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

AL OTRO LADO, INC., *et al*, Plaintiffs, v. Kirstjen NIELSEN,[1] Secretary, U.S. Department of Homeland Security, in her official capacity; *et al.*, Defendants.	Case No. 3:17-cv-02366-BAS-KSC Defendants' Motion and Notice of Motion to Dismiss and Memorandum of Points and Authorities and Exhibits in Support Thereof Hon. Cynthia Bashant Courtroom 4B Hearing: February 12, 2018 NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

[1] Secretary Nielsen is automatically substituted for Deputy Secretary Duke pursuant to Federal Rule of Civil Procedure 25(d).

DEFENDANTS' MOTION TO DISMISS AND NOTICE THEREOF

PLEASE TAKE NOTICE that on February 12, 2018, at a time the Court deems proper, or as soon thereafter as the parties may be heard, Defendants will move to dismiss Plaintiffs' Complaint (ECF No. 1) under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). This Motion is based on the following Memorandum of Points and Authorities, and all pleadings, papers, and files in this action, and on any arguments as may be presented orally at the hearing on this Motion. The parties initially conferred through counsel on October 3, 2017, regarding Defendants' intent to file a motion to dismiss in the Central District and the Plaintiffs' intent to oppose. On December 4, 2017, the parties conferred about Defendants' intent to file this renewed motion.

Dated: December 14, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

Case No. 3:17-cv-02366

I certify that on December 14, 2017, I served a copy of the foregoing Motion and Notice of Motion to Dismiss and Memorandum of Points and Authorities and Exhibits in Support Thereof, filing this document with the Clerk of Court through the CM/ECF system, which will provide electronic notice and an electronic link to this document to all attorneys of record.

/s/ Genevieve M. Kelly
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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS UNDER FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

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INTRODUCTION

The Court should dismiss this Complaint in its entirety because it fails to state a live case or controversy and fails to state a claim upon which relief may be granted. The individual Doe Plaintiffs' 5 U.S.C. § 706(1) claims—that they were "denied access" to the asylum process in the United States—should be dismissed as moot because within several days of Plaintiffs' commencing this action, every claimant received the verifiable opportunity to be processed as applicants for admission, consistent with 8 U.S.C. §§ 1225(a)(1), (3), and to be either referred to U.S. Citizenship and Immigration Services ("USCIS") for a credible fear determination or issued a Notice to Appear before an immigration judge.

Moreover, Plaintiffs have failed to articulate any other causes of action. Even if the Complaint is read broadly, there is no waiver of sovereign immunity under which Plaintiffs could bring any other live claim. Although they describe alleged incidents of misconduct by individual officers, Plaintiffs do not bring a cause of action or seek a remedy in tort. Furthermore, Plaintiffs complain (A) that U.S. Customs and Border Protection ("CBP") has adopted an "officially sanctioned policy" of denying asylum seekers access to the asylum process; and (B) that CBP will continue to deny asylum seekers the opportunity to access the asylum process, but both contentions fail to state a cognizable cause of action under any law. Plaintiffs have already received all of the relief that the Court can provide them. Therefore, the Court should dismiss Plaintiffs' Complaint in its entirety.

RELEVANT FACTS

Plaintiffs allege Defendants violated the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, the Administrative Procedure Act ("APA"),

5 U.S.C. § 500 *et seq.*, the Fifth Amendment's Due Process Clause, and international law when unknown CBP officers "denied" the six Doe Plaintiffs "access to the U.S.-asylum process" at three ports of entry along the U.S.-Mexico border in August 2016 and May, June, and August of 2017. Plaintiffs allege that the individual officers committed various incidents of misconduct—including coercing Plaintiffs into withdrawing their applications for admission or into recanting their fear, making material misrepresentations to Plaintiffs to discourage them from applying for asylum, and physically abusing Plaintiffs—after each Doe Plaintiff expressed a fear of return to her country of origin or her intent to seek asylum in the United States. Compl. ¶¶ 39–82. In support of their allegations, Plaintiffs offer several non-profit organizations' reports, which include unnamed sources' allegations of misconduct by CBP officers at several ports of entry along the U.S.-Mexico border, Compl. ¶¶ 37 n.25–38 n.28; 96 n. 29; 98 n. 30, as well as an administrative complaint filed by Plaintiffs' Counsel and others with DHS's Office for Civil Rights and Civil Liberties ("CRCL") and Office of Inspector General ("OIG"), Compl. ¶ 102 n.31. (Plaintiffs do not challenge Defendants' processing of any administrative complaint. *See generally id.*) One such report alleges that CBP "wrongfully denied access" to 125 "asylum seekers" at ports of entry along the U.S.-Mexico Border, while simultaneously acknowledging that CBP properly processed "some 8,000 asylum seekers" in a similar but shorter time period at the same ports of entry. Human Rights First, *Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers* (2017) [hereinafter *Crossing the Line*] (cited by Compl. ¶ 35 n.22).

The Complaint alleges that the Doe Plaintiffs' experiences are emblematic of CBP's alleged "officially sanctioned policy" and "systematic and persistent practice" of denying "asylum seekers" "access to the U.S. asylum process" at ports of entry along the U.S.-Mexico border, a policy or practice that allegedly has

been in place "since at least the summer of 2016" and that allegedly "w[as] performed (and continue[s] to be performed) at the instigation, under the control or authority of, or with the knowledge, consent, direction or acquiescence" of the United States. Compl. ¶¶ 5, 37, 83. Without pointing to any specific statement or providing specific citations, Plaintiffs allege that Mr. John Wagner, CBP's Deputy Executive Assistant Commissioner for the Office of Field Operations, "admitted" to CBP's "illegal practice in sworn testimony before Congress." Compl. ¶ 103 n.32. Plaintiffs also allege that CBP believes the alleged misconduct of its officers, if true, is lawful. Compl. ¶¶ 149, 163, 175, 183.

Within one week of the commencement of this action, Plaintiffs' and Defendants' Counsel coordinated the processing of each Doe Plaintiff to have the verifiable opportunity to appear at a port of entry along the U.S.-Mexico border to be processed as an arriving alien at the San Ysidro and Laredo ports of entry. *See* Decl. of Karen Ah Nee ("Ah Nee Decl.") Ex. A, ¶ 4; Decl. of Ruben Coe ("Coe Decl.") Ex. B, ¶ 4; Decl. of Manuel A. Abascal ("Abascal Decl.") (ECF No. 67-1) ¶¶ 2–7; Emails between Plaintiffs' and Defendants' Counsel ("Emails") (ECF No. 67-2). Each Doe Plaintiff who subsequently arrived at a port of entry was processed as an applicant for admission, Ah Nee Decl. Ex. A, ¶ 4; Coe Decl. Ex. B, ¶ 4, resulting in each being referred to a USCIS asylum officer for a credible fear interview or being issued a notice to appear before an immigration judge after expressing a fear of returning to their home country or an intention to apply for asylum. Beatrice Doe, who did not appear at a port of entry with the other five Doe Plaintiffs, can return to a port of entry to be processed as an arriving alien at any time, should she choose to do so. ECF No. 58-1; 8 U.S.C. §§ 1225(b)(1), (2); 8 C.F.R. § 253.3; *see also* Emails (ECF No. 67-2) (agreement that all Plaintiffs can present themselves at the ports of entry and be processed as applicants for admission consistent with the INA).

ARGUMENT

The Court should dismiss the Complaint. The Complaint attempts to bring several possible claims, none of which presents a live, justiciable controversy. Plaintiffs' only well-pleaded claim, that they should receive the opportunity to be processed as arriving aliens under 5 U.S.C. § 706(1), should be dismissed as moot, because plaintiffs have already received that relief. Other than the § 706(1) claim, however, the Complaint presents only generalized allegations of harm and conclusory claims for relief, without identifying any corresponding actionable legal claim. If this Court liberally construes the Complaint as seeking review under 5 U.S.C. §706(2) of an alleged CBP policy to deny asylum-seekers access to asylum proceedings, such a claim should be dismissed under Rule 12(b)(6) because Plaintiffs have failed to identify any final agency action for the Court to review under § 706(2), have failed to allege sufficient facts that could establish that such an agency policy exists, and have failed to demonstrate any legal dispute between the parties whatsoever regarding CBP's duty to asylum-seekers. The Complaint also uses language implying that it has lodged a "pattern or practice" claim that CBP has engaged in a "pattern or practice" of misconduct—but Plaintiffs fail to identify a private right of action for a per se "pattern or practice" claim and, even if they had established a private right of action for such a claim, the facts in the Complaint are too speculative to otherwise establish a live case or controversy.

I. The Doe Plaintiffs' 5 U.S.C. § 706(1) Claims Should be Dismissed as Moot because Each Doe Plaintiff has Received All of the Relief that § 706(1) Can Provide.

A. Legal Standard

Title 5 U.S.C. § 706(1) permits a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." Plaintiffs claim that they were

"den[ied] . . . access to the [U.S.] asylum process."[2] Compl. ¶ 38. But within days of the commencement of this action, each Plaintiff who still sought relief presented himself or herself at a port of entry along the U.S.-Mexico border and was processed as an arriving alien, meaning that, consistent with 8 U.S.C. § 1225(b), each was referred for a credible fear interview with a USCIS asylum officer or issued a notice to appear before an immigration judge. Ah Nee Decl. Ex. A, ¶ 4; Coe Decl. Ex. B, ¶ 4. Plaintiffs' request for "access to the asylum process" should therefore be dismissed as moot.

The United States Constitution restricts the jurisdiction of federal courts to "Cases" and "Controversies," U.S. Const. art III, § 2, such that they have authority

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[2] Plaintiffs misstate the law in this regard. The INA does not refer to "access to the asylum process." Rather, the law requires all applicants for admission to be inspected for admissibility to the United States. 8 U.S.C. § 1225(a)(1). Any alien who is not admissible is subject to removal from the United States, normally (with exceptions not relevant here) either by an immigration judge after a removal proceeding (in which the alien may apply for any relief from removal, including asylum), *see* 8 U.S.C. §§ 1225(b)(2), 8 U.S.C. § 1229a, or, in certain situations, through the expedited removal process, *see* 8 U.S.C. § 1225(b)(1). But, consistent with federal law, which incorporates the United States' international obligations, if an inadmissible alien who is subject to expedited removal indicates a fear of return, CBP must refer that alien to USCIS for a credible fear interview. 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 235.3(b)(4). In either instance, CBP officers do not adjudicate any actual asylum application during the processing of an application for admission, but ensure that any asylum-related claims are referred to a party who is able to actually adjudicate those claims.

to resolve only "'the legal rights of litigants in actual controversies.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885)). To invoke the federal judiciary's Article III jurisdiction, Plaintiffs must demonstrate that they possess a legally cognizable interest, or a "'personal stake,'" in the outcome of the action. *Camreta v. Greene*, 563 U.S. 692, 701 (2011) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). "This requirement ensures that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013).

"A corollary to this case-or-controversy requirement is that 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Id.* at 71–72 (internal punctuation omitted) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)). "If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Id.* (internal quotation marks omitted).

B. Each Doe Plaintiff Has Received an Opportunity to be Fully Processed for Admission.

Each Doe Plaintiff has received all the relief the Court could have granted. Plaintiffs filed their Complaint on Wednesday, July 12, 2017, alleging that Defendants had denied the Doe Plaintiffs access to the asylum process by failing to process them at ports of entry in accordance with the law. Compl. p. 53; Compl. ¶¶ 19–24. Within days, pursuant to an agreement between the parties, Defendants' Counsel and Plaintiffs' Counsel coordinated the arrival and verifiable processing of the Doe Plaintiffs as applicants for admission to the United States. Abascal

Decl. (ECF No. 67-1) ¶¶ 2–7; Emails (ECF No. 67-2); Ah Nee Decl. Ex. A, ¶ 4; Coe Decl. Ex. B, ¶ 4. All of the Does choosing to take advantage of this opportunity for coordinated processing came to either the San Ysidro or Laredo ports of entry and were processed as applicants for admission, *id*., meaning that they were either referred to a USCIS asylum officer to present their claims of fear or were issued a notice to appear before an immigration judge. 8 U.S.C. §§ 1225(b)(1)(A)(ii), 1225(b)(2); 8 C.F.R. § 235.3(b)(4). Beatrice Doe, who chose not to take advantage of this coordinated arrangement, can return to a port of entry at any time to be processed as an applicant for admission. *Id. See also* Emails (ECF No. 67-2) (*non-expiring* agreement verifying that Plaintiffs can fully access all lawfully available protections available to them under the INA). This renders Plaintiffs' APA claim under 5 U.S.C. § 706(1) moot.

Plaintiffs alleged that they had sought access to the asylum process but were denied that opportunity when they were not properly processed as applicants for admission. Compl. ¶¶ 19–24. All the Court could have ordered under those circumstances was that Plaintiffs have the opportunity to be properly processed under the INA. 5 U.S.C. § 706(1). Each Plaintiff has already received that opportunity. *See* Abascal Decl. (ECF No. 67-1) ¶¶ 2–7; Emails (ECF No. 67-2); Ah Nee Decl. Ex. A, ¶ 4; Coe Decl. Ex. B, ¶ 4. Those who availed themselves of the opportunity were properly processed under 8 U.S.C. § 1225(b)(1)(A)(ii) and were either referred for credible fear interviews or issued a notice to appear before an immigration judge. *Id.* Thus, the Doe Plaintiffs, including Beatrice Doe, have received all the relief to which they are entitled, and the Court must dismiss their § 706(1) claims as moot. *See* U.S. Const. art. III, § 2; *Kohler v. In-N-Out Burgers*, No. 2013 WL 5315443, at *7 (C.D. Cal. Sept. 12, 2013) (stating that in a case in which a plaintiff is only entitled to injunctive relief, the plaintiff's claims usually

become moot when the defendant remedies the violation) (citing *Oliver v. Ralphs Grocery Co.*, 654 F.3d 903, 905 (9th Cir. 2011)).

C. The Doe Plaintiffs' Alleged Harm is not Transitory, nor is it Capable of Repetition while Evading Review.

No exceptions to the mootness doctrine apply here. In particular, Plaintiffs' harm is not capable of repetition while evading review. First, "the 'capable of repetition' prong of the exception requires a 'reasonable expectation' that the same party will confront the same controversy again." *W. Coast Seafood Processors Ass'n v. Nat. Res. Def. Council, Inc.*, 643 F.3d 701, 704 (9th Cir. 2011). There is no reason to anticipate that the Doe Plaintiffs—all of whom received the opportunity to be processed as applicants for admission within one week of commencing this action—will return to a port of entry as applicants for admission in the future, or that, upon doing so, they will not be properly processed, especially considering the low percentage rate of improper processing Plaintiffs cite. *See Crossing the Line* 1 (stating CBP "referred some 8,000 asylum seekers at ports of entry from December 2016 to March 2017,"[3] but documenting only "125 cases of asylum seekers turned away by CBP officers at ports of entry between November 2016 and April 2017") (quoted in Compl ¶ 35 n.22); *City of Los Angeles v. Lyons*, 461 U.S. 95, 104 (1983) ("[P]ast wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy.").

Second, "[a] controversy evades review only if it is 'inherently limited in duration such that it is likely always to become moot before federal court litigation is completed.'" *W. Coast Seafood*, 643 F.3d at 705. For example, a plaintiff challenging limitations on her access to abortion will likely always give birth before a

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[3] CBP properly processes a much higher number of arriving aliens. *See* Decl. of Dhanraj Samaroo ("Samaroo Decl.") (ECF No. 110-10), ¶¶ 4–7.

court can finally resolve her legal claims, making it impossible to resolve the legal issue were normal mootness rules to apply. *Roe v. Wade*, 410 U.S. 113, 125 (1973). Likewise, a detainee's challenge to pretrial detention standards will not likely be resolved before his criminal trial, similarly preventing judicial review by regular application of the mootness doctrine. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam). In such instances, the challenge becomes moot as an operation of time—not as a result of the actions of the defendants. That cannot be the case here, where Plaintiffs can maintain their claims that they are being denied their statutory right to be processed as arriving aliens until they receive the opportunity to be processed.

The styling of the Complaint as a putative class action does not change this analysis. "If none of the named plaintiffs purporting to represent a class establishes the requisite [ ] case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). Any limitations on this general rule outlined by the Ninth Circuit in *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011), do not apply here. This is not a case in which Defendants have "bought off" individual claimants in order to avoid class certification. *See id.* at 1091; Emails (ECF No. 67-2) (arranging, after Plaintiffs' Counsel's initiation, for Plaintiffs to receive only such process already afforded to them by statute and regulation). Nor, for the reasons discussed in the preceding paragraph, is it a case where Plaintiffs' claims are so "inherently transitory" that a class representative's interest will automatically expire before the Court can rule on a class certification motion. *Pitts*, 653 F.3d at 1090. Accordingly, because each Doe Plaintiff has already obtained all the relief he or she is eligible to receive, the Court must dismiss the Complaint as moot.

II. All of Al Otro Lado's Claims Must Be Dismissed For Lack of Statutory Standing.

All of Al Otro Lado's claims should be dismissed for lack of statutory standing.[4] "[A] statutory cause of action extends only to plaintiffs whose interests "fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014). "The fact that [an immigration provision] may affect the way an organization allocates its resources . . . does not give standing to an entity which is not within the zone of interests the statute meant to protect." *I.N.S. v. Legalization Assistance Project of L.A. Cty. Fed'n of Labor*, 510 U.S. 1301, 1305 (1993). Al Otro Lado is a "legal services organization" whose mission is to "coordinate and to provide screening, advocacy and legal representation for individuals in asylum and other immigration proceedings . . . ." Compl. ¶ 12. It has not cited any provision in the INA designed to confer rights on advocacy groups in this context. *See generally* Compl. Rather, like the Immigration Reform and Control Act, 8 U.S.C. § 1225(b)(1)(A)(ii) "was clearly meant to protect the interests of undocumented aliens, not the interests of organizations." *See Legalization Assistance Project of L.A. Cty. Fed'n of Labor*, 510 U.S. at 1305. Accordingly, Al Otro Lado lacks the standing to bring the allegations described in this Complaint and all of its claims must be dismissed. *See Nw. Immigrant Rights Project v. United States Citizenship & Immigration Servs.*, No. C15-0813JLR, 2016 WL 5817078, at 10–15 (W.D. Wash. Oct. 5, 2016) (holding that an immigrant rights organization lacked statutory standing to bring

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[4] The Central District recognized Al Otro Lado's "questionable standing" when transferring this case to this Court. Order Granting Defs' Mot. to Transfer Venue (ECF No. 113) 3.

an INA/mandamus or APA claim because, among several other reasons, the organization did not fall within those statutes' zones of interest).

III. Notwithstanding Plaintiffs' Lack of Standing, the Complaint Fails to State any Other Claim for Relief.

Even if Al Otro Lado were to have statutory standing to bring a cognizable claim and the Doe Plaintiffs were to have Article III standing, the Complaint still fails to state any claim for relief apart from the full relief that the Doe Plaintiffs have already received. Even if this Court were to generously construe the Complaint as alleging (A) that CBP has adopted an "officially sanctioned policy" of denying asylum seekers access to the asylum process; and (B) that CBP's "pattern or practice" will continue to deny asylum seekers the opportunity to access the asylum process, such allegations nevertheless fail to allege sufficient facts to state a claim for relief, do not correspond to a proper cause of action, and are too speculative to constitute a live case or controversy under Article III.

A. The Complaint Fails to State an APA Claim under 5 U.S.C. § 706(2).

While the Complaint does not expressly seek judicial review of a final agency action, it alleges that CBP has adopted an "officially sanctioned policy" and cites the APA, 5 U.S.C. § 706(2). Compl. ¶¶ 5, 154. To the extent that the Court construes those references as a request for judicial review of an alleged unlawful policy under the APA, 5 U.S.C. § 706(2), the Court should dismiss that request under Rule 12(b)(6).[5]

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[5] It is unclear over what kind of a live claim Plaintiffs believe the Court may have jurisdiction. Plaintiffs allege that "Defendants' conduct is actionable under the Alien Tort Statute, 28 U.S.C. § 1350," Compl. ¶ 180, but the Alien Tort Statute does not constitute a waiver of sovereign immunity and therefore does not create a

When challenging an agency action under the APA, "the person claiming a right to sue must identify some 'agency action' that affects him in the specified fashion." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990). "[T]he 'agency action' in question must be 'final agency action,'" *id.* (citing 5 U.S.C. § 704), or a "consummation of the agency's decisionmaking process" "from which legal consequences will flow." *See Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). It is "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent . . . thereof." 5 U.S.C. § 551(13) (defining "agency action").

Plaintiffs do not point to any "agency action" for the Court to review, so any § 706(2) claim fails outright. Even if Plaintiffs *had* identified an "agency action," they have still failed to allege sufficient facts to support a claim that a final agency action "denying asylum-seekers access to the asylum process" *actually exists*. To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible when the facts pleaded "allow[] the court to draw the reasonable

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cause of action against the government. *Tobar v. United States*, 639 F.3d 1191 (9th Cir. 2011). Plaintiffs also reference the "doctrine of *non-refoulement*," Compl. ¶¶ 124–29, 177–85, but fail to explain how it imposes relevant legal obligations on the government beyond the obligations captured in 8 U.S.C. § 1225(b)(1)(A)(ii). *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 464 (1987) (explaining that non-refoulment under the United Nations Protocol of 1967 is "essentially identical" to withholding of deportation under the INA).

inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). That is not to say that the claim must be probable, but there must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* Facts "'merely consistent with' a defendant's liability" fall short of a plausible entitlement to relief. *Id.* (quoting *Twombly*, 550 U.S. at 557). Here, Plaintiffs' factual allegations regarding the existence of an "officially sanctioned policy" do not meet this standard. If anything, based on those allegations and the assertions contained in the Complaint's source material, the only reasonable inference to be drawn is that Defendants' "officially sanctioned policy" is to comply with federal law and that any deviation from that could not have involved more than a small minority of officers. Accordingly, the Court should dismiss that claim under Federal Rule of Civil Procedure 12(b)(6).

Plaintiffs generally allege "hundreds" of instances where CBP officers have failed to process asylum seekers who arrive at ports of entry along the U.S.-Mexico border as applicants for admission, broadly citing several newspaper articles and "reports" by non-profit organizations that present only generalized allegations. *See* Compl. ¶¶ 35 n.22–38 n.28. But the assertions contained in the Complaint and its source material[6] cut against any inference that this represents a

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[6] "A court may . . . consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). "[A] district court ruling on a motion to dismiss may consider a document the authenticity of which is not contested, and upon which the plaintiff's complaint necessarily re-

broadly-sanctioned policy. For example, Plaintiffs cite a 2017 Human Rights First article alleging that there were at least 125 documented occasions between December 2016 and March 2017 where an applicant for admission intending to apply for asylum was denied the opportunity to present his or her claim of fear at a port of entry. Compl. ¶ 38 n.27. However, the report also acknowledges that "CBP agents referred some 8,000 asylum seekers at ports of entry" along the U.S.-Mexico Border to USCIS for credible fear interviews during the same period. *Crossing the Line* 1. This ratio—125 alleged denials out of 8,000 appropriate referrals to USCIS, or an alleged 1.6% denial rate, by 24,000 CBP officers across 328 ports of entry, see Compl. ¶ 27—does not, as Plaintiffs imply, support a claim that CBP is engaging in an "officially sanctioned policy" of denying applicants for admission access to the asylum process.[7] *See Perez v. United States*, 103 F. Supp. 3d 1180,

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lies." *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998), *superseded by statute on other grounds as stated in Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 681–82 (9th Cir. 2006). "[D]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

[7] The report assumes that other denials of entry or instances of improper processing, in addition to the 125 alleged, also took place in that same period. But without any more specific facts, this can only be characterized as the type of "[t]hreadbare recitals of the elements of a cause of action, supported by [a] mere conclusory statement[]" that is insufficient to state a claim under Rule 12(b)(6). *Iqbal*, 553 U.S. at 678.

1204 (S.D. Cal. 2015) (holding that plaintiffs failed to allege sufficient facts to state a claim that CBP had a "policy" where Defendants acted in concert with the alleged policy only 10% of the time).

This is not the only time that Plaintiffs' own source material contradicts the alleged existence of an "officially sanctioned policy" to deny asylum seekers access to the asylum process. The Human Rights First report states:

> CBP officials have confirmed that the United States continues to recognize its obligation to process asylum seekers. In March 2017, a CBP spokesperson told reporters, "CBP has not changed any policies affecting asylum procedures. These procedures are based on international law and are focused on protecting some of the world's most vulnerable and persecuted people."

Crossing the Line. In addition, Plaintiffs cite a *Washington Post* article stating that there have not been any changes to CBP policy relating to the processing of asylum-seekers, and that CBP doesn't "tolerate any kind of abuse" of the process by CBP employees. Joshua Partlow, "U.S. border officials are illegally turning away asylum seekers, critics say," *Washington Post*, Jan. 16, 2017, https://www.washingtonpost.com/world/the_americas/us-border-officials-are-illegally-turning-away-asylum-seekers-critics-say/2017/01/16/f7f5c54a-c6d0-11e6-acda-59924caa2450_story.html?utm_term=.239b29be29bd [hereinafter Partlow Article] (cited in Compl. ¶ 38 n.28).

The Complaint also cites a congressional hearing for the proposition that CBP "has acknowledged its illegal practice [of denying asylum seekers access to asylum proceedings] in sworn testimony before Congress [in which] CBP's [Office of Field Operations] admitted that CBP officials were turning away asylum applicants at POEs along the U.S.-Mexico border." Compl. ¶ 103 (citing *Immigration and Customs Enforcement and Customs and Border Protection Fiscal Year 2018 Budget Request: Hearing Before the Subcomm. on Homeland Security of the*

H. Comm. on Appropriations, 115th Cong. 207 (2017) [hereinafter *Homeland Security Subcomm. Hearing*], available at https://www.gpo.gov/fdsys/pkg/CHRG-115hhrg27050/pdf/CHRG-115hhrg27050.pdf.). Plaintiffs' assertion is misleading. In the portion of the transcript to which Plaintiffs allude, Congresswoman Roybal-Allard asked Mr. Wagner about a "significant number of reports of CBP officers at ports of entry turning away individuals attempting to claim credible fear [that were] documented in the press [and] by Human Rights First based on firsthand interviews of CBP officers at ports of entry turning away individuals attempting to claim credible fear." *Homeland Security Subcomm. Hearing* at 289. Mr. Wagner responded that at several points during a recent surge of migrants arriving at the border, some ports of entry became full and could not "humanely and safely and securely hold any more people," such that CBP began working with Mexico on methods to control the flow of migrants entering U.S. ports of entry at any given time, so that individuals could be processed as "safely and humanely" as possible. *Id.* at 290. Mr. Wagner also described contingency plans that were established to enable CBP—should another surge of migrants arrive at the border—to "quickly set up temporary space to house people humanely and securely while they're awaiting processing . . . ." *Id.* Far from supporting Plaintiffs' contentions that CBP "acknowledged its illegal practice . . . [of] turning away asylum applicants," Mr. Wagner's testimony demonstrates CBP's goal of safely processing *all* individuals arriving at a port of entry, including those claiming fear or intending to apply for asylum.[8]

[8] The Congresswoman also stated that, "CBP southwest border apprehensions in the second quarter of [fiscal year 2017] were 56 percent lower than the first quar-

Plaintiffs next allege that CBP officials engaged in an "officially sanctioned policy" of denying asylum seekers access to the asylum process "at the instigation [of], under the control or authority of, or with the knowledge, consent, direction or acquiescence of" the named Defendants. Compl. ¶ 5. But here too, Plaintiffs fail to allege sufficient specific facts to permit a reasonable inference that such action occurred. Plaintiffs acknowledge that Defendant McAleenan "oversees a staff of more than 60,000 employees," and that Defendant Owen "exercises authority over 20 major field offices and 328 [ports of entry]" and "manages a staff of more than 29,000 employees, including more than 24,000 CBP officials and specialists." Compl. ¶¶ 26, 27. Plaintiffs do not, however, allege any factual connection between the alleged misconduct of a handful of officers and a policy governing the behavior of the other 60,000 CBP employees who did not engage in the same conduct. *See* Compl. ¶¶ 1– 185. Without those specific factual allegations, there can be no inference that Defendants adopted or acquiesced to a policy or practice of prohibiting or improperly processing asylum seekers.

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ter. However, the number of credible fear applications dropped by only 21 percent, and the percentage of positive credible fear determinations was largely unchanged at 77 percent." *Id.* at 289. While these statistics might partially be explained by the country conditions Plaintiffs describe in Central America's Northern Triangle, *see* Compl. ¶¶ 29–36, the statistics also may demonstrate that, proportional to the number of individuals attempting to enter the United States without inspection, CBP made significantly more credible fear referrals in the second quarter of 2017 than in the first. Such statistics hardly help Plaintiffs state a claim that CBP has a policy of denying asylum seekers access to credible fear interviews.

Plaintiffs' allegations of an official policy are analogous to the plaintiffs' allegations in *Perez*, 103 F. Supp. 3d at 1205. There, the plaintiffs alleged that the United States Border Patrol maintained a so-called "Rocking Policy," whereby Border Patrol agents on the U.S.-Mexico border "deem[ed] the throwing of rocks at them by persons of Hispanic descent and presumed Mexican nationality to be per se lethal force to which the agents [could] legitimately respond with fatal gunfire." *Id.* at 1191. The plaintiffs also alleged that the Secretary of DHS knew of and condoned this policy because she had "received an email each time deadly force was used by the CBP," had stated in a congressional hearing that "we examine each and every case in which there is a death, to evaluate what happened," and had "sign[ed] off on the CBP Use of Force Policy Handbook." *Id.* at 1204. The Court dismissed the plaintiffs' claims against the Secretary and the Commissioner of CBP under Rule 12(b)(6) finding, among other things, that plaintiffs failed to allege sufficient facts to state a claim that Border Patrol had a "policy" where its agents acted in concert with the alleged policy only 10% of the time. *Id.* So too here, Plaintiffs have failed to allege specific factual allegations showing that any CBP officers, to the extent that they engaged in any misconduct, acted pursuant to an "officially sanctioned policy" or other "final agency action." *See* Compl. ¶ 5. If anything, where the plaintiffs in *Perez* at least attempted to make factual allegations showing how the supervisory defendants would have known about the alleged unlawful policy, Plaintiffs fail to allege such facts here. *Compare Perez*, 103 F. Supp. 3d at 1204–05 *with* Compl. ¶¶ 1–185. Plaintiffs have not pleaded sufficient facts to "nudge their [claim of an unlawful policy] across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

Moreover, Plaintiffs allege no facts showing why, if a policy exists to deny access to the asylum process, a vast majority of applicants for admission at the U.S.-Mexico border were processed consistently with the law. They simply state

that, "[b]y refusing to follow the law, Defendants are engaged in an officially sanctioned policy." Compl. ¶ 5. This is the type of "threadbare recital" of a claim, "supported by mere conclusory statements," that is insufficient to show that Defendants have adopted an "officially sanctioned policy" of turning away asylum seekers at the border. *Iqbal*, 556 U.S. at 678. The Federal Rules "do[] not require 'detailed factual allegations,' but [they] demand[] more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (citing *Twombly*, 550 U.S. at 555).

In an attempt to manufacture either a § 706(2) claim or some other type of live claim, Plaintiffs allege that "Defendants contend that the conduct and practices [as alleged in the Complaint] are lawful," Compl. ¶¶ 149, 163, 175, 184, an allegation that seems to acknowledge the requirement that a legal dispute must exist for the Court to order injunctive relief. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013) ("In our system of government, courts have 'no business' deciding legal disputes or expounding on law in the absence of such a case or controversy."). Plaintiffs have failed to identify any legal dispute between the parties.[9] Defendants agree that the law requires inspection of all applicants for admission. 8 U.S.C. §§ 1225(a)(1) ("An alien . . . who arrives in the United States shall be deemed for purposes of this chapter an applicant for admission."), (3) ("All aliens . . . who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers."); *see, e.g.*, Partlow Article. Defendants also agree that the law requires

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[9] This lack of a legal dispute (i.e., a live case or controversy) is one more reason why the Doe Plaintiffs' alleged injuries are not susceptible to repetition evading review. *See supra*, section I.B.

officers who encounter an applicant for admission at a port of entry who is subject to expedited removal and who expresses fear of persecution to refer that individual for a credible fear interview with an asylum officer, and that applicants for admission who found to be inadmissible and are not subject to expedited removal must generally be issued a notice to appear before an Immigration Judge. *See* 8 U.S.C. § 1225(b)(1)(A)(ii) ("If an immigration officer determines that an alien . . . who is arriving in the United States . . . is inadmissible [for either fraud or lack of proper documents] . . . and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer . . . ."); 8 C.F.R. § 235.3(b)(4) ("[T]he inspecting officer shall not proceed further with removal of the alien until the alien has been referred for an interview by an asylum officer . . . ."); 8 U.S.C. § 1225(b)(2)(A) ("[I]n the case of an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for [a hearing before an Immigration Judge]."); *see also Homeland Security Subcomm. Hearing* at 207–300. And Defendants agree that the law requires an alien's decision to withdraw his or her application for admission to be voluntary. 8 C.F.R. § 235.4 ("The alien's decision to withdraw his or her application for admission must be made voluntarily . . . .").

The Complaint not only fails to identify a policy, guidance, or other final agency action the legality of which the parties dispute, but it also fails to allege sufficient facts from which the Court could reasonably infer that a final agency action—the legality of which the parties dispute—exists at all. *See* Compl. ¶¶ 1–185. Therefore, to the extent Plaintiffs attempt to assert a § 706(2) claim, the Court must dismiss it under Rule 12(b)(6).

B. Plaintiffs Cannot Manufacture a Live Claim by Characterizing the Alleged Misconduct as a "Pattern or Practice."

In addition to alleging an unlawful "officially sanctioned policy," the Complaint alleges that CBP has engaged in an unlawful "pattern or practice" of denying asylum-seekers access to asylum proceedings. But Plaintiffs cannot bring a per se "pattern or practice" claim because Congress has not created such a private right of action. And Plaintiffs' "pattern or practice" allegations are too speculative to support any other possible claim.

1. There is no Private Right of Action for a Per Se "Pattern or Practice" Claim against Federal Law Enforcement.

Congress has never waived sovereign immunity to create a private right of action for a per se "pattern or practice" claim against federal law enforcement.[10] *See Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." (internal quotation marks and citations omitted)). While the Attorney General has authority to bring suit against various local and state law enforcement organizations for engaging in a "pattern or practice" of unlawful activity under 34

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[10] While some courts have discussed a "pattern or practice" in the context of reviewing a contested agency policy or of determining supervisory liability in tort actions, those courts have used the phrase to describe the type of evidence they were examining, not to describe a stand-alone private right of action against federal officers or agencies. *See, e.g.*, *Campos v. Nail*, 43 F.3d 1285, 1287 (9th Cir. 1994) (permitting review of an immigration judge's "blanket policy" affecting *all* asylum seekers who were detained before establishing a U.S. residence); *Perez*, 103 F. Supp. 3d at 1205.

U.S.C. § 12601, that provision does not create a private right action against local and state law enforcement organizations and therefore could not extend to create such a private right of action against federal law enforcement. *See* 34 U.S.C. § 12601; *Gustafson v. City of W. Richland*, No. CV-10-5040-EFS, 2011 WL 5507201, at *3 (E.D. Wash. Nov. 7, 2011) (unpublished) (holding that 42 U.S.C. § 14141—the provision later transferred to 34 U.S.C. § 12601—does not create a private right of action), *aff'd*, 559 F. App'x 644 (9th Cir. 2014). Accordingly, any per se "pattern or practice" claim must be dismissed.

2. Plaintiffs' "Pattern or Practice" Allegations are otherwise too Speculative to Create a Live Claim.

In addition to there being no cause of action for Plaintiffs per se "pattern or practice" claims, Plaintiffs' "pattern or practice" allegations are also too speculative to otherwise establish a live case or controversy. *See Rizzo v. Goode*, 423 U.S. 362, 375 (1976) (stating that an "unadorned finding of a statistical pattern," absent a theory about what official policy or which supervisor deliberately caused it, cannot support a claim that police officers' widespread misconduct constituted a live case or controversy).

The Supreme Court has repeatedly rejected the proposition that a claim of widespread officer misconduct—even conduct that is likely to lead to additional future injuries—can establish a present case or controversy. In *Rizzo v. Goode*, the plaintiffs established at trial the existence of an "assertedly pervasive pattern of illegal and unconstitutional mistreatment by police officers" that was likely to continue into the future. 423 U.S. at 366, 370. But the Supreme Court explained that even where "'there is a real and immediate threat of repeated injury,' the attempt to anticipate under what circumstances the [respondents] would be made to appear in the future before petitioners 'takes us into the area of speculation and conjecture.'" *Id.* at 373 (quoting *O'Shea*, 414 U.S. at 495–96). The Court explained that

a claim of injury cannot rest upon "what one or a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception" of departmental procedures. *Id.* at 372.

The Supreme Court reached the same conclusion in *Lyons*, 461 U.S. 95, a case in which the lead plaintiff had been injured by an LAPD officer putting him into a choke hold. The lawsuit alleged that LAPD police officers routinely applied such dangerous choke holds at the instruction of the city regardless of whether they were threatened with deadly force. *Id.* at 98. The Supreme Court determined that although Lyons had stated a claim for damages based on the harm he had already suffered, he had no standing to seek an injunction against the police department's choke hold practice. *Id.* at 109. "Lyons' lack of standing," the Supreme Court explained, rests "on the speculative nature of his claim that he will again experience injury as the result of that practice even if continued." *Id.* The Court also noted that individual lawsuits seeking redress for actual harm suffered gave plaintiffs an adequate remedy, as did the various administrative avenues available to challenge the police department's practices. *Id.* The allegation that the LAPD's widespread chokehold practice would continue to cause more injuries, without any evidence of an official policy or instruction, could not be heard in federal court. *Id.* at 113.

Like the plaintiffs in *Lyons* and *Rizzo*, Plaintiffs' claim here that future injuries are likely to result from CBP's alleged practices fails to present a live case or controversy. In *Lyons*, the Supreme Court stated that:

> In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either, (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an

> encounter, whether for the purpose of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such manner.

Lyons, 461 U.S. at 105–06 (emphasis in original). Here, Plaintiffs make neither such assertion. Plaintiffs have not alleged that *all* CBP officers at the ports of entry always deny asylum seekers access to the asylum process. *Compare Lyons*, 461 U.S. at 105–06 *with* Compl. ¶¶ 1–185. Far from that, Plaintiffs simply cite a report acknowledging only 125 alleged incidents of asylum seekers being denied access to the asylum process during the same period that 8,000 asylum seekers were correctly processed at the ports of entry along the U.S.-Mexico border. *Crossing the Line* 1 (cited by Compl ¶ 35 n.22).

Additionally, Plaintiffs have not alleged that CBP or DHS ordered CBP officers to deny asylum seekers access to the asylum process. *Cf. Lyons*, 461 U.S. at 105–06. Far from that, the Complaint itself references a report stating that CBP's public commitment to ensuring that asylum seekers have access to the asylum process, including a statement that the agency has not changed any procedures related to asylum seekers under the new administration and that its procedures "are based on international law and focused on protecting some of the world's most vulnerable and persecuted people." Partlow Article ("A spokesman for [CBP] said that there has been 'no policy change' affecting asylum procedures, which are based on international law aimed at protecting some of the world's most vulnerable and persecuted people. And 'we don't tolerate any kind of abuse' by U.S. border officials, he said."). Accordingly, the Court should dismiss any "pattern or practice" claims under Rule 12(b)(1).

CONCLUSION

Because the Doe Plaintiffs' claims are moot, because Al Otro Lado lacks statutory standing, and because any other allegations inferred from the Complaint would fail to state a live claim, the Court should dismiss the Complaint in its entirety. Plaintiffs are entitled to no further relief. They are not entitled to class certification or appointment of class counsel because, among other reasons, their only well-pleaded claims are moot. *See* Compl. ¶ 186. They are not entitled to a judgment declaring that Defendants' policies, practices, acts, or omissions give rise to federal jurisdiction or are unlawful, because they have not pleaded a sufficient claim of an unlawful policy and because the Court has no jurisdiction over their "pattern or practice" claims. *See* Compl. ¶ 186. They are not entitled to injunctive relief requiring Defendants to comply with the law or prohibiting Defendants from engaging in the unlawful acts because they have failed to present any live claims and because no legal controversy exists over what the law requires. *See* Compl. ¶ 186. And they are not entitled to injunctive relief requiring Defendants to implement new oversight and accountability procedures because they have failed to present a live case or controversy.[11] If in the future any similar allegations were to arise involving other individuals, affected individuals could bring claims for individual relief.

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[11] Even if Plaintiffs had presented a live claim, *Lyons* would have precluded them from obtaining this type of injunctive relief, which too closely involves the Court in CBP's operational procedures. *Lyons*, 461 U.S. at 111.