of the type Plaintiffs suggest. Even accepting the
8 Complaint’s references to documented instances of asylum seekers at POEs along the
9 U.S.-Mexico border who were denied access to the asylum process, the Complaint
10 expressly incorporates reports which show that many more asylum seekers were not
11 denied access.¹⁶ For example, the Complaint cites a 2017 report from Human Rights
12 First, which reports at least 125 occasions between December 2016 and March 2017
13 in which applicants for admission were denied access. (Compl. ¶ 38 n.27.)¹⁷ Yet, the
14 report also states that “CBP agents referred some 8,000 asylum seekers at [POEs]”
15 along the U.S-Mexico border to credible fear interviews during the same period. *See*
16 *Crossing the Line*, at 1. This information defeats the inference that a categorical
17 policy of the nature Plaintiffs intimate exists. *See R.I.L.-R*, 80 F. Supp. 3d at 174
18 (declining to find that “DHS adopted a categorical policy in June 2014 of denying

20 ¹⁶ Plaintiffs contend that “evidentiary arguments” regarding the existence of the
21 unwritten policy they allege are not appropriate at the pleading stage. (ECF No. 143
22 at 23 n.8.) Because the Complaint expressly incorporates various reports and articles
23 and provides the web links to them, the Court may consider these materials in full to
24 assess the sufficiency of the allegations in the Complaint. *See Knievel v. ESPN*, 393
25 F.3d 1068, 1076 (9th Cir. 2005) (courts may also consider “documents ‘whose
26 contents are alleged in a complaint and whose authenticity no party questions, but
27 which are not physically attached to the [plaintiff’s] pleading.’”).

26 ¹⁷ The Complaint provides the following source: B. Shaw Drake, *et al.*,
27 *Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers*, Human Rights
28 First, 16 (2017), <https://www.humanrightsfirst.org/sites/default/files/hrf-crossing-the-line-report.pdf> [*“Crossing the Line”*].

1 release to all asylum-seeking Central American families in order to deter further
2 immigration” given that “in some small number of cases” ICE granted bonds).

3 Both sides also dispute whether the Complaint shows the existence of an
4 unwritten policy based on the following allegation: “[o]n June 13, 2017, in
5 questioning before the House Appropriations Committee, the Executive Assistant
6 Commissioner for CBP’s OFO admitted that CBP officials were turning away asylum
7 applicants at POEs along the U.S.-Mexico border.” (Compl. ¶ 103.) However, the
8 Complaint does not incorporate any particular portion of the testimony of John
9 Wagner, Deputy Executive Assistant Commissioner for the Office of Field
10 Operations of CBP, and thus it is not clear that this information is properly reviewable
11 at the motion to dismiss stage. Even if it were, the Court does not find the testimony
12 sufficient to show the existence of the unwritten policy Plaintiffs allege. Insofar as
13 CBP is “working with Mexico to develop methods to control the flow of migrants
14 entering U.S. [POEs] at any given time” (ECF No. 135-1 at 16), that information does
15 not show the consummation of an agency decision-making process, let alone one that
16 applies to asylum seekers in the manner Plaintiffs allege. As for the “contingency
17 plans” for a future “surge of migrants,” (*id.*), it is unclear how a such a plan has any
18 application in this case because the Complaint does not allege that any Plaintiff was
19 turned away by CBP officials as part of a policy concerning migrant “surges.”

20 In the absence of allegations showing a final agency order, rule, regulation,
21 policy, or plan to deny asylum seekers who present themselves at POEs along the
22 U.S.-Mexico border—or allegations from which the Court could infer that one
23 exists—the Complaint fails to plead that Defendants have a policy this Court can
24 “hold unlawful and set aside.” 5 U.S.C. § 706(2). Because Plaintiffs may be able to
25 allege the existence of a policy, the Court dismisses without prejudice Plaintiffs’
26 Section 706(2) claim concerning an alleged policy. This conclusion does not affect
27 the sufficiency of Plaintiffs’ Section 706(1) claims. *See Bark v. U.S. Forest Serv.*, 37
28 F. Supp. 3d 41, 50–51 (D.D.C. 2014) (rejecting challenge to “a generalized, unwritten

1 administrative ‘policy,’” but permitting challenge to five challenged permits).

2 **IV. CONCLUSION & ORDER**

3 For the foregoing reasons, the Court **HEREBY ORDERS** that:

4 1. The Court **GRANTS IN PART** Defendants’ motion to dismiss and
5 **DISMISSES WITHOUT PREJUDICE:** (a) Plaintiffs A.D, B.D., and C.D.’s claims
6 under Section 706(1) only insofar as they have sought to compel agency action under
7 8 C.F.R § 235.4, and (b) all Plaintiffs’ claims under Section 706(2) regarding
8 Defendants’ alleged policy.


9 2. The Court **DENIES ON ALL OTHER GROUNDS** Defendants’
10 motion.

11 3. The Court Plaintiffs **GRANTS LEAVE TO AMEND** the pleadings
12 consistent with this Order. Plaintiffs may file a First Amended Complaint **no later**
13 **than September 15, 2018.**

14 4. If Plaintiffs do not file an amended complaint or request additional time
15 to do so by the foregoing date, Defendants shall file an Answer **no later than**
16 **September 24, 2018.**

17 **IT IS SO ORDERED.**

18 **DATED: August 20, 2018**


Hon. Cynthia Bashant
United States District Judge

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