

1 LATHAM & WATKINS LLP  
 2 Wayne S. Flick (CA Bar No. 149525)  
 3 *wayne.s.flick@lw.com*  
 4 Manuel A. Abascal (CA Bar No. 171301)  
 5 *manny.abascal@lw.com*  
 6 James H. Moon (CA Bar No. 268215)  
 7 *james.moon@lw.com*  
 8 Robin A. Kelley (CA Bar No. 287696)  
 9 *robin.kelley@lw.com*  
 10 355 South Grand Avenue, Suite 100  
 11 Los Angeles, California 90071-1560  
 12 Telephone: +1.213.485.1234  
 13 Facsimile: +1.213.891.8763

9 AMERICAN IMMIGRATION COUNCIL  
 10 Melissa Crow (DC Bar No. 453487)  
 11 *mcrow@immcouncil.org*  
 12 Karolina Walters (TX Bar No. 24083431)  
 13 *kwalters@immcouncil.org*  
 14 Aaron Reichlin-Melnick (NY Bar No.  
 15 5338652), *areichlin-*  
 16 *melnick@immcouncil.org*  
 17 1331 G Street, NW, Suite 200  
 18 Washington, DC 20005  
 19 Telephone: +1.202.507.7523  
 20 Facsimile: +1.202.742.5619

CENTER FOR CONSTITUTIONAL  
 RIGHTS  
 Baher Azmy (NY Bar No. 2860740)  
*bazmy@ccrjustice.org*  
 Ghita Schwarz (NY Bar No.  
 3030087), *gschwarz@ccrjustice.org*  
 Angelo Guisado (NY Bar No.  
 5182688), *aguisado@ccrjustice.org*  
 666 Broadway, 7th Floor  
 New York, NY 10012  
 Telephone: +1.212.614.6464  
 Facsimile: +1.212.614.6499

*Attorneys for Plaintiffs*

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

21 Al Otro Lado, Inc., *et al.*,  
 22 Plaintiffs,

v.

24 Kirstjen Nielsen, *et al.*,  
 25 Defendants.

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

**PLAINTIFFS' OPPOSITION TO  
 MOTION TO DISMISS**

Hearing Date: February 12, 2018

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

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

	<b><u>Page</u></b>
I. INTRODUCTION.....	1
II. FACTUAL BACKGROUND.....	4
A. Plaintiffs Have Alleged Systematic Wrongdoing by Defendants Along the U.S.-Mexico Border.....	4
B. Class Representatives Were Denied Access to the Asylum Process.....	5
C. Al Otro Lado Has Alleged Diversion of Its Resources and Frustration of Its Mission.....	8
D. Defendants Offered Partial Relief to the Class Representatives After the Filing of the Complaint .....	9
III. ARGUMENT .....	10
A. Class Representatives’ Claims Are Not Moot.....	10
1. B.D.’s Claims Are Not Moot Because She Did Not Accept Defendants’ Offer.....	11
2. The Claims of All Class Representatives Who Crossed Are Not Moot.....	11
3. Defendants Provided Only Partial Relief to Class Representatives.....	15
B. Al Otro Lado Has Standing to Bring Its Claims.....	15
C. Plaintiffs’ Claims Are Adequately Pled and Judicable.....	18
1. Plaintiffs Have Stated a Claim Under the APA. ....	19
2. Plaintiffs Have Alleged an Illegal Policy or Practice.....	21
3. This Court Has Jurisdiction to Grant Prospective Injunctive Relief. ....	24
IV. CONCLUSION .....	25

**TABLE OF AUTHORITIES**

**Page(s)**

**CASES**

1

2

3

4 *Armstrong v. Davis,*  
275 F.3d 849 (9th Cir. 2001) ..... 24

5

6 *Ashcroft v. Iqbal,*  
556 U.S. 662 (2009) ..... 19

7

8 *Bell Atl. Corp. v. Twombly,*  
550 U.S. 544 (2007) ..... 19

9

10 *Bell v. City of Boise,*  
709 F.3d 890 (9th Cir. 2013) ..... 12

11 *Biodiversity Legal Found. v. Badgley,*  
309 F.3d 1166 (9th Cir. 2002) ..... 3, 15

12

13 *Campbell-Ewald Co. v. Gomez,*  
136 S. Ct. 663 (2016) ..... 11

14

15 *Campos v. Nail,*  
43 F.3d 1285 (9th Cir. 1994) ..... 19

16 *Chen v. Allstate Ins. Co.,*  
819 F.3d 1136 (9th Cir. 2016) ..... 2, 11, 12, 13, 14

17

18 *City of Los Angeles v. Lyons,*  
461 U.S. 95 (1983) ..... 24, 25

19

20 *Cnty. of Riverside v. McLaughlin,*  
500 U.S. 44 (1991) ..... 12

21 *Comm. for Immigrants Rights v. Cnty. of Sonoma,*  
644 F. Supp. 2d 1177 (N.D. Cal. 2009) ..... 17

22

23 *Davis v. United States,*  
No. 16-6258, 2017 WL 1862506 (N.D. Cal. May 9, 2017) ..... 14

24

25 *Decker v. Nw. Envtl. Def. Ctr.,*  
133 S. Ct. 1326 (2013) ..... 10

26

27 *Diaz v. First Am. Home Buyers Prot. Corp.,*  
732 F.3d 948 (9th Cir. 2013) ..... 11

28 *Doe v. Trump,*  
No. 17-0178, 2017 WL 6551491 (W.D. Wash. Dec. 23, 2017) ..... 18

1 *El Rescate Legal Servs., Inc. v. EOIR*,  
 2 959 F.2d 742 (9th Cir. 1992)..... 16, 18

3 *Fair Hous. of Marin v. Combs*,  
 4 285 F.3d 899 (9th Cir. 2002)..... 3, 16, 17

5 *Garcia v. Johnson*,  
 6 No. 14-01775, 2014 WL 6657591 (N.D. Cal. Nov. 21, 2014) ..... 14, 15, 20, 25

7 *Haro v. Sebelius*,  
 8 729 F.3d 993 (9th Cir. 2013)..... 12

9 *Havens Realty Corp. v. Coleman*,  
 10 455 U.S. 363 (1982) ..... 3, 16

11 *Hughey v. Drummond*,  
 12 No. 14-00037, 2017 WL 590265 (E.D. Cal. Feb. 13, 2017)..... 22

13 *I.N.S. v. Legalization Assistance Project of L.A. Cty. Fed’n of Labor*,  
 14 510 U.S. 1301 (1993) ..... 17

15 *Karuk Tribe of Cal. v. U.S. Forest Serv.*,  
 16 681 F.3d 1006 (9th Cir. 2012)..... 2, 10

17 *Knox v. Serv. Emps. Int’l Union*,  
 18 132 S. Ct. 2277 (2012) ..... 10

19 *Leonard v. Clark*,  
 20 12 F.3d 885 (9th Cir. 1993)..... 10, 11

21 *Lexmark Int’l, Inc. v. Static Control Components, Inc.*,  
 22 134 S. Ct. 1377 (2014) ..... 18

23 *Long v. Cnty. of Los Angeles*,  
 24 442 F.3d 1178 (9th Cir. 2006)..... 21

25 *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*,  
 26 132 S. Ct. 2199 (2012) ..... 18

27 *Menotti v. City of Seattle*,  
 28 409 F.3d 1113 (9th Cir. 2005)..... 22

*Monell v. Dept. of Social Services of City of New York*,  
 436 U.S. 658 (1978) ..... 21

*Munyua v. United States*,  
 No. 03-04538, 2005 WL 43960 (N.D. Cal. Jan. 10, 2005) ..... 4

*Navarro v. Sherman*,  
 72 F.3d 712 (9th Cir. 1995)..... 21

1 *Nw. Env'tl. Def. Ctr. v. Bonneville Power Admin.*,  
 2 477 F.3d 668 (9th Cir. 2007)..... 19

3 *Orantes-Hernandez v. Thornburgh*,  
 4 919 F.2d 549 (9th Cir. 1990)..... 25

5 *Ortega-Melendres v. Arpaio*,  
 6 836 F. Supp. 2d 959 (D. Ariz. 2011)..... 22

7 *Oyenik v. Corizon Health, Inc.*,  
 8 696 F. App'x 792 (9th Cir. 2017)..... 22

9 *Perez v. United States*,  
 10 103 F. Supp. 3d 1180 (S.D. Cal. 2015) ..... 22

11 *Perez v. United States*,  
 12 No. 13-1417, 2014 WL 4385473 (S.D. Cal. Sept. 3, 2014)..... 22

13 *Pitts v. Terrible Herbst, Inc.*,  
 14 653 F.3d 1081 (9th Cir. 2011)..... 2, 10, 12, 13, 14, 25

15 *Redman v. County of San Diego*,  
 16 942 F.2d 1435 (9th Cir. 1991)..... 21

17 *Rivas v. Napolitano*,  
 18 714 F.3d 1108 (9th Cir. 2013)..... 20

19 *Rizzo v. Goode*,  
 20 423 U.S. 362 (1976) ..... 24

21 *Shah v. Cty. of Los Angeles*,  
 22 797 F.2d 743 (9th Cir. 1986)..... 21

23 *Sierra Club v. United States EPA*,  
 24 762 F.3d 971 (9th Cir. 2014)..... 10

25 *Sosna v. Iowa*,  
 26 419 U.S. 393 (1975) ..... 12

27 *U.S. Parole Comm'n v. Geraghty*,  
 28 445 U.S. 388 (1980) ..... 12

*United States v. Howard*,  
 480 F.3d 1005 (9th Cir. 2007)..... 13

*Unknown Parties v. Johnson*,  
 163 F. Supp. 3d 630 (D. Ariz. 2016)..... 14, 22

*Valle Del Sol Inc. v. Whiting*,  
 732 F.3d 1006 (9th Cir. 2013)..... 16

1 *Vietnam Veterans of Am. v. CIA*,  
 2 811 F.3d 1068 (9th Cir. 2016)..... 20  
 3 *Wade v. Kirkland*,  
 4 118 F.3d 667 (9th Cir. 1997)..... 14, 25  
 5 *Weisbuch v. Cnty. of Los Angeles*,  
 6 119 F.3d 778 (9th Cir. 1997)..... 19  
 7 *Williams v. Gerber Prod. Co.*,  
 8 552 F.3d 934 (9th Cir. 2008)..... 3, 19, 23

8 **STATUTES**

9 5 U.S.C. § 551(13)..... 20  
 10 5 U.S.C. § 702..... 20, 25  
 11 5 U.S.C. § 706(1)..... 19, 20, 21  
 12 5 U.S.C. § 706(2)..... 19  
 13 8 U.S.C. § 1158(a)(1)(B)(ii)–(iii)..... 15  
 14 8 U.S.C. § 1182(d)(5) ..... 4  
 15 8 U.S.C. § 1225(a)(1) ..... 20  
 16 8 U.S.C. § 1225(a)(1)(3)..... 20  
 17 8 U.S.C. § 1225(b)(1) ..... 4  
 18 8 U.S.C. § 1225(b)(1)(A)(ii)..... 20  
 19 8 U.S.C. § 1225(b)(2) ..... 4  
 20 8 U.S.C. § 1229..... 4  
 21 8 U.S.C. § 1229a..... 4  
 22

23 **RULES**

24 Fed. R. Civ. P. 12(b)(6) ..... 3, 18, 19  
 25

26 **REGULATIONS**

27 8 C.F.R. § 1225(b)(2)(A)..... 20  
 28 8 C.F.R. § 208.31(b)..... 21

1 8 C.F.R. § 212.5(b) ..... 4

2 8 C.F.R. § 235.3(b)(4) ..... 20

**CONSTITUTIONAL PROVISIONS**

3

4

5 U.S. Const., Article III..... 10, 18

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiff Al Otro Lado, Inc. (“Al Otro Lado”), a non-profit legal services  
3 organization, and individual plaintiffs Abigail Doe, Beatrice Doe, Carolina Doe,  
4 Dinora Doe, Ingrid Doe, and Jose Doe (collectively, “Class Representatives,” and  
5 with Al Otro Lado, “Plaintiffs”), acting for themselves and on behalf of all persons  
6 similarly situated, submit the following Opposition to the Motion to Dismiss  
7 (“Motion”) filed by Defendants Kristjen Nielsen, Secretary, U.S. Department of  
8 Homeland Security (“DHS”); Kevin K. McAleenan, Acting Commissioner, U.S.  
9 Customs and Border Protection (“CBP”); and Todd C. Owen, Executive Assistant  
10 Commissioner, Office of Field Operations, CBP (collectively, “Defendants”).

11 **I. INTRODUCTION**

12 This case concerns Defendants’ pattern and practice of denying asylum  
13 seekers their right to access the U.S. asylum system. Before filing suit, Class  
14 Representatives sought refuge at ports of entry (“POEs”) along the U.S.-Mexico  
15 border – after being beaten, raped or threatened with death in their home countries –  
16 only to be turned away by CBP. CBP used various tactics to prevent Class  
17 Representatives from applying for asylum, including falsely stating that asylum was  
18 no longer available in the U.S. after the election of President Trump, coercing them  
19 to sign forms withdrawing their applications, and threatening to return them to their  
20 home countries if they pressed for asylum.

21 Class Representatives’ experiences reflect a systematic and persistent  
22 practice by CBP that has unlawfully denied many other asylum seekers access to  
23 the U.S. asylum process. Notably, Defendants do not dispute that there are  
24 hundreds of documented cases of CBP officials refusing to allow class members to  
25 seek protection in the U.S. after they presented themselves at POEs and asserted  
26 their intention to apply for asylum or a fear of returning to their home countries.  
27 Indeed, CBP leadership testified before Congress about CBP’s plan to “control the  
28 flow of migrants entering U.S. [POEs] at any given time” in response to

1 questioning about the “significant number of reports of CBP officers at [POEs]  
2 turning away individuals attempting to claim credible fear.” (Mot. 16.) Instead,  
3 Defendants argue that (1) Class Representatives’ claims are moot because they  
4 were offered the opportunity to be preliminarily processed for admission *after* the  
5 Complaint was filed; (2) Al Otro Lado lacks statutory standing to bring its claims;  
6 and (3) Plaintiffs have failed to state a claim because their allegations of illegal  
7 conduct are not plausible. Each of these arguments fails as a matter of law.

8 *First*, as to mootness, Defendants have failed to satisfy their “heavy burden”  
9 to demonstrate that Plaintiffs lack any concrete interest in the outcome of this  
10 litigation. *See Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th  
11 Cir. 2012). Each of the five Class Representatives who crossed the border after  
12 this lawsuit was filed still has a cognizable legal interest in pursuing his or her  
13 class claims. Under binding Ninth Circuit authority, even if the named plaintiff in  
14 a putative class action were to receive “complete relief on [his] individual  
15 claims . . . before class certification,” the plaintiff “still would be entitled to seek  
16 certification.” *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1142 (9th Cir. 2016). In  
17 other words, Defendants cannot simply moot Class Representatives’ putative class  
18 claims by providing individual relief to Class Representatives after the filing of the  
19 Complaint. *See Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090 (9th Cir. 2011)  
20 (“[M]ooting the putative class representative’s claim will not moot the class  
21 action.”). This rule exists precisely for these circumstances – that is, where  
22 defendants seek to avoid classwide review of widespread and continuing illegal  
23 practices by providing relief to named plaintiffs prior to class certification.

24 Moreover, Defendants’ mootness arguments are flawed because Defendants  
25 have not provided full relief to *any* Class Representative, and thus each one retains  
26 a concrete interest in the litigation. Beatrice Doe has standing because she has not  
27 yet received any relief whatsoever, and her case is not moot merely because she  
28 was *offered* passage across the border. *See Chen*, 819 F.3d at 1138 (“a claim

1 becomes moot when a plaintiff *actually receives* complete relief on that claim, not  
2 merely when that relief is offered or tendered”). In addition, each of the remaining  
3 five Class Representatives who crossed the border after this lawsuit was filed still  
4 has a legal interest in this action because he or she is also seeking declaratory  
5 relief. *See Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1174–75 (9th Cir.  
6 2002) (a “district court ha[s] a duty to decide the merits of [a] declaratory  
7 judgment claim even [when] the request for an injunction ha[s] become moot”).  
8 Three of these individuals also have a cognizable legal interest because they were  
9 coerced by CBP officers to make false statements which Defendants could attempt  
10 to use against them in their asylum proceedings or otherwise.

11 *Second*, Defendants’ argument that Al Otro Lado lacks standing to bring its  
12 claims neglects well-established Supreme Court and Ninth Circuit law holding that  
13 organizational plaintiffs may bring claims for relief separate and apart from the  
14 injuries suffered by their members when they show “a personal stake in the  
15 outcome of the controversy.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363,  
16 378–79 (1982). Specifically, an organization must show that, due to the  
17 complained-of actions, it suffered “a drain on its resources from both a diversion of  
18 its resources and a frustration of its mission.” *Fair Hous. of Marin v. Combs*, 285  
19 F.3d 899, 905 (9th Cir. 2002). Al Otro Lado has adequately alleged both “a  
20 diversion of its resources and a frustration of its mission” due to Defendants’  
21 unlawful practices, and thus has standing to bring its claims.

22 *Third*, Defendants’ arguments based on Rule 12(b)(6) fail because Plaintiffs  
23 have adequately alleged each of their claims, and their allegations must be  
24 accepted as true at the pleading stage. *See Williams v. Gerber Prod. Co.*, 552 F.3d  
25 934, 937 (9th Cir. 2008). Contrary to Defendants’ assertions, Plaintiffs have  
26 adequately alleged Defendants’ policy and practice of illegally denying individuals  
27 access to the asylum process, and the likelihood of repetition in the future. The  
28 Complaint includes detailed allegations regarding hundreds of individuals whom

1 CBP barred from seeking asylum; references statements made by CBP officers that  
 2 support and corroborate the allegations of a policy or practice; and cites numerous  
 3 published media and non-governmental organization reports of this conduct during  
 4 the relevant period, of which Defendants no doubt were aware. Further, it cites  
 5 administrative complaints made to the DHS Office of Inspector General (“OIG”)  
 6 and Office for Civil Rights and Civil Liberties (“CRCL”), and an ongoing OIG  
 7 investigation regarding this conduct, and alleges that the conduct nevertheless  
 8 continues. Accepting these allegations as true, the claims are adequately alleged.

## 9 **II. FACTUAL BACKGROUND**

### 10 **A. Plaintiffs Have Alleged Systematic Wrongdoing by Defendants** 11 **Along the U.S.-Mexico Border**

12 Since at least 2016, CBP officials have systematically prevented asylum  
 13 seekers arriving at POEs along the U.S.-Mexico border from accessing the U.S.  
 14 asylum process.<sup>1</sup> (Compl. ¶ 37.) Plaintiffs, as well as numerous non-governmental  
 15 organizations and news outlets, have documented well over 100 cases in which  
 16 CBP officials have failed to comply with U.S. and international law and arbitrarily  
 17 denied access to the asylum process to asylum seekers presenting themselves at  
 18 POEs along the U.S.-Mexico border. (*Id.* ¶ 38.)

19 CBP officials have carried out this practice through misrepresentations,  
 20 threats and intimidation, verbal and physical abuse, and coercion. (Compl. ¶ 84;  
 21 *see id.* ¶¶ 85–103.) For example, CBP officials have turned away asylum seekers  
 22

---

23 <sup>1</sup> The duty of CBP officials to provide such individuals access to the asylum  
 24 process “is not discretionary.” *Munyua v. United States*, No. 03-04538, 2005 WL  
 25 43960, at \*6 (N.D. Cal. Jan. 10, 2005). CBP officers who encounter an asylum  
 26 seeker at a POE may either issue a Notice to Appear, allowing the individual to  
 27 pursue asylum in removal proceedings, *see* 8 U.S.C. §§ 1225(b)(2), 1229, 1229a;  
 28 or refer the individual for a credible fear interview with an Asylum Officer. *See id.*  
 § 1225(b)(1). Alternatively, a CBP official may exercise discretionary authority to  
 grant humanitarian parole, allowing the asylum seeker to affirmatively apply for  
 asylum after entry. *See id.* § 1182(d)(5); 8 C.F.R. § 212.5(b).

1 after falsely informing them that the U.S. is no longer providing asylum, that  
2 President Trump signed a new law ending asylum, that a law providing asylum to  
3 Central Americans ended, that Mexicans are not eligible for asylum, and that the  
4 U.S. is no longer accepting mothers with children. (*Id.* ¶ 85.) CBP officials have  
5 also pressured and intimidated asylum seekers by threatening to take their children  
6 away from them if they did not renounce their asylum claims and leave the POE,  
7 deport asylum seekers if they persisted in their claims, and turn asylum seekers  
8 over to the Mexican government if they did not leave the POE. (*Id.* ¶ 87.) CBP  
9 officials have even resorted to verbal and physical abuse, including holding a gun  
10 to an asylum seeker’s back and forcing her out of the POE, grabbing an asylum  
11 seeker’s six-year-old daughter’s arm and throwing her to the ground, and yelling  
12 profanities at an asylum-seeking mother and her son. (*Id.* ¶ 90.)

13 The prevalence and persistence of CBP’s illegal practices have been  
14 documented by non-governmental organizations and other experts working in the  
15 U.S.-Mexico border region. (Compl. ¶ 95.) The Complaint details the extensive  
16 reports on CBP’s illegal conduct at the border by Human Rights First, Amnesty  
17 International, Women’s Refugee Commission, the Dilley Pro Bono Project in  
18 Texas, and Al Otro Lado. (*Id.* ¶¶ 96–101.) These reports detail the repeated  
19 misrepresentations, harassment, coercion, threats and physical violence that asylum  
20 seekers faced at the hands of CBP officials along the U.S.-Mexico border. (*Id.*)  
21 Further, there is an ongoing investigation regarding Defendants’ practices in  
22 response to an administrative complaint submitted to the DHS CRCL and OIG, the  
23 results of which have not yet been announced. (*See id.* ¶ 102.)

24 **B. Class Representatives Were Denied Access to the Asylum Process**

25 Each of the Class Representatives has been significantly impacted by CBP’s  
26 illegal practices. Plaintiff **Abigail Doe** (“A.D.”), a citizen of Mexico, and her two  
27 young children were targeted and threatened with death or severe harm in Mexico  
28 by a large drug cartel that had previously targeted her husband, leaving her certain

1 she would not be protected by local officials. (Compl. ¶ 19.) When she fled to the  
2 San Ysidro POE with her children to seek asylum, CBP officials coerced her into  
3 signing a form withdrawing her application for admission to the U.S., falsely  
4 stating that she did not have a fear of returning to Mexico. (*Id.*) A.D. and her  
5 children were then forced to return to Mexico. (*Id.*; *see also id.* ¶¶ 39–45.)  
6 Although Defendants assert that A.D. was processed as an applicant for admission  
7 shortly after Plaintiffs filed the Complaint and threatened to seek a TRO (*see* Mot.,  
8 Ex. A (ECF No. 135–2)), A.D.’s coerced statement remains in CBP’s custody, and  
9 the government may use it against her in the future. (*See* Compl. ¶¶ 42–43).

10 Plaintiff **Beatrice Doe** (“B.D.”) is a citizen of Mexico and mother of three  
11 children under age sixteen. (Compl. ¶ 20.) B.D. and her family were targeted and  
12 threatened with death or severe harm in Mexico by a dangerous drug cartel, and she  
13 was subjected to severe domestic violence. (*Id.*) B.D. and her family fled to POEs  
14 to seek asylum, once at Otay Mesa and twice at San Ysidro. (*Id.*) CBP officials  
15 coerced B.D. into recanting by signing a form withdrawing her application for  
16 admission to the U.S., falsely stating that she and her children have no fear of  
17 returning to Mexico. (*Id.*) As a result of Defendants’ conduct, B.D. and her children  
18 were unable to access the asylum process and were forced to return to Tijuana. (*Id.*;  
19 *see also id.* ¶¶ 46–54.) B.D.’s coerced statement remains in CBP’s custody, and the  
20 government may use it against her in the future. (*See id.* ¶¶ 50–51).

21 Plaintiff **Carolina Doe** (“C.D.”) is a citizen of Mexico and mother of three.  
22 (Compl. ¶ 21.) Her brother-in-law was kidnapped and dismembered by a drug  
23 cartel in Mexico and, after the murder, her family was targeted and threatened with  
24 death or severe harm. (*Id.*) In fear for her life, she fled with her children to the  
25 San Ysidro POE, seeking asylum. (*Id.*) CBP officials coerced her into recanting  
26 her fear on video and signing a form withdrawing her application for admission to  
27 the U.S., falsely stating that she did not have a fear of returning to Mexico. (*Id.*)  
28 As a result of Defendants’ conduct, C.D. and her children were unable to access

1 the asylum process and were forced to return to Tijuana. (*Id.*; *see also id.* ¶¶ 55–  
2 60.) Although Defendants assert that C.D. was processed as an applicant for  
3 admission shortly after Plaintiffs filed the Complaint and threatened to seek a TRO  
4 (*see* Mot., Ex. A), C.D.’s coerced statement remains in CBP’s custody, and the  
5 government may use it against her in the future. (*See* Compl. ¶¶ 56–58).

6 Plaintiff **Dinora Doe** (“D.D.”) is a citizen of Honduras and mother to an  
7 eighteen-year-old daughter. (Compl. ¶ 22.) D.D. and her daughter were targeted,  
8 threatened with death or severe harm, and repeatedly raped by MS-13 gang  
9 members. (*Id.*) On three occasions, they fled to the Otay Mesa POE seeking  
10 asylum. (*Id.*) Each time D.D. presented herself at the POE, CBP officials  
11 misinformed her about her rights under U.S. law and denied her the opportunity to  
12 access the asylum process. (*Id.*) As a result of Defendants’ conduct, D.D. and her  
13 daughter were forced to return to Tijuana. (*Id.*; *see also id.* ¶¶ 61–69.)

14 Plaintiff **Ingrid Doe** (“I.D.”), a citizen of Honduras, is a mother of three.  
15 (Compl. ¶ 23.) Her mother and three siblings were murdered by 18th Street gang  
16 members in Honduras. (*Id.*) After the murders, 18th Street gang members  
17 threatened to kill I.D., and she and her children were subject to severe domestic  
18 violence. (*Id.*) They fled to the Otay Mesa POE and the San Ysidro POE, seeking  
19 asylum. (*Id.*) CBP officials misinformed I.D. about her rights under U.S. law and  
20 denied her the opportunity to access the asylum process. (*Id.*) As a result of  
21 Defendants’ conduct, I.D. and her children were forced to return to Tijuana. (*Id.*;  
22 *see also id.* ¶¶ 70–77.)

23 Plaintiff **Jose Doe** (“J.D.”) is a citizen of Honduras who was brutally  
24 attacked by 18th Street gang members. (Compl. ¶ 24.) The 18th Street gang also  
25 murdered several of his family members and threatened to kidnap and harm J.D.’s  
26 two daughters. (*Id.*) J.D. fled Honduras and arrived in Nuevo Laredo, Mexico,  
27 where he was accosted by gang members. (*Id.*) J.D. presented himself at the  
28 Laredo, Texas POE the next day and expressed his fear of returning to Honduras

1 and his desire to seek asylum in the U.S. (*Id.*) CBP officials misinformed J.D.  
2 about his rights under U.S. law and denied him the opportunity to access the  
3 asylum process. (*Id.*) As a result of Defendants' conduct, J.D. was forced to  
4 return to Nuevo Laredo where he again was approached by gang members. (*Id.*)  
5 He then fled to Monterrey, Mexico. (*Id.*; *see also id.* ¶¶ 78–82.)

6 **C. Al Otro Lado Has Alleged Diversion of Its Resources and**  
7 **Frustration of Its Mission**

8 Plaintiff Al Otro Lado is a legal services organization serving indigent  
9 deportees, migrants, refugees, and their families. (Compl. ¶ 12; Decl. of Erika  
10 Pinheiro, ECF No. 90–1 (“Pinheiro Decl.”) ¶ 2.) Its mission is to coordinate and to  
11 provide screening and legal representation for individuals in asylum and other  
12 immigration proceedings, to seek redress for civil rights violations, and to provide  
13 assistance with other legal and social service needs. (Compl. ¶ 12; Pinheiro Decl.  
14 ¶ 2.)

15 Defendants' conduct has forced Al Otro Lado to divert significant resources  
16 away from its core operational mission to counteract CBP's illegal practice of  
17 turning away asylum seekers at POEs, thereby frustrating its organizational  
18 purpose. (Compl. ¶¶ 12–18; Pinheiro Decl. ¶¶ 2–8.) Specifically, Al Otro Lado  
19 has altered its previously used large-scale clinic model in favor of individualized  
20 services to effectively respond to Defendants' illegal practices, and has spent  
21 significant time and resources providing individual assistance and advocating that  
22 Defendants cease their illegal tactics at POEs. (Compl. ¶¶ 12–15; Pinheiro Decl.  
23 ¶ 3.) This work has diverted Al Otro Lado's time and resources from its numerous  
24 other client-related services programs, and its operations in Los Angeles. (Compl.  
25 ¶¶ 16–17; Pinheiro Decl. ¶¶ 6–7.) Because Al Otro Lado was compelled to divert  
26 resources from its core operational mission in order to address CBP's unlawful  
27 conduct, its organizational goals have been compromised. (Compl. ¶ 18; Pinheiro  
28 Decl. ¶ 8.)

1           **D. Defendants Offered Partial Relief to the Class Representatives**  
2           **After the Filing of the Complaint**

3           Plaintiffs filed the Complaint on July 12, 2017. (ECF No. 1.) Plaintiffs seek  
4           declaratory and injunctive relief for Defendants’ violations of (1) the asylum  
5           provisions of the Immigration and Nationality Act (“INA”); (2) the Administrative  
6           Procedure Act (“APA”); (3) procedural due process under the Due Process Clause;  
7           and (4) the duty of *non-refoulement* under international law. (Compl. ¶¶ 139–85.)

8           The same day that the Complaint was filed, Plaintiffs’ counsel contacted the  
9           U.S. Attorney’s Office to explain the precariousness of Plaintiffs’ situation, the  
10          temporary nature of their shelter in Tijuana, and the danger they continued to face  
11          absent immediate *ex parte* injunctive relief. (Decl. of Manuel A. Abascal, ECF  
12          No. 67–1 (“Abascal Decl.”) ¶ 2, Ex. A.) By 5:00 a.m. on July 14, Plaintiffs’  
13          counsel reached Defendants’ attorneys by phone and explained the lawsuit and  
14          need for an *ex parte* application. (*Id.* ¶ 6.) Plaintiffs’ counsel then followed up  
15          with an email that included a copy of the Complaint and the draft *ex parte*  
16          application, which Plaintiffs’ counsel stated would be filed later that day. (*Id.*) By  
17          6:48 p.m., the parties reached an agreement to allow Class Representatives and  
18          their children to present themselves at POEs and to access the asylum system  
19          without the need for a TRO. (*Id.* ¶ 7, Ex. B.)

20          Defendants filed a motion to dismiss in the prior court in the Central District  
21          of California on October 12, 2017. (ECF No. 58.) This first motion to dismiss was  
22          substantially similar to the instant Motion, and the prior court dismissed the motion  
23          to dismiss without prejudice when it transferred this case to the Southern District  
24          on November 21, 2017. (ECF No. 113.) With their renewed Motion, Defendants  
25          submitted evidence showing that some of the Class Representatives crossed the  
26          border and were processed as applicants for admission pursuant to Defendants’  
27          proposal. (*See Mot.*, Ex. A.)

28

1 **III. ARGUMENT**

2 **A. Class Representatives' Claims Are Not Moot.**

3 Defendants argue that Plaintiffs' claims are moot because, shortly after filing  
4 their Complaint, five of the Class Representatives accepted Defendants' offer to be  
5 processed as applicants for admission to the U.S. (Mot. 6–7.)

6 “The doctrine of mootness, which is embedded in Article III’s case or  
7 controversy requirement, requires that an actual, ongoing controversy exist at all  
8 stages of federal court proceedings.” *Pitts*, 653 F.3d at 1086. “Although the  
9 Supreme Court has described mootness as a constitutional impediment to the  
10 exercise of Article III jurisdiction, the Court has applied the doctrine flexibly,  
11 particularly where the issues remain alive, even if ‘the plaintiff’s personal stake in  
12 the outcome has become moot.’” *Id.* at 1087. The moving party bears a “heavy  
13 burden” of demonstrating mootness. *Karuk*, 681 F.3d at 1017. A case becomes  
14 moot only when an intervening circumstance deprives the plaintiff of a personal  
15 stake in the outcome of the suit and it becomes “impossible for a court to grant any  
16 effectual relief whatsoever to the prevailing party.” *Decker v. Nw. Env’tl. Def. Ctr.*,  
17 133 S. Ct. 1326, 1335 (2013). “[A]s long as the parties have a concrete interest,  
18 however small, in the outcome of the litigation, the case is not moot.” *Knox v.*  
19 *Serv. Emps. Int’l Union*, 132 S. Ct. 2277, 2287 (2012).

20 Under the controlling legal standard, Defendants have failed to meet their  
21 heavy burden to prove the mootness of any of Plaintiffs' claims. Notably, “only  
22 one [plaintiff] must establish standing to enable review.” *Sierra Club v. United*  
23 *States EPA*, 762 F.3d 971, 976 (9th Cir. 2014). “[O]nce the court determines that  
24 one of the plaintiffs has standing, it need not decide the standing of the others.”  
25 *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993). Here, *each* Class  
26 Representative has standing.

27

28

1                   **1.     B.D.’s Claims Are Not Moot Because She Did Not Accept**  
 2                   **Defendants’ Offer.**

3                   Defendants argue that B.D.’s claims are moot because, although she did not  
 4 accept Defendants’ offer of coordinated processing as an applicant for admission,  
 5 she *could* return and be processed at a POE in the future. (Mot. 7.) Defendants are  
 6 mistaken. “[A]n unaccepted [ ] offer that would have fully satisfied a plaintiff’s  
 7 claim does not render that claim moot.” *Diaz v. First Am. Home Buyers Prot.*  
 8 *Corp.*, 732 F.3d 948, 954–55 (9th Cir. 2013). “A case becomes moot [ ] ‘only  
 9 when it is impossible for a court to grant any effectual relief what-ever to the  
 10 prevailing party.’” *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016).

11                   B.D. remains outside the U.S., has not received any of the relief she is  
 12 seeking and remains entitled to relief notwithstanding Defendants’ offer of  
 13 passage. *See Chen*, 819 F.3d at 1138 (“a claim becomes moot when a plaintiff  
 14 *actually receives* complete relief on that claim, not merely when that relief is  
 15 offered or tendered”). Defendants have failed to show that B.D.’s claims are moot,  
 16 and the Court may properly consider the class claims regardless of the standing of  
 17 the other proposed Class Representatives. *See Leonard*, 12 F.3d at 888.

18                   **2.     The Claims of All Class Representatives Who Crossed Are**  
 19                   **Not Moot.**

20                   Defendants argue that the claims of the five Plaintiffs who crossed the U.S.-  
 21 Mexico border after this lawsuit was filed are now moot because they received all  
 22 the relief to which they were entitled. (Mot. 6.) This argument fails based on the  
 23 “inherently transitory” exception to mootness. Specifically, the Ninth Circuit has  
 24 explicitly held that even if the named plaintiff in a putative class action were to  
 25 receive “complete relief on [his] individual claims for damages and injunctive  
 26 relief before class certification,” the plaintiff “still would be entitled to seek  
 27 certification.” *Chen*, 819 F.3d at 1142. This exception is grounded in a class  
 28 representative’s continuing interest in pursuing a Rule 23 class action, which the

1 Supreme Court has repeatedly recognized. *See Cnty. of Riverside v. McLaughlin*,  
 2 500 U.S. 44, 51–52 (1991); *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 404  
 3 (1980); *Sosna v. Iowa*, 419 U.S. 393, 399–402 (1975).

4 The exception applies when the named plaintiff’s individual interests  
 5 become moot before a court order granting a timely filed motion for class  
 6 certification. Specifically, the exception allows class claims to relate back to the  
 7 filing of the complaint when they “are so inherently transitory that the trial court  
 8 will not have even enough time to rule on a motion for class certification before the  
 9 proposed representative’s individual interest expires.” *Pitts*, 653 F.3d at 1090.  
 10 Based on this well-recognized legal principle, the Ninth Circuit has repeatedly  
 11 applied this exception to preserve class plaintiffs’ claims. *See Haro v. Sebelius*,  
 12 729 F.3d 993, 1003 (9th Cir. 2013) (although plaintiff’s “individual interest in  
 13 injunctive relief expired” about a month after the complaint was filed, because “the  
 14 district court could not have been expected to rule on a motion for class  
 15 certification in that period,” the “expiration of Haro’s personal stake in injunctive  
 16 relief did not moot the [putative class members’] claim for injunctive relief”);  
 17 *Chen*, 819 F.3d at 1147 (“[W]hen a defendant consents to judgment affording  
 18 complete relief on a named plaintiff’s individual claims before certification, but  
 19 fails to offer complete relief on the plaintiff’s class claims, a court should not enter  
 20 judgment on the individual claims, over the plaintiff’s objection, before the  
 21 plaintiff has had a fair opportunity to move for class certification.”).<sup>2</sup>

22 \_\_\_\_\_  
 23 <sup>2</sup> This exception is consistent with the well-established principle that a  
 24 defendant’s “voluntary cessation of challenged conduct does not ordinarily render  
 25 a case moot because a dismissal for mootness would permit a resumption of the  
 26 challenged conduct as soon as the case is dismissed.” *See Bell v. City of Boise*, 709  
 27 F.3d 890, 898 (9th Cir. 2013). When a party abandons a challenged practice  
 28 freely, the case will be moot only “if subsequent events made it absolutely clear  
 that the allegedly wrongful behavior could not reasonably be expected to recur.”  
*Id.* The party asserting mootness has the “heavy burden” of making such a  
 showing, and “[t]his heavy burden applies to a government entity that voluntarily  
 ceases allegedly illegal conduct.” *Id.* at 898–99.

1 This exception exists to prevent defendants from mooting viable class claims  
2 by agreeing to provide complete relief to the individual named plaintiffs. For  
3 instance, in *Pitts*, the defendants attempted to moot the named plaintiffs’ claims by  
4 offering them all the monetary relief to which they would have been entitled in a  
5 putative class action. 653 F.3d at 1090–91. The Ninth Circuit held that the  
6 “inherently transitory” exception applies not just to situations involving claims that  
7 are inherently transitory by their nature, but also to situations where defendants  
8 seek to “buy off” the individual claims of the named plaintiffs by offering the relief  
9 to which the named plaintiffs would be entitled before they file a motion for class  
10 certification. *Id.* at 1091. The principles articulated in *Pitts* were recently  
11 reaffirmed by the Ninth Circuit as consistent with the policies underlying class  
12 actions. *See Chen*, 819 F.3d at 1148 (“[O]ffers to provide full relief to the  
13 representative plaintiffs who wish to pursue a class action must be treated  
14 specially, lest defendants find an easy way to defeat class relief.”). Any contrary  
15 rule would result in a multiplicity of actions or denial of relief for viable class  
16 claims based on a defendant’s litigation tactics.

17 Defendants devote only one paragraph to this central issue and argue that  
18 “[t]his is not a case in which Defendants have ‘bought off’ individual claimants in  
19 order to avoid class certification.” (Mot. 9.)<sup>3</sup> As explained above, the exception  
20 cannot be construed so narrowly; the same rule applies when a plaintiff receives  
21 complete injunctive, as opposed to monetary, relief prior to class certification. *See*  
22

---

23 <sup>3</sup> Defendants also argue that the Class Representatives’ claims do not qualify  
24 for the “capable of repetition” yet “evading review” exception to mootness. (Mot.  
25 at 8–9.) This is merely the broader principle behind the “inherently transitory”  
26 exception discussed above: the Class Representatives’ claims are inherently  
27 transitory, thus evading review, and are actionable because they are capable of  
28 repetition, particularly when considering the members of the class as a whole. *See*  
*United States v. Howard*, 480 F.3d 1005, 1009 (9th Cir. 2007) (“under the capable  
of repetition, yet evading review doctrine, the termination of a class  
representative’s claim does not moot the claims of other class members”).

1 *Chen*, 819 F.3d at 1138 (providing complete relief on claim for injunctive relief  
2 does not preclude named plaintiff’s ability to seek class certification under *Pitts*).  
3 In fact, courts in the Ninth Circuit have consistently applied the “inherently  
4 transitory” exception in cases in which injunctive and/or declaratory relief is  
5 sought. *See, e.g., Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997); *Unknown*  
6 *Parties v. Johnson*, 163 F. Supp. 3d 630, 641–42 (D. Ariz. 2016); *Garcia v.*  
7 *Johnson*, No. 14-01775, 2014 WL 6657591, at \*11 (N.D. Cal. Nov. 21, 2014).

8 And contrary to Defendants’ assertions, they did *in fact* attempt to buy off or  
9 pick off Class Representatives based on their participation in this suit in a manner  
10 indistinguishable from *Pitts* and its progeny. *See Davis v. United States*, No. 16-  
11 6258, 2017 WL 1862506, at \*2 (N.D. Cal. May 9, 2017) (holding that defendants  
12 “picked off” named plaintiffs under *Pitts* because the relief was provided “after the  
13 complaint was filed” and because “the Court ha[d] no confidence that it would  
14 have done so absent [plaintiff’s] status as a named plaintiff in this case”).  
15 Specifically, Defendants offered to process Class Representatives at POEs only  
16 *after* the Complaint was filed and as part of an effort by Defendants to moot or to  
17 avoid the anticipated TRO filing, which was necessitated by the danger the Class  
18 Representatives faced in their temporary shelters in Tijuana as they attempted to  
19 flee persecution. (*See Abascal Decl.* ¶ 7, Ex. B.) Defendants’ offer came after  
20 repeated denials of access to the asylum process prior to the litigation. (*See*  
21 *Compl.* ¶¶ 39–82.) Because Defendants offered to satisfy Plaintiffs’ individual  
22 claims for injunctive relief within days of the filing of the Complaint, there was no  
23 time for Plaintiffs to file a class certification motion or for the Court to rule on it.

24 Finally, Defendants argue that Plaintiffs do not qualify for this exception  
25 because a “low percentage rate of improper processing” means that they do not  
26 have a “‘reasonable expectation’ that [they would] confront the same controversy  
27 again.” (Mot. 8.) Defendants simply ignore the fact that individual Plaintiffs were  
28 denied access to the asylum process multiple times (*Compl.* ¶¶ 20, 22–23), and that

1 Plaintiffs’ interests in representing the class continue “even if there is no indication  
2 that they may again be subject to the acts that gave rise to their claims.” *Garcia*,  
3 2014 WL 6657591, at \*11.

4 **3. Defendants Provided Only Partial Relief to Class**  
5 **Representatives.**

6 Each of the remaining five Class Representatives who crossed the border  
7 after this lawsuit was filed still has a legal interest in this action because he or she  
8 is also seeking declaratory relief. In the Ninth Circuit, a “district court ha[s] a duty  
9 to decide the merits of [a] declaratory judgment claim even [when] the request for  
10 an injunction ha[s] become moot.” *Biodiversity Legal*, 309 F.3d at 1174–75.

11 Additionally, Class Representatives continue to be harmed by Defendants’  
12 initial denial of access to the asylum process. CBP officials coerced Class  
13 Representatives A.D., B.D. and C.D. into signing and recording false statements  
14 that they did not fear returning to their home countries. (*See* Compl. ¶¶ 42–43, 50–  
15 51, 56–58.) These Class Representatives’ coerced statements remain in CBP’s  
16 custody, and the government could attempt to use them to prejudice Class  
17 Representatives in the future, in their asylum proceedings or otherwise. *See* 8  
18 U.S.C. § 1158(a)(1)(B)(ii)–(iii) (asylum seekers bear burden of proof on  
19 establishing credibility, and judges may consider consistency of statements to  
20 determine credibility). The illegal procurement of coerced statements has caused  
21 these Class Representatives to suffer ongoing harm that could not be remedied by  
22 safe passage, and they therefore retain an ongoing, live interest in this case.

23 **B. Al Otro Lado Has Standing to Bring Its Claims.**

24 Defendants argue that Al Otro Lado lacks standing because Plaintiffs have  
25 not pointed to a specific statutory provision that provides Al Otro Lado standing to  
26  
27  
28

1 sue.<sup>4</sup> (Mot. 10–11.) However, well-established Supreme Court and Ninth Circuit  
 2 precedent provides that an organizational plaintiff like Al Otro Lado may bring  
 3 claims based on its own injuries separate and apart from the injuries suffered by its  
 4 members, as long as the organization can also show its “personal stake in the  
 5 outcome of the controversy.” *Havens*, 455 U.S. at 378–79. An organization has  
 6 standing to bring claims for injuries caused by practices which “perceptibly  
 7 impair[]” its ability to provide assistance to those people the organization serves,  
 8 along “with the consequent drain on the organization’s resources.” *Id.* at 379.

9 The Ninth Circuit has applied this standard to assess organizational standing,  
 10 holding that an organization may bring a claim when it suffers “a drain on its  
 11 resources from both a diversion of its resources and a frustration of its mission.”  
 12 *Fair Hous. of Marin*, 285 F.3d at 905. Immigration-focused nonprofits have  
 13 repeatedly been found to have organizational standing when challenging practices  
 14 that frustrate their mission to provide services to their clientele. *See Valle Del Sol*  
 15 *Inc. v. Whiting*, 732 F.3d 1006, 1018–19 (9th Cir. 2013) (organizational plaintiffs  
 16 established standing by alleging that their “core activities involve[d] the  
 17 transportation and/or provision of shelter to unauthorized aliens,” and they  
 18 “diverted their resources to address their constituents’ concerns”); *El Rescate*  
 19 *Legal Servs., Inc. v. EOIR*, 959 F.2d 742, 748 (9th Cir. 1992) (organizational  
 20 plaintiff that provided assistance to refugees in their efforts to obtain asylum  
 21 established standing by alleging that a “policy frustrate[d] the[ir] goals and  
 22 require[d] the organizations to expend resources in representing clients they  
 23 otherwise would spend in other ways”); *see also Comm. for Immigrants Rights v.*

---

24 <sup>4</sup> Defendants note the prior court’s reference to Al Otro Lado’s standing in its  
 25 order transferring the case. (Mot. 10 n.4 (citing ECF No. 113).) The court’s lone  
 26 reference to Al Otro Lado as being “(with questionable standing)” was in the  
 27 context of deciding the motion to transfer venue. The prior court did not rule on or  
 28 even discuss the merits of Al Otro Lado’s standing. Indeed, the court received no  
 briefing on this topic because Defendants did not address Al Otro Lado’s standing  
 in their prior motion to dismiss. (*See* ECF No. 58.)

1 *Cnty. of Sonoma*, 644 F. Supp. 2d 1177, 1185, 1195 (N.D. Cal. 2009) (immigrant  
2 rights organization established standing by alleging that it “had to expend time and  
3 resources engaging in a campaign to end the challenged practices at issue”).

4 Al Otro Lado’s allegations are sufficient to confer organizational standing in  
5 the Ninth Circuit. Al Otro Lado alleged that it has suffered “a drain on its  
6 resources from both a diversion of its resources and a frustration of its mission”  
7 because it has been forced to respond to Defendants’ illegal practices. *See Fair*  
8 *Hous. of Marin*, 285 F.3d at 905. Specifically, it has diverted significant resources  
9 away from its other programs related to its core mission and altered its methods of  
10 providing services in order to effectively respond to Defendants’ illegal actions.  
11 (See Compl. ¶¶ 12–18; Pinheiro Decl. ¶¶ 2–8.) It previously provided “large-scale,  
12 mass-advisal legal clinics” for asylum seekers, but Defendants’ practices have  
13 forced it to devote significant resources to directly responding to Defendants’  
14 unlawful practices at POEs, by “transition[ing] to an individualized representation  
15 model where attorneys are required to work with asylum seekers one-on-one and  
16 provide direct representation.” (Compl. ¶¶ 13–14; Pinheiro Decl. ¶¶ 3–4.) This  
17 has resulted in a diversion of resources and has prevented it from pursuing multiple  
18 other programs core to its mission, such as programs related to financial literacy,  
19 education, mental health, and opioid recovery, among others. (Compl. ¶ 16;  
20 Pinheiro Decl. ¶ 6.).

21 Defendants cite two non-precedential cases to argue that Al Otro Lado lacks  
22 standing because its claims do not fall within the “zone of interests” that the INA  
23 was intended to protect.<sup>5</sup> (Mot. 10.) The zone of interests test asks whether a  
24 plaintiff bringing a statutory cause of action is asserting interests which are  
25

---

26 <sup>5</sup> Defendants cite *I.N.S. v. Legalization Assistance Project of L.A. Cty. Fed’n*  
27 *of Labor*, 510 U.S. 1301, 1304 (1993), which is not a binding Supreme Court  
28 opinion; it is an application for a stay submitted to Justice Sandra Day O’Connor  
wherein she sat as Circuit Justice and speculated on the outcome.

1 “arguably within the zone of interests” protected by the law invoked. *Match-E-Be-*  
2 *Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210  
3 (2012). It is a matter of statutory interpretation, not a requirement of constitutional  
4 standing under Article III. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*,  
5 134 S. Ct. 1377, 1388, 1388 n.3 (2014).

6 Al Otro Lado brings claims under the APA to compel agency action  
7 pursuant to the INA, and the zone of interest test in the APA context “is not  
8 ‘especially demanding.’” *Id.* at 1389. The Supreme Court “conspicuously  
9 included the word ‘arguably’ in the test to indicate that the benefit of any doubt  
10 goes to the plaintiff,” and has held “that the test forecloses suit only when a  
11 plaintiff’s interests are so marginally related to or inconsistent with the purposes  
12 implicit in the statute that it cannot reasonably be assumed that Congress  
13 authorized that plaintiff to sue.” *Id.* (internal quotation marks omitted).

14 Al Otro Lado readily meets this test: part of its core mission is to coordinate  
15 and provide screening and legal representation for individuals seeking asylum  
16 under the INA (Compl. ¶ 12; Pinheiro Decl. ¶¶ 2–3), which sets forth a specific  
17 process to pursue such relief. Its mission of assisting asylum seekers falls squarely  
18 within the zone of interests of the INA. *See Doe v. Trump*, No. 17-0178, 2017 WL  
19 6551491, at \*11 (W.D. Wash. Dec. 23, 2017) (organizational plaintiffs fell within  
20 the zone of interest of the INA and Refugee Act due to their mission of assisting  
21 refugees); *El Rescate*, 959 F.2d at 745, 748 (organization with mission of assisting  
22 Central American refugees in obtaining asylum had standing to bring challenge  
23 under the INA for violation of refugees’ statutory rights).

24 **C. Plaintiffs’ Claims Are Adequately Pled and Judicable.**

25 Defendants next argue that Plaintiffs’ claims should be dismissed under Rule  
26 12(b)(6) for failure to state a claim because, they assert, there are insufficient  
27 allegations to (1) support an APA claim, (2) show that Defendants have adopted a  
28 policy or practice of denying access to the asylum process, and (3) support the

1 conclusion that Defendants will continue to deny asylum seekers access to the  
2 asylum process.<sup>6</sup> (Mot. 11.)

3 Fundamentally, Defendants ignore that, in considering a Rule 12(b)(6)  
4 motion to dismiss, courts must accept the allegations of the complaint as true and  
5 construe the pleading “in the light most favorable to the plaintiff.” *Williams*, 552  
6 F.3d at 937. The complaint need only contain “a short and plain statement of the  
7 claim showing that [the plaintiff] is entitled to relief,” *Bell Atl. Corp. v. Twombly*,  
8 550 U.S. 544, 555 (2007), and “sufficient factual matter, accepted as true, to ‘state  
9 a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
10 (2009). This plausibility standard “is not akin to a probability requirement,” *id.*;  
11 “weighing [of evidence] is inappropriate . . . at the dismissal stage.” *Weisbuch v.*  
12 *Cnty. of Los Angeles*, 119 F.3d 778, 785 (9th Cir. 1997).

13 **1. Plaintiffs Have Stated a Claim Under the APA.**

14 Defendants argue that Plaintiffs did not state an APA claim because they did  
15 not identify any “final agency action.” (Mot. at 11–12.) Defendants’ critique is  
16 misplaced; the review of “final agency action” for APA claims brought under 5  
17 U.S.C. § 706(2) is distinct from the analysis for APA claims to compel agency  
18 action under § 706(1), and Plaintiffs brought the latter APA claim. *See Nw. Env’tl.*  
19 *Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 681 n.10 (9th Cir. 2007).

20 The APA authorizes suits by “[a] person suffering legal wrong because of  
21 agency action, or adversely affected or aggrieved by agency action within the

---

22  
23 <sup>6</sup> Defendants also argue that Plaintiffs’ claims should be dismissed because  
24 there is no “per se ‘pattern or practice’ claim because Congress has not created  
25 such a private right of action.” (Mot. 21.) Nowhere in the Complaint do Plaintiffs  
26 attempt to bring a so-called “pattern or practice” claim as an independent cause of  
27 action. That Plaintiffs may challenge a pattern or practice of violations under the  
28 INA, the APA, and the Constitution is without question. *See Campos v. Nail*, 43  
F.3d 1285, 1291 (9th Cir. 1994) (“[A] statutory or regulatory violation [under the  
INA] can support a ‘pattern or practice’ case as well as a constitutional  
violation.”); *id.* at 1288 (“[The] statutory right to apply for asylum . . . may be  
violated by a pattern or practice that forecloses the opportunity to apply.”).

1 meaning of a relevant statute.” 5 U.S.C. § 702. Agency action includes a “failure  
 2 to act,” *id.* § 551(13), and the APA provides that a “reviewing court shall . . .  
 3 compel agency action unlawfully withheld or unreasonably delayed.” *Id.* § 706(1).  
 4 “A court can compel agency action under [the APA] only if there is ‘a specific,  
 5 unequivocal command’ placed on the agency to take a ‘discrete agency action,’  
 6 and the agency has failed to take that action.” *Vietnam Veterans of Am. v. CIA*,  
 7 811 F.3d 1068, 1075 (9th Cir. 2016); *see id.* at 1079 (holding that plaintiffs could  
 8 bring a claim against the Army to compel agency action when the Army failed to  
 9 provide a warning required by Army regulations); *Rivas v. Napolitano*, 714 F.3d  
 10 1108, 1111 (9th Cir. 2013) (compelling government to reconsider a plaintiff’s  
 11 denied visa application when federal regulations required such reconsideration).

12 Defendants expressly agree with Plaintiffs that the law *requires* them to take  
 13 several actions with respect to the asylum process. (Mot. 19–20.) Specifically,  
 14 Defendants state: “the law requires inspection of all applicants for admission”; “the  
 15 law requires” asylum officers to conduct credible fear interviews when a  
 16 noncitizen “indicates either an intention to apply for asylum . . . or a fear of  
 17 persecution”; and “the law requires” that a noncitizen’s “decision to withdraw his  
 18 or her application for admission [ ] be voluntary.” (*Id.* (citing 8 U.S.C.  
 19 §§ 1225(a)(1), 1225(a)(1)(3), 1225(b)(1)(A)(ii); 8 C.F.R. §§ 235.3(b)(4),  
 20 1225(b)(2)(A)). Thus, there is no dispute that Defendants are *legally required* to  
 21 take these specific, discrete agency actions. The controversy between the parties  
 22 concerns whether Defendants failed to take these legally required actions.  
 23 Plaintiffs alleged that Defendants did not (*see* Compl. ¶ 153), and that is sufficient  
 24 to state a claim to compel agency action unlawfully withheld or unreasonably  
 25 delayed under the APA. *See Vietnam Veterans of Am.*, 811 F.3d at 1075; *Garcia*,  
 26 2014 WL 6657591 at \*5, \*11 (granting plaintiffs’ APA claim under 5 U.S.C.  
 27 § 706(1) by directing U.S. Citizenship and Immigration Services to conduct  
 28

1 reasonable fear determinations for asylum seekers under 8 C.F.R. § 208.31(b)  
 2 when such determinations were unreasonably delayed).

3 **2. Plaintiffs Have Alleged an Illegal Policy or Practice.**

4 Defendants argue that Plaintiffs have not stated sufficient facts to allege that  
 5 Defendants adopted a policy or practice of refusing entry to asylum seekers. (Mot.  
 6 13–18.) Defendants essentially ask the Court to adjudicate the merits of this suit  
 7 by arguing that (1) the alleged conduct – which they notably do not deny – reflects  
 8 only isolated incidents and not an official policy, and (2) the percentage of actual  
 9 denials is low and, thus, CBP follows the law most of the time. Contrary to the  
 10 government’s assumption, Plaintiffs need not show a formal, written policy;  
 11 Plaintiffs have pled sufficient facts to show a widespread pattern and practice of  
 12 denial of access to the asylum process to support a reasonable inference of liability.

13 A policy, practice or custom need not be explicitly written. *See Redman v.*  
 14 *County of San Diego*, 942 F.2d 1435, 1445 (9th Cir. 1991).<sup>7</sup> Rather, Plaintiffs may  
 15 show a policy where they plausibly allege widespread practices or evidence of  
 16 repeated constitutional violations. *See Navarro v. Sherman*, 72 F.3d 712, 714–15,  
 17 715 n.3 (9th Cir. 1995) (liability can be based upon “widespread abuses or  
 18 practices that cannot be affirmatively attributed to the decisions or ratification of  
 19 an official policy-maker ‘but are so pervasive as to have the force of law’”).  
 20 Defendants’ argument that the frequency with which its officers engaged in  
 21 unconstitutional conduct is not sufficiently “widespread” distorts the legal

---

22  
 23 <sup>7</sup> Plaintiffs’ allegations of a policy or practice are analogous to claims brought  
 24 under *Monell v. Dept. of Social Services of City of New York*, in which a local  
 25 government “may be sued for constitutional deprivations visited pursuant to  
 26 governmental ‘custom’ even though such a custom has not received formal  
 27 approval through the government’s official decision-making channels.” 436 U.S.  
 28 658, 690–91 (1978). In such cases, a policy “can be one of action or inaction,”  
*Long v. Cnty. of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006), and allegations  
 of official misconduct are sufficient even when based on “a bare allegation that the  
 individual officers’ conduct conformed to official policy, custom, or practice.”  
*Shah v. Cty. of Los Angeles*, 797 F.2d 743, 747 (9th Cir. 1986).

1 landscape. Indeed, courts within the Ninth Circuit have repeatedly found the  
2 existence of an unwritten policy to “have the force of law” where Plaintiffs alleged  
3 as few as a handful of instances of misconduct. *See, e.g., Oyenik v. Corizon*  
4 *Health, Inc.*, 696 F. App’x 792, 794 (9th Cir. 2017); *Menotti v. City of Seattle*, 409  
5 F.3d 1113, 1147–48 (9th Cir. 2005); *Hughey v. Drummond*, No. 14-00037, 2017  
6 WL 590265, at \*4–5 (E.D. Cal. Feb. 13, 2017); *Johnson*, 163 F. Supp. 3d at 639–  
7 40; *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 986–87 (D. Ariz. 2011).

8 Defendants twice assert that in *Perez v. United States*, 103 F. Supp. 3d 1180  
9 (S.D. Cal. 2015), “plaintiffs failed to allege sufficient facts to state a claim that  
10 CBP had a ‘policy’ where Defendants acted in concert with the alleged policy only  
11 10% of the time,” and thus argue that Plaintiffs’ allegations of hundreds of  
12 instances of illegal activity are insufficient to establish the existence of policy.  
13 (Mot. 14–15, 18.) Defendants mischaracterize *Perez*. In that case, plaintiffs  
14 brought a *Bivens* action seeking *damages* against high-level officials, arguing that  
15 they had sufficient personal knowledge to be liable for an alleged “Rocking  
16 Policy.” 103 F. Supp. 3d at 1187, 1200–02. The court held that plaintiffs did not  
17 adequately plead that certain defendants had personal knowledge of the policy  
18 under plaintiffs’ burden to overcome defendants’ qualified immunity for damages.  
19 *Id.* at 1206. However, the court had previously held that, as to the Border Patrol  
20 Chief, plaintiffs *had* pled sufficient facts to state a claim for relief. *Perez v. United*  
21 *States*, No. 13-1417, 2014 WL 4385473, at \*11 (S.D. Cal. Sept. 3, 2014); *see*  
22 *Perez*, 103 F. Supp. at 1211–12 (denying qualified immunity). Far from  
23 undermining Plaintiffs’ claims, *Perez* shows that Plaintiffs have more than  
24 sufficiently pled the existence of a policy or practice by CBP officers. Indeed, the  
25 *Perez* court found that a *single* article, incorporated by reference in the complaint,  
26 “reporting that ‘Border Patrol agents will be allowed to continue using deadly  
27 force against rock-throwers,’” combined with the allegations in the complaint, “set  
28

1 forth facts to permit the inference that the alleged Rocking Policy existed for the  
2 entirety of [the Border Patrol Chief’s] tenure.” *Perez*, 2014 WL 4385473 at \*11.

3 By comparison, Plaintiffs’ Complaint incorporates by reference multiple  
4 reports, articles, and administrative complaints, detailing hundreds of examples of  
5 asylum denials in support of their claims for injunctive and declaratory relief.  
6 (Compl. ¶¶ 95–101.) These reports detail the misrepresentations, harassment,  
7 coercion, threats and physical violence that asylum seekers such as Class  
8 Representatives have repeatedly faced. (*See id.*) Defendants’ attempts to ignore  
9 these allegations and point to alternative interpretations of the facts alleged, are  
10 simply not appropriate in connection with a motion to dismiss.

11 Furthermore, Defendants also concede Congressional testimony by John  
12 Wagner about CBP’s plan to “control the flow of migrants entering U.S. ports of  
13 entry at any given time,” which he gave in response to questioning about the  
14 “significant number of reports of CBP officers at [POEs] turning away individuals  
15 attempting to claim credible fear.” (Mot. 16.) While Defendants argue that  
16 alternative inferences and conclusions should be drawn from this testimony, for  
17 purposes of this Motion, the Court must construe the Complaint in the light most  
18 favorable to Plaintiffs and resolve all doubts in Plaintiffs’ favor. *See Williams*, 552  
19 F.3d at 937. This admission from a high-level official that CBP worked to limit  
20 the number of migrants entering POEs supports Plaintiffs’ allegations of a pattern  
21 or practice of denying asylum seekers at POEs access to the asylum process and  
22 high-level knowledge and acquiescence in the unlawful conduct.<sup>8</sup>

23 \_\_\_\_\_  
24 <sup>8</sup> Defendants’ factual contention that the admittedly “hundreds” of instances  
25 where CBP officers failed to process asylum seekers are insufficient because they  
26 referred some 8,000 people for asylum processing—as well as Defendants’  
27 mathematical calculations about the percentage of turnaways relative to others  
28 allowed to access the asylum process—are evidentiary arguments that are  
inappropriate at this stage. (*See Mot.* 13–14.) Furthermore, not only would it be  
improper to assess the validity of these factual assertions at this juncture, but it is  
unclear how Defendants can possibly make these claims when they admit that they

1                   **3.     This Court Has Jurisdiction to Grant Prospective**  
 2                   **Injunctive Relief.**

3                   Defendants attack Plaintiffs’ allegations that Defendants will continue to  
 4 deny asylum seekers access to the asylum process as “too speculative to create a  
 5 live case or controversy.” (Mot. 22.) However, in a class action, a court may  
 6 make specific factual findings (once properly presented with evidence) on “the  
 7 threat of future harm to the plaintiff class,” and when such findings “establish[ ]  
 8 that the named plaintiffs (or some subset thereof sufficient to confer standing on  
 9 the class as a whole) are personally subject to that harm, ‘the possibility of  
 10 recurring injury ceases to be speculative’ and standing is appropriate.” *Armstrong*  
 11 *v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001). The class can establish a pattern of  
 12 officially sanctioned behavior where the injury suffered by the plaintiffs is repeated  
 13 and similar to the rest of the class. *Id.* at 864. Plaintiffs here have sufficiently  
 14 alleged that Defendants’ practices are repeated, widespread and were inflicted  
 15 similarly on Class Representatives and the class members they seek to represent.

16                   The cases Defendants cite to support their claim that allegations of future  
 17 injury are “too speculative” are readily distinguishable. *See Rizzo v. Goode*, 423  
 18 U.S. 362, 371 (1976) (*after* the case proceeded past the pleading stage and “the  
 19 facts developed,” the Court held that there was insufficient evidence of an unlawful  
 20 policy that would lead to future harm); *City of Los Angeles v. Lyons*, 461 U.S. 95,  
 21 108 (1983) (Lyons lacked standing to pursue prospective relief against the City’s  
 22 use of “chokeholds” by police officers because it was too speculative to assume  
 23 that Lyons himself would again be choked by a Los Angeles police officer).

24  
 25  
 26 have not yet fully investigated the matter themselves. There is an ongoing  
 27 investigation into Defendants’ practices in response to an administrative complaint  
 28 made to the DHS OIG and CRCL. (*See* Compl. ¶ 102.) Defendants do not explain  
 how they reached their asserted “factual” conclusions when the agency that is  
 investigating these very issues has not yet reached its own conclusion.

1 Crucially, the “inherently transitory” exception did not apply in those cases,  
 2 as it does here. Plaintiffs’ class claims may continue, even if their “individual  
 3 interest[s] expire[,],” because this Court has not yet had the opportunity to rule on  
 4 Plaintiffs’ forthcoming motion for class certification. *See Pitts*, 653 F.3d at 1090.<sup>9</sup>  
 5 As explained above, the unlikelihood of repetition of the unlawful conduct against  
 6 Class Representatives does not moot their request for classwide relief. *See Wade*,  
 7 118 F.3d at 670 (“If the district court finds the claims are indeed ‘inherently  
 8 transitory,’ then the action qualifies for an exception to mootness even if there is  
 9 no indication that [class representatives] may again be subject to the acts that gave  
 10 rise to the claims.”); *Garcia*, 2014 WL 6657591, at \*11 (“class representatives . . .  
 11 qualify for an exception to the mootness doctrine . . . even if there is no indication  
 12 that they may again be subject to the acts that gave rise to their claims.”).<sup>10</sup>

#### 13 **IV. CONCLUSION**

14 For the foregoing reasons, Defendants’ Motion should be denied in its  
 15 entirety. If necessary, Plaintiffs respectfully request leave to amend the Complaint.

16 Dated: January 29, 2018

LATHAM & WATKINS LLP

17 By /s/ Manuel A. Abascal

18 Manuel A. Abascal

19 *Attorneys for Plaintiffs*

20 \_\_\_\_\_  
 21 <sup>9</sup> In their final footnote, Defendants state that *Lyons* precludes Plaintiff from  
 22 obtaining the injunctive relief they seek, because it “too closely involves the Court  
 23 in CBP’s operational procedures.” (Mot. at 25 n.11.) However, the Ninth Circuit  
 24 explicitly recognized “that the prudential limitations circumscribing federal court  
 25 intervention in state law enforcement matters involved in *Lyons*” are  
 26 “inapplicable” in cases involving injunctions against federal immigration officials  
 27 because the federal courts have an “important role . . . in constraining misconduct  
 28 by federal agents.” *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th  
 Cir. 1990).

<sup>10</sup> Defendants devote three sentences in the Motion to a vague sovereign  
 immunity defense. (Mot. 1, 11 n.5, 21.) However, the APA eliminates the defense  
 of sovereign immunity in cases seeking non-monetary relief against federal  
 officials. 5 U.S.C. § 702.

1 LATHAM & WATKINS LLP  
 2 Wayne S. Flick (CA Bar No. 149525)  
 3 *wayne.s.flick@lw.com*  
 4 Manuel A. Abascal (CA Bar No. 171301)  
 5 *manny.abascal@lw.com*  
 6 James H. Moon (CA Bar No. 268215)  
 7 *james.moon@lw.com*  
 8 Robin A. Kelley (CA Bar No. 287696)  
 9 *robin.kelley@lw.com*  
 10 355 South Grand Avenue, Suite 100  
 11 Los Angeles, California 90071-1560  
 12 Telephone: +1.213.485.1234  
 13 Facsimile: +1.213.891.8763

9 AMERICAN IMMIGRATION COUNCIL  
 10 Melissa Crow (D.C. Bar No. 453487,  
 11 *pro hac vice* pending)  
 12 *mcrow@immcouncil.org*  
 13 Karolina Walters (Texas Bar No.  
 14 24083431, *pro hac vice* pending)  
 15 *kwalters@immcouncil.org*  
 16 Aaron Reichlin-Melnick (N.Y. Bar No.  
 17 24081150, *pro hac vice* pending)  
 18 *AREichlin-Melnick@immcouncil.org*  
 19 1331 G Street, NW, Suite 200  
 20 Washington, DC 20005  
 21 Telephone: +1.202.507.7520  
 22 Facsimile: +1.202.742.5619

Attorneys for Plaintiffs

CENTER FOR CONSTITUTIONAL RIGHTS  
 Baher Azmy (N.Y. Bar No. 2860740, *pro hac vice* pending)  
*bazmy@ccrjustice.org*  
 Ghita Schwarz (N.Y. Bar No. 3030087, *pro hac vice* pending)  
*gschwarz@ccrjustice.org*  
 Angelo Guisado (N.Y. Bar No. 5182688, *pro hac vice* pending)  
*aguisado@ccrjustice.org*  
 666 Broadway, 7th Floor  
 New York, NY 10012  
 Telephone: +1.212.614.6464  
 Facsimile: +1.212.614.6499

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

21 Al Otro Lado, Inc., *et al.*,  
 22 Plaintiffs,

23 v.

24 Kirstjen Nielsen, *et al.*,  
 25 Defendants.

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

**CERTIFICATE OF SERVICE**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I certify that on January 29, 2018, I filed the document listed below with the Clerk of the Court for the United States District Court, Southern District of California by using the Court’s CM/ECF system, and also served counsel of record via this Court’s CM/ECF system.

**PLAINTIFFS’ OPPOSITION TO MOTION TO DISMISS**

DATED: January 29, 2018

LATHAM & WATKINS LLP

By: /s/ Manuel A. Abascal  
Manuel A. Abascal  
Attorneys for Plaintiffs