UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

AL OTRO LADO, INC.; ABIGAIL DOE, BEATRICE DOE, CAROLINA DOE, DINORA DOE, INGRID DOE, ROBERTO DOE, MARIA DOE, JUAN DOE, VICTORIA DOE, BIANCA DOE, EMILIANA DOE, AND CÉSAR DOE, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

ALEJANDRO MAYORKAS, Secretary, U.S. Department of Homeland Security, in his official capacity; TROY A. MILLER, Acting Commissioner, U.S. Customs and Border Protection, in his official capacity; WILLIAM A. FERRERA, Executive Assistant Commissioner, Office of Field Operations, U.S. Customs and Border Protection, in his official capacity,

Defendants.[1]

Case No. 17-cv-02366-BAS-KSCJUDGMENT (ECF No. 563); AND

(3) **REQUIRING SUPPLEMENTAL BRIEFING**

This action challenges the lawfulness of the Government's practice of systematically denying asylum seekers access to the asylum process at ports of entry ("POEs") along the U.S.-Mexico border. Plaintiffs allege that in violation of existing statutory, constitutional, and international law, Customs and Border Protection ("CBP") officers do not inspect

[1] Because all Defendants are sued in their official capacities, the successors for these public offices are automatically substituted as Defendants per Fed. R. Civ. P. 25(d).

asylum seekers when they arrive at POEs and refer them for asylum interviews but instead turn them back to Mexico on the basis that the ports are "at capacity[.]"[2,3] (Second Am. Compl. ("SAC") ¶ 13, ECF No. 189.)

Now before the Court are the parties' respective summary judgment motions. (Pls.' Mot. for Summ. J. ("Pls.' MSJ"), ECF No. 535; Defs.' Cross-Mot. for Summ. J. and Opp'n to Pls.' Mot. for Summ. J. ("Defs.' MSJ"), ECF No. 563.) For the reasons stated below, the Court **GRANTS IN PA 7 Tw -2RT.3 (o) 7 Tw -2ND DE2.9(N Tw [illegible]**

¶ 8.) These POEs are overseen by four regional field offices: San Diego, Tucson, El Paso, and Laredo. (JSUF ¶ 7.)

B. First Use of Metering in 2016

Before metering was implemented in 2016, iTc 0 Tw 9Q5t(2016, n,m (21)9 0 g 12g2f

asylum seekers because of the "local humanitarian crisis" developing in border towns. (JSUF ¶ 81.) After Hurricane Matthew struck in October 2016, the number of arrivals increased. (JSUF ¶¶ 96–97.) DHS, with the assistance of MCAT,[6] developed a multi-phased plan to "address the surge of migration along the Southwest border," including constructing "soft-sided holding facilities" to increase capacity. (JSUF ¶¶ 116, 121–22, 125–26, 128.)

The presidential election was held on November 8, 2016. (JSUF ¶ 133.) On November 9, 2016, some soft-sided facilities were put on hold. (JSUF ¶¶ 134, 151.) Shortly after, then-CBP Deputy Commissioner Kevin McAleenan attended a meeting at DHS where he discussed increasing "efforts to meter arrivals of non-UAC, non-Mexican CF [credible fear] cases mid-bridge." (JSUF ¶ 140.) Then-DHS Secretary Jeh Johnson approved the proposal to increase metering on November 10, 2016. (JSUF ¶ 141.) Soft-sided facilities were ultimately scrapped or put on stand-by. (JSUF ¶¶ 134, 151, 170–71.)

Metering was then adopted by POEs, although the way in which it was implemented varied. (JSUF ¶¶ 142–44.) At some ports, officers were stationed too far from the limit line and consequently turned back asylum seekers on U.S. soil. (JSUF ¶¶ 157, 159, 160, 162–63, 166–67.) There were also differences in approach, with some ports verbally providing "return" appointments to asylum seekers while others advised them only "to come back at a later time." (JSUF ¶¶ 164–65.) Officials at Laredo noticed that the so-called "turnbacks" were having a strong enough deterrent effect that constant metering was not necessary. (JSUF ¶ 165.)

The levels of migration ebbed and flowed in the following 16 months. In December 2016, the number of inadmissible arrivals presenting at POEs on the southwest border decreased. (JSUF ¶ 168.) In a 2017 report, the Office of the Inspector General ("OIG")

[6] In October 2016, the CBP Commissioner established a Migrant Crisis Action Team ("MCAT"), which was composed of various CBP and DHS components and headed by Border Patrol's Deputy Chief. (JSUF ¶¶ 117–18.) The MCAT reported oi6a9c 0 Tw 0. s

stated that the "surge of migrants arriving on the Southwest border in 2016" "abruptly, drastically, and unexpectedly ended" in January 2017. (JSUF ¶ 169.) Nonetheless, some ports (r)-4.y, a-31.2109 [(c)12.1 (o1 Tw .8 (78.3 3g)8.3 (on)]TJ -0.004 Tc 0 c]TJ 0 (.8 (74

In May 2018, DHS made its position on metering publicly known. The DHS Secretary at the time, Kirstjen Nielsen, publicly stated: "We are 'metering,' which means that if we don't have the resources to let them in on a particular day, they are going to have to come back." (JSUF ¶ 238.) Around this time, CBP officials responded to DHS's requests for information regarding the number of people likely to be turned away under a full implementation of the metering policy. (JSUF ¶¶ 239–43.)

Shortly thereafter, in June 2018, Nielsen issued a "Prioritization-Based Queue Management" ("PBQM") memorandum to the CBP Commissioner. (JSUF ¶ 244; *see also* "Prioritization-Based Queue Management," Ex. 3 to Decl. of Alexander Halaska in supp. of Defs.' MSJ, ECF No. 563-5.) In the memorandum, Nielsen explained that apprehensions between POEs and arrivals at POEs of inadmissible migrants "continue to rise," but "CBP's resources remain strained along the Southwest Border." (*Id.*) Specifically, she noted that inadmissible arrivals at POEs require additional processing because they lack documents, which "delays the flow of legitimate trade and travel" and "draws resources away from CBP's fundamental responsibilities." (*Id.*) Nielsen sought to refocus CBP "on its primary mission: to protect the American public from dangerous people and materials while enhancing our economic competitiveness through facilitating legitimate trade and travel." (*Id.*)

To this end, she directed the CBP Commissioner to "initiate a 30-day pilot program to prioritize staffing and operations in accordance with the following order of priority at all Southwest border ports of entry:" (1) national security efforts, (2) counter-narcotics operations, (3) economic security, and (4) trade and travel facilitation. (*Id.*) The PBQM memorandum further explains how these priorities function practically: Nielsen further granted DFOs the discretion to "establish and operate physical access controls at the borderline, including as close to the U.S.-Mexico border as operationally feasible." (JSUF ¶ 245.) Thus, according to Nielsen, ports could process asylum seekers to the extent their capacity would allow "without negatively impacting their other responsibilities" under this priority-based regime. (JSUF ¶ 247.) Port officials subsequently began to use "operational

capacity" instead of "detention capacity" to determine when to employ metering at their respective POEs. (JSUF ¶ 50.) CBP has not officially defined the term "operational capacity" in its written policy and procedure documents. (JSUF ¶ 251.)

Additional metering guidance was issued by CBP in 2019 and 2020, reiterating the

Section 1225(b) establishes the specific procedure by which immigration officials must conduct this inspection. 8 U.S.C. § 1225(b)(1)(A). Officers are required to order all noncitizens determined to be "inadmissible" removed without further hearing or review—a process known as "expedited removal"—"unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution." 8 U.S.C. § 1225(b)(1)(A)(i). Once an applicant for admission indicates either of the above, "the officer shall refer the alien for an interview by an asylum officer under subparagraph (B)." 8 U.S.C. § 1225(b)(1)(A)(ii).[7] Subparagraph (B) elaborates on the interview process and events following the credible fear determination. *See* 8 U.S.C. § 1225(b)(1)(B)(i)–(iii).

LEGAL STANDARD

I. Summary Judgment

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought." Fed. R. Civ. P. 56(a). Summary judgment is appropriate under Rule 56(c) where the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record." (quoting *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000))); *Cherokee Nation v. United States Dep't of the Interior*, No. 19-CV-2154-TNM-ZMF, 2021 WL 1209205, at *6 (D.D.C. Mar. 31, 2021) ("Review under [§ 706(1)] is not limited to the administrative record."); *see also Consejo de Desarrollo Economico de Mexicali, AC v. United States*, 438 F. Supp. 2d 1207, 1221 (D. Nev. 2006) (refusing to limit its review to the administrative record when evaluating a § 706(1) claim, instead considering "materials submitted by Plaintiffs as they relate to the present matter"), *rev'd on other grounds*, 482 F.3d 1157 (9th Cir. 2007).

Accordingly, when evaluating the APA claimr5a2 (a)AT64Aae)p.2.1 (s t)8.5 (he .)6.1 (o

I. Immigration and Nationality Act

Plaintiffs' first claim for relief alleges that Defendants have violated their inspection and referral duties under the INA by turning back asylum seekers at POEs and thereby denying them the statutorily prescribed access to the asylum process. (SAC ¶¶ 244–52.) They request as relief a judicial determination of their rights under these provisions. (*Id.* ¶¶ 253–55.) Defendants move for summary judgment against this claim on the basis that the IN

E.E.O.C. v. Peabody W. Coal Co., 610 F.3d 1070, 1085 (9th Cir. 2010)). Thus, the Ninth Circuit concluded that the APA's waiver "superseded the *Larson* exceptions only for suits in which the . . . waiver applies[.]" *Id.* at 1092. Finding the APA waiver did not apply, the court held that the ultra vires claim was not abrogated by the APA.

Here, on summary judgment, neither party argues that the APA's waiver of sovereign immunity does not apply to Plaintiffs' claims. The Court also independently finds no reason why the APA's waiver would not apply in this case. Thus, in keeping with the rule as articulated in *Robinson*, the Court finds that the APA waiver applies to Plaintiffs' claims and consequently abrogates Plaintiffs' ultra vires INA claim. *Cf. Jafarzadeh v. Duke*, 270 F. Supp. 3d 296, 311 (D.D.C. 2017) (dismissing plaintiffs' ultra vires claim for adjustment of status under the INA because plaintiffs could obtain review under the APA). Summary judgment in favor of Defendants on this claim is therefore warranted.

II. Unlawful Withholding Under the APA (5 U.S.C. § 706(1))

The purpose of the APA is, in part, to provide an avenue for judicial review of "agency action." *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected ore o2.2 t (r)12.2 (ie)12.1v(te)12.1 (bio)8.2y5 ( )8.1 (o22.7 (e)3.6(on

members not on U.S. soil,[9] and; (3) in any event, their inspection and referral duties were not unlawfully withheld because asylum seekers were still ultimately provided access to the process, although it was delayed.

A. Final Agency Action

Accordingly, the Court finds no "final agency action" is necessary for Plaintiffs' § 706(1) claim and rejects Defendants' arguments as to the same.

B. Discrete Agency Action

are mandatory duties for which this Court can compel § 706(1) relief and do not raise any argument on summary judgment to the contrary. *See Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1196 (S.D. Cal. 2019) ("The parties agree that the mandatory duties to inspect all aliens and refer certain aliens seeking asylum are discrete actions for which this Court can compel Section 706(1) relief . . . .").

This defeats any argument that the record reflects a "broad programmatic attack" on agency action that is not permitted under § 706(1). These types of attacks occur when a plaintiff fails to identify a discrete agency action to which the court should compel compliance and instead identifies several purported agency "failures" that constitute violations of the law. *See Lujan*, 497 U.S. at 891 n.2 (finding that "land withdrawal review program" was not an agency action because it did not identify "some specific order or regulation" that applied to everyone but instead constituted "a generic challenge to all aspects" of the program). But Plaintiffs here have identified specific statutory duties to inspect and refer every applicant for admission who approaches a POE. This is the discrete agency action Plaintiffs claim Defendants failed to take when they turned class members back. *See Ramirez*, 310 F. Supp. 3d at 20–21 ("Plaintiffs in this case seek to compel an agency to take the discrete and concrete action of considering statutorily specified factors in determining where and how to place [unaccompanied minors] . . . now that they have aged out of HHS's care and custody."); *Meina Xie v. Kerry*, 780 F.3d 405, 408 (D.C. Cir. 2015) (finding discrete agency action where plaintiff "point[ed] to a precise section of the INA, establishing a specific principle of temporal priority that clearly reins in the agency's discretion, and argues that the disparate cut-off dates for various subcategories manifest a violation of the principle").

POEs."); Nov. 11, 2016 "Metering Flow" email, Ex. 70 to MeFlow r1.72 6038.4 (o)0. 21. (t)8.

turned them away. The Court addresses below whether these turnbacks violated the statutes at issue. (*See infra* Section II.C.4.) But here, finding no dispute of fact regarding the aforementioned evidence, the Court finds a discrete agency action exists for purposes of Plaintiffs' § 706(1) claim.

C. Mandatory and Ministerial Duties

"An agency 'ministerial act' for purposes of mandamus relief has been defined as a clear, non-discretionary agency obligation to take a specific affirmative action, which obligation is positively commanded and so plainly prescribed as to be free from doubt." *Indep. Min. Co.*, 105 F.3d at 508 (quotations omitted). The issue on summary judgment is whether Defendants' duties to inspect and refer class members for asylum upon their arrival to a POE are mandatory and ministerial. [illegible]

This analysis expressly rejected Defendants' arguments concerning plain meaning and the presumption against extraterritoriality. *Id.* at 1199–1202.

Defendants do not cite to a different factual basis or intervening legal developments to alter the Court's previous holding that both statutes mandate inspection and referral for asylum seekers not standing on U.S. soil at the time they interacted with CBP officers who turned them back. Thus, the Court abides by its previous conclusion regarding the scope of the statutes in this case. *See Huynh v. Harasz*, No. 14-CV-02367-LHK, 2016 WL 2757219, at *21 (N.D. Cal. May 12, 2016) (applying the "law of the case" doctrine to preclude summary judgment on legal issues previously decided by a court on a motion to dismiss "[i]f no factual issues have changed between the initial decision and the instant [summary judgment] motion" (citing *Bollinger v. Oregon*

Lado, 394 F. Supp. 3d at 1210 ("Sections 1158 and 1225 cannot be nullified by general statutory provisions regarding the Secretary's authority unless Congress clearly intended so."). Defendants' reliance on additional statutes in their summary judgment motion is similarly futile, as these provisions still do not provide a basis for agency discretion that supplants Defendants' duty to inspect and refer asylum seekers in § 1158(a)(1) and § 1225.

As this Court previously found, § 1225 codifies Congress's specific and detailed instructions regarding "how immigration officers are to 'manage the flow' of arriving aliens who express to an immigration officer an intention to apply for asylum or a fear of persecution." *Id.* at 1210; *see also P.J.E.S. by & through Escobar Francisco v. Wolf*, 502 F. Supp. 3d 492, 542 (D.D.C. 2020) ("[T]he immigration laws cited are clearly part of a 'comprehensive scheme [that] has deliberately targeted specific problems with specific solutions.'" (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012))). None of the enumerated lists of various responsibilities and missions in 6 U.S.C. § 111, 211(c), 211(g)(3) include any indication that Congress intended to supersede the duties established by § 1225. *See BNSF Ry. Co. v. Cal. Dep't of Tax & Fee Admin.*, 904 F.3d 755, 766 (9th Cir. 2018) ("[W]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987))). Section 211(c)(8)(A) states that the CBP Commissioner shall "enforce and administer all immigration laws" including "the inspection, processing, and admissions of persons who seek to enter or depart the United States." Similarly, § 211(g)(3)(B) indicates that OFO is responsible for "conduct[ing] inspections" at POEs to prevent illegal entry and "carry out other duties and power prescribed by the Commissioner." Nothing indicates that these lists are exhaustive or in order of priority such that one duty takes precedence over another, let alone that they preempt other specific statutory mandates.

Indeed, one of the cited provisions includes as a "primary mission" that DHS "ensure that the functions of the agencies and subdivisions within the Department that are not related directly to securing the homeland *are not diminished or neglected except by a*

specific explicit Act of Congress."

at the alleged Turnback Policy or the alleged acts of individual CBP officers standing on the U.S. side of the international bridge between Mexico and the United States"—occurs within the United States and therefore involves a permissible domestic application of the statute. *See id.* at 1202 (citing *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016)).

The Court therefore finds *Sale* inapposite and rejects Defendants' arguments based on this case.

(b) *DHS v. Thuraissigiam*

The second case Defendants cite to support their position is *DHS v. Thuraissigiam*, __ U.S. __, 140 S. Ct. 1959 (2020), a recent Supreme Court decision that post-dates this Court's dismissal order. In *Thuraissigiam*, the respondent asylum seeker filed a habeas action to challenge his expedited removal order after he entered the United States without inspection or entry documents. *Id.* at 1967. In relevant part, the respondent asserted that his due process rights were violated by a jurisdiction-stripping provision of the INA that precluded judicial review of his allegedly deficient credible fear proceeding. *Id.* at 1981. In rejecting his claim, the Supreme Court held that because respondent had not "effected an entry" when he illegally crossed into the United States, he "ha[d] only those rights regarding admission that Congress has provided by statute." *Id.* at 1983. In so finding, the Court cited, as an equivalent example, noncitizens who seek admission at a POE, stating that "[w]hen an alien arrives at a port of entry . . . the alien is on U. S. soil" but still not considered to have entered the country. *Id.* at 1982 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, 215 (1953)) (other quotations and citations omitted).

Defendants argue that this language subverts the Court's determination that the scope of "arriving in the United States" at a POE includes those not on U.S. soil. The Court disagrees. First, as with *Sale*, the language in *Thuraissigiam* is mere dicta. The respondent in the case was not, in fact, arriving at a POE. This cursory example assumes a usual state of affairs—

applicability under the factual circumstances present here. Second, shortly after making this statement, the Supreme Court uses more expansive language when referring to the respondent by stating that "an alien who *tries to enter the country illegally* is treated as an 'applicant for admission'" who has also not "effected an entry." *Id.* at 1983 (citing Id

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"To implement its immigration policy, the Government must be able to decide (1) who may enter the country and (2) who may stay here after entering." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). "That process of decision," captured in part by 8 U.S.C. § 1225, "generally begins at the Nation's borders and ports of entry, where the Government must determine whether an alien seeking to enter the country is admissible." *Id.* As the Court previously summarized, § 1225(a) establishes a general inspection duty and § 1225(b)(1) sets forth additional specific duties that arise for aliens arriving in the United States.

With regard to the inspection duty, the statute states that "[a]n alien present in the United States who has not been admitted or who arrives in the United States (whether or .)

The plain text requires that an asylum seeker "arrives" or "is arriving" in the United States to prompt inspection, the first step in this process of decision. "Arrive" is not modified or conditioned to contemplate, let alone require, more than one arrival at a POE before Defendants' duties attach. *See, e.g.*, *Matter of F-P-R*, 24 I & N Dec. 681, 683, Int. Dec. 3630, 2008 WL 4817462 (BIA 2008) (distinguishing, for purposes of one-year asylum application deadline, between "arrival"—"to come to a certain point in the course of travel; reach one's destination" and "to come to a place after traveling,"—and "last arrival" which "refer[s] to an alien's most recent coming or crossing into the United States after having traveled from somewhere outside the country"). But the Court acknowledges, as it has previously, Congress's instruction that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise—words used in the present tense include the future as well as the present." 1 U.S.C. § 1; *see Al Otro Lado*, 394 F. Supp. at 1200 (noting that this provision of the Dictionary Act has been applied to the INA). The present and present progressive use of "arrive," then, can be understood to encompass both the asylum seekers' present arrival at a POE and any future arrival at a POE.t h e

complied with the statute by "arriving" at a POE and stating that they seek asylum. For example, the evidence in this case shows that class members, at the instruction of CBP officers, are required to leave the ports, coordinate with Mexican immigration officials to put their name on a list (which, evidence shows, itself sometimes required a wait), and spend additional time in Mexico waiting for their "appoq 21.72 21.72 0o096 Two6(se)3(q)8.36(

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While future case law could alter this holding, the cases cited by Defendants do not, at this juncture, displace the Court's adoption of the extraterritorial application of the Fifth Amendment. Thus, the Court finds no basis in the case law cited by Defendants to depart from its original conclusion that, under the functional approach in *Boumediene*, the Fifth Amendment applies to conduct that occurs on American soil and therefore applies here, where CBP failed to inspect and refer class members for asylum under statute. *See id.* at 1218–21.

B. Denial of Due Process

The Supreme Court recently emphasized that "the only procedural rights of an alien seeking to enter the country are those conferred by statute," and as such "'the decisions of executive or administrative officers, *acting within powers expressly conferred by congress*, are due process of law.'" *Thuraissigiam*, 140 S. Ct. at 1977 (emphasis added) (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892)); *see also Wolff*, 418 U.S. at 557 ("A liberty interest created by statute is protected by due process."); *Meachum v. Fano*, 427 U.S. 215, 226 (1976) ("[A] person's liberty is equally protected, even when the liberty

Otro Lado, 394 F. Supp. 3d 1168, 1198–1205. Because Defendants' turning back of asylum seekers unlawfully withholds their duties under statute, it violates the process due to class members.[18] Thus, the Court finds summary judgment appropriate in Plaintiffs' favor on their due process claim.

IV. Alien Tort Statute

The ATS confers on district courts "original jurisdiction of any civil action by an

inspection and referral. (*See supra* Section II.C.1.) Concerning the ATS, however, the Court cannot rely on its previous interpretation of the relevant domestic statutes but must instead determine here, with reference to scholarship, judicial decisions, and "the general usage and practice of nations," whether this understanding of the duty of non-refoulement is specific, universal, and obligatory from which no derogation is permitted.

"Turnbacks" or "pushbacks" have been acknowledged in international legal literature as a "direct arrival prevention measure" that, on land, usually involve some tactics or measures "to prevent migrants from approaching or crossing the border" such that "screening for protection needs will be summary or non-existent." Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, U.N. Human Rights Council, at ¶ 51, U.N. Doc. A/HRC/37/50 (Nov. 23, 2018). Several international legal authorities have expressed that pushbacks are incompatible with the duty of non-refoulement because they deprive migrants of their right to seek international protection on an individualized basis. *Id.* ¶ 52; *see also* Advisory Op. on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol ("Advisory Op."), U.N. High Comm'r for Refugees (UNHCR), ¶ 43 (Jan. 26, 2007). This is premised on the legal principle that the source of this duty, Article 33, applies extraterritorially to asylum seekers approaching land borders from contiguous countries. *See* UNHCR Advisory Op. ¶ 7 ("The prohibition of refoulement to a danger of persecution under international refugee law is applicable to any form of forcible removal, including . . . non-admission at the border . . . ."); UNHCR Executive Cmty. Conclusion No. 22 (XXXII), Protection of Asylum-Seekers in Situations of Large-Scale Influx (1981) ("In all cases the fundamental principle of non-refoulement—including non-rejection at the frontier—must be scrupulously observed."); *see also* Mark Gibney, Refugees, 4 Encyclopedia of Human Rights 315, 318 (Oxford University Press, 2009) ("In practice, [the duty of non-refoulement] means that a . . . state must either admit

This rift has manifested itself in judicial and tribunal determinations as well. Some courts have adopted an expansive understanding of jurisdiction and even applied it to find an extraterritorial duty regarding non-refoulement obligations.[21] The United States Supreme Court, however, has not. In *Sale v. Haitian Centers Council, Inc.*, the Court held that "the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory[.]" 509 U.S. at 183 (1993). The Court in *Sale* relied heavily on statutory interpretation of the text of Article 33 and the "negotiating history" of this provision to conclude that it was not intended to apply outside the territorial seas of the United States. *See id.* at 179–87. The Court acknowledges that this precedent is almost three decades old, and its conclusion is dependent on an interpretation of Article 33 that has since been explicitly disagreed with by the UNHCR itself. UNHCR Advisory Op. ¶¶ 24 n.54, 28–29, 31; *see also The Haitian Centre for Human Rights et al. v. United States*, Inter-American Comm. on Human Rights, Case 10.675 (1997). Nonetheless, its interpretation of Article 33 remains binding precedent on this Court. *See Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) ("Binding authority within this regime cannot be considered and cast aside; it is not merely evidence of what the law is. Rather,

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[21] *See Hirsijamaa and Others v. Italy*, Application No. 27765/09, European Court of Human Rights ("ECHR") (2012) ("[T]he Italian border control operation of 'push-back' on the high seas, coupled with the absence of an individual, fair and effective procedure to screen asylum seekers, constitutes a serious breach of the prohibition of collective expulsion of aliens and consequently of the principle of non-

caselaw on point is the law. If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect. Binding authority must be followed unless and until overruled by a body competent to do so."); *cf. Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) ("[C]lear congressional action trumps customary international law and previously enacted treaties.").[22, 23]

Abiding by non-refoulement principles in the instant circumstances is an objective toward which all countries—including this one—should undoubtedly strive. However, given both controlling case law and the ongoing debate over the proper scope of countries' jurisdictions, the Court regrettably cannot find that this norm is universally applied beyond borders. As such, the Court finds that the duty of non-refoulement as it applies to migrants at the border but physically outside the territorial United States is not a norm from which no derogation is permitted. *See Sosa*, 542 U.S. at 725 (limiting the international norms actionable under the ATS to only those that "rest on a norm of international character accepted by the civilized world"). In the absence of jus cogens norm, the Court finds Plaintiffs' ATS claim is not actionable as a matter of law.

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[22] The Department of Justice ("DOJ") also does not recognize the extraterritoriality of Article 33, even after the UNHCR stated that it applies extraterritorially. *See* Legal Obligations of the United States Under Article 33 of the Refugee Convention, Dep't of State Mem. Op. for the Legal Adviser (Dec. 12, 1991), accessed at https://www.justice.gov/file/23326/; U.S. observations on UNCHR Advisory Opinion on Extraterritorial Application of Non-Refoulement Obligations (Dec. 28, 2007), accessed at https://2001-2009.state.gov/s/l/2007/112631.htm.

[23] Although the law is not conclusive on customary international laws' relationship with domestic laws, lower courts have held that federal statutes have supremacy. *See, e.g.*, *Flores-Nova v. Att'y Gen. of U.S.*, 652 F.3d 488, 495 (3d Cir. 2011) (finding customary international law not binding on the court to the extent that it conflicted with a statute); *Payne–Barahona v. Gonzales*, 474 F.3d 1, 3–4 (1st Cir. 2007) (stating that where customary international law conflicts with a federal statute, "the clear intent of Congress would control"); *Guaylupo-Moya v. Gonzales*

V. Equitable Relief

Plaintiffs seek declaratory relief on the basis that Defendants violated the law by implementing turnbacks. (Pls.' Mem. of P. & A. at 38–39.)

(5) As to Plaintiffs' fourth claim for a violation of the ATS, Plaintiffs' MSJ is **DENIED** and Defendants' MSJ is **GRANTED**;

(6) As to Plaintiffs' fifth claim for equitable relief, both parties are **DENIED WITHOUT PREJUDICE** pending further briefing on the following questions:

a. What remedy is appropriate in light of the Court's § 706(1) finding?

b. How does 42 U.S.C. § 265 ("Title 42") affect the implementation of a