MORRISON & FOERSTER LLP
Eric M. Acker (CA Bar No. 135805)
John R. Lanham (CA Bar No. 289382)
eacker@mofo.com
jlanham@mofo.com
12531 High Bluff Drive, Suite 200
San Diego, CA 92130-3588
Telephone: 858.720.5109
Facsimile: 858.720.5125

AMERICAN IMMIGRATION COUNCIL
Michelle Lapointe*
(DC Bar No. 90032063)
mlapointe@immcouncil.org
PMB2026
2001 L Street, NW, Suite 500
Washington, DC 20036
Telephone: 202.507.7523
Facsimile: 202.742.5619

CENTER FOR GENDER AND REFUGEE STUDIES
Melissa Crow*
(DC Bar No. 453487)
crowmelissa@uclawsf.edu
1121 14th Street, NW, Suite 200
Washington, DC 20005
Telephone: 202.355.4471
Facsimile: 415.581.8824

CENTER FOR CONSTITUTIONAL RIGHTS
Baher Azmy* (NY Bar No. 2860740)
bazmy@ccrjustice.org
666 Broadway, 7th Floor
New York, NY 10012
Telephone: 212.614.6464
Facsimile: 212.614.6499

DEMOCRACY FORWARD FOUNDATION
Brian Netter* (DC Bar No. 979362)
bnetter@democracyforward.org
P.O. Box 34553
Washington, DC 20043
Telephone: 202.448.9090
Facsimile: 202.796.4426

Additional Attorneys for Plaintiffs Listed on Next Page

** admitted pro hac vice*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

AL OTRO LADO, INC., *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, President of the United States, in his official capacity, *et al.*,

Defendants.

Case No. 3:25-cv-01501-RBM-BLM

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Hon. Ruth Bermudez Montenegro
Date: November 3, 2025
Courtroom: 5B

NO ORAL ARGUMENT UNLESS ORDERED BY THE COURT

MORRISON & FOERSTER LLP
Robert W. Manoso*
(DC Bar No. 426323)
rmanoso@mofo.com
2100 L Street, NW, Suite 900
Washington, DC 20037
Telephone: 202.887.1555
Facsimile: 202.887.0763

AMERICAN IMMIGRATION COUNCIL
Rebecca Cassler* (DC Bar No. 90017398)
rcassler@immcouncil.org
Suchita Mathur* (DC Bar No. 90013156)
smathur@immcouncil.org
PMB2026
2001 L Street, NW, Suite 500
Washington, DC 20036
Telephone: 202.507.7523
Facsimile: 202.742.5619

CENTER FOR CONSTITUTIONAL RIGHTS
Angelo Guisado* (NY Bar No. 5182688)
aguisado@ccrjustice.org
Adina Marx-Arpadi*
(NY Bar No. 6019335)
amarxarpadi@ccrjustice.org
666 Broadway, 7th Floor
New York, NY 10012
Telephone: 212.614.6464
Facsimile: 212.614.6499

CENTER FOR GENDER AND REFUGEE STUDIES
Blaine Bookey (CA Bar No. 267596)
bookeybl@uclawsf.edu
Peter Habib (CA Bar No. 359646)
habibpeter@uclawsf.edu
200 McAllister Street
San Francisco, CA 94102
Telephone: 415.565.4877
Facsimile: 415.581.8824

CENTER FOR GENDER AND REFUGEE STUDIES
Robert Pauw* (WA Bar No. 13613)
rpauw@ghp-law.net
c/o Gibbs Houston Pauw
1000 Second Avenue, Suite 1600
Seattle, WA 98104
Telephone: 206.682.1080
Facsimile: 206.689.2270

DEMOCRACY FORWARD FOUNDATION
Sarah M. Rich* (GA Bar No. 281985)
srich@democracyforward.org
Adnan Perwez* (DC Bar No. 27532)
aperwez@democracyforward.org
P.O. Box 34553
Washington, DC 20043
Telephone: 202.448.9090
Facsimile: 202.796.4426

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

Defendants seek to dismiss Plaintiffs' challenge to a series of executive actions that effectively close southern border ports of entry ("POEs") to asylum seekers. Defendants' arguments are fundamentally flawed: ***First***, Defendants rely on a presidential proclamation issued under 8 U.S.C. § 1182(f) ("Proclamation"),[1] but vastly overread the scope of authority Congress delegated under this statute. ***Second***, Defendants erroneously claim an ability to override other parts of the Immigration and Nationality Act ("INA"), as evidenced by both the language of the Proclamation and its implementation via the Asylum Shutdown Policy.[2] ***Third***, Defendants incorrectly deny that their abrupt cancellation of thousands of CBP One appointments on Inauguration Day ("CBP One Cancellation") constitutes substantive rulemaking undertaken without the required administrative procedures and fail to consider the reliance interests of the putative subclass members who waited under dangerous conditions in Mexico to obtain those appointments.

Further, contrary to Defendants' arguments, Plaintiffs—both individual and organizational—have standing to challenge the Proclamation, Asylum Shutdown Policy, and CBP One Cancellation. The challenged actions are reviewable under the Administrative Procedure Act ("APA") as well as longstanding equitable principles. Try as they might, Defendants cannot evade review of their unlawful actions. The INA does not permit the executive branch to deny access to asylum by executive fiat. *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 985 (9th Cir. 2021). Accordingly, this Court should deny Defendants' motion.

II. STATEMENT OF FACTS

On January 20, 2025, Defendants shut down access to the U.S. asylum process at southern border POEs. At noon Eastern that day, DHS abruptly canceled roughly

[1]Proclamation No. 10888, 90 Fed. Reg. 8333 (Jan. 20, 2025).
[2]The Asylum Shutdown Policy is memorialized in a written memorandum issued by U.S. Customs and Border Protection on February 28, 2025. ECF No. 1, ¶ 102–03; Ex. A, USA00023–24.

30,000 previously scheduled CBP One appointments—the sole mechanism by which most asylum seekers had been permitted to present themselves at POEs since 2023. ECF No. 1, Compl. ¶¶ 6, 88, 95. CBP simultaneously disabled the CBP One app's scheduling functionality, leaving thousands stranded in Mexico after they had waited, often for months, in reliance on the government's representations that using CBP One would provide access to the asylum process. *Id.* ¶¶ 5, 80–82, 89. Defendants' CBP One Cancellation pulled the rug out from under tens of thousands of asylum seekers.

Later that day, Section 3 of the Proclamation indefinitely suspended "entry" of all noncitizens who do not provide federal officials with medical and criminal history and other background information. *Id.* ¶¶ 8–11, 96–98. CBP's guidance implementing the Proclamation directs that such individuals "shall not be permitted to cross the international boundary," even if they "claim[] or manifest[] a fear at the international boundary line." *Id.* ¶¶ 12, 103. In practice, this Asylum Shutdown Policy bars individuals from presenting themselves at POEs to seek asylum. *Id.* ¶ 12.

The consequences for Plaintiffs have been devastating. Individual Plaintiffs—who fled grave harm in their home countries and sought to access the U.S. asylum process via CBP One appointments or by presenting themselves at POEs—were left without recourse when Defendants closed ports to asylum seekers. *Id.* ¶¶ 22–32, 114–148. They are stranded in Mexico, exposed to kidnapping, extortion, torture, and other targeted violence without any opportunity to seek protection in the United States. *Id.* ¶¶ 8, 107–113, 138, 141. Al Otro Lado ("AOL") and Haitian Bridge Alliance ("HBA") (together, "Organizational Plaintiffs") have likewise been injured by Defendants' actions. By cutting off all paths to asylum at POEs, Defendants have significantly impaired, and in some cases precluded, AOL from engaging in its core work of legal assistance and accompaniment to POEs, *id.* ¶¶ 33–35, 149–154, and HBA from engaging in its core work of providing legal and other assistance to newly arrived Black migrants in the United States. *Id.* ¶¶ 36–37, 155–159.

III. LEGAL STANDARD

In evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in the plaintiff's favor. *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016). Dismissal is improper if the complaint alleges "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A Rule 12(b)(1) motion challenges subject matter jurisdiction; jurisdictional dismissals in federal question cases "are exceptional." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Rule 12(f) motions to strike are "disfavored and must be viewed in the light most favorable to the non-moving party." *Brighton Collectibles, Inc. v. Coldwater Creek Inc.*, No. 08-CV-2307-H (WVG), 2009 WL 10671325, at *1 (S.D. Cal. Dec. 7, 2009).

IV. ARGUMENT

A. Defendants' Policies Inflict Direct Injuries That Establish Standing for All Plaintiffs.

1. AOL and HBA Have Standing Because Defendants' Policies Directly Impede Their Core Work.

Defendants' challenge to the Organizational Plaintiffs' standing misstates the law and mischaracterizes the Complaint. ECF No. 45, MTD 6–10. The Proclamation, Asylum Shutdown Policy, and CBP One Cancellation "directly affect[] and interfere[] with" AOL's and HBA's core operations by "perceptibly impair[ing] [their] ability to provide counseling."[3] *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 395 (2024) ("*FDA*") (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) ("*Havens*")); *see Immigrant Defs. L. Ctr. v. Noem*, 145 F.4th 972, 987–88

[3]Organizational Plaintiffs also satisfy causation and redressability. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Defendants do not contest causation with regard to Organizational Plaintiffs. Defendants generally contest redressability as to all Plaintiffs, MTD 14; this argument fails because this Court has authority both to declare unlawful and enjoin implementation of the Proclamation and to vacate final agency action under the APA, *see infra* Part IV(C).

(9th Cir. 2025) ("*ImmDef*") ("[*FDA*] reinforced the holding in *Havens*").[4] And a court in this district has already recognized AOL and HBA's standing to challenge similar restrictions on asylum access post-*FDA*. *See Al Otro Lado, Inc. v. Mayorkas*, No. 23-CV-1367-AGS-BLM, 2024 WL 4370577, at *5 (S.D. Cal. Sept. 30, 2024). Defendants do not acknowledge this ruling.

FDA does not help Defendants. MTD 8–10. *FDA* reaffirmed *Havens* in relevant part, distinguishing the disruption of counseling and referral services in *Havens* from expenditure of funds on issue advocacy opposing agency action. *FDA*, 602 U.S. at 394–95.[5] Nothing in *FDA* requires that a challenged policy "directly regulate[]" an organization, as Defendants suggest. MTD 9.

Here, the Complaint alleges numerous examples of direct interference with AOL's and HBA's core work, not simply issue-advocacy expenditures. Analogous to the organizational plaintiff in *Havens*, AOL's and HBA's core business activities include the provision of legal assistance, accompaniment, and other services to individuals who seek access to the asylum process at POEs. The Proclamation, Asylum Shutdown Policy, and CBP One Cancellation impede this core work by cutting off access to the U.S. asylum process at POEs. Compl. ¶ 149. For example:

- The border closure has thwarted AOL's accompaniment and legal assistance activities for individuals hoping to seek asylum at POEs. Compl. ¶¶ 35, 149.
- The sharp decline in the number of clients arriving in the United States has threatened AOL's existing funding streams for domestic

[4]Defendants' attempt to distinguish *ImmDef*, MTD 10 n.2, is both incorrect and irrelevant. Far from "gloss[ing] over" *FDA* "without adequately explaining what precisely constituted the impairment," *id.*, the *ImmDef* court explained that the challenged policy created new "barriers" to accomplishing core work and listed at least five ways in which ImmDef had to "offset" those barriers, amounting to "concrete and demonstrable injury" that was "far more extensive" than the harm in *FDA*. *ImmDef*, 145 F.4th at 988. Here, Plaintiffs allege not mere barriers that they must overcome to carry out their core activities—which would be sufficient under *ImmDef* and *Havens*—but actions that make much of their core work impossible.

[5]The plaintiff in *Havens* "operated a housing counseling service." *FDA*, 602 U.S. at 395. It had standing because the defendants' actions "directly affected and interfered with" its "core business activities" of providing those services. *Id.*

work.[6] *Id.* ¶ 152.

- HBA has been unable to welcome newly arrived Black migrants or provide them legal and other assistance due to Defendants' policies. *Id.* ¶¶ 37, 155.

Defendants try to minimize the impact of their policies by characterizing the resulting harm as mere resource diversion or frustration of mission. MTD 8–10. But these harms are not "downstream," "incidental," or "abstract." MTD 7–9. They directly impede—and in some cases, completely block—the Organizations' "core business activities" by cutting off access to the asylum system. Compl. ¶¶ 149–59. Although Organizational Plaintiffs also represent noncitizens already in the United States,[7] assisting newly arrived noncitizens and those seeking to present themselves at POEs is a critical part of their work. Compl. ¶¶ 149, 157. Just as racial steering practices in *Havens* "perceptibly impaired [the plaintiff]'s ability to provide counseling and referral services" to a specific population, *FDA*, 602 U.S. at 395, Defendants' policies directly interfere with AOL and HBA's work providing legal assistance and accompaniment to asylum seekers at POEs. Compl. ¶¶ 35, 37.

AOL and HBA also have a "judicially cognizable interest" in this challenge. *Compare* MTD 7 (citing *United States v. Texas*, 599 U.S. 670 (2023), and *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)). *Texas* rejected the plaintiff states' standing based on assertions that DHS's failure to make more arrests "imposes costs on the States," finding no precedent for a suit to force the executive to make more arrests. 599 U.S. at 674–75, 686. *Linda R.S.* similarly rejected standing where a party sought to compel "more prosecutions." *Id.* at 677 (discussing *Linda R.S.*, 410 U.S. at 619).

---

[6]Defendants' argument that the pleadings do not include sufficient information about funding impacts to establish standing, MTD 9 (citing *Viasat, Inc. v. FCC*, 47 F.4th 769, 781 (D.C. Cir. 2022)), fails. *Viasat* rests on D.C. Circuit Local Rule 28(a)(7), which requires "evidence" of standing to be filed as part of a petition for review of administrative action where a statute provides for direct review in the D.C. Circuit.

[7]Defendants provide no authority for their insinuation that an organization that can still serve constituent communities in other ways cannot show impairment of their pre-existing core activities under *Havens* and *FDA*. *See, e.g.*, MTD 7 (emphasizing that the organizations have "shifted the focus" of their services), 8–10 (similar). Where core activities are impaired, as here, injury exists.

But AOL and HBA do not challenge enforcement decisions rooted in prosecutorial discretion; they seek to remedy violations of the INA and APA resulting from the Proclamation, Asylum Shutdown Policy, and CBP One Cancellation.

Defendants' zone-of-interests argument is easily dismissed. The zone-of-interests test is "not . . . especially demanding" and is satisfied if the claims "arguably" fall within the statute's protected interest. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224–25 (2012) (citation omitted). Courts apply this test in light of the APA presumption of reviewability of agency action. *Id.* at 225. AOL and HBA readily meet the standard. *See E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 768–69 (9th Cir. 2018) ("*EBSC I*") (similar organizations' interests were "consistent with the INA's purpose" of making legal services available to asylum seekers); *Al Otro Lado*, 2024 WL 4370577, at *8 (AOL and HBA were within INA's zone of interests because they "help individuals apply for and obtain asylum [and] provide low-cost immigration services" (quoting *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 668 (9th Cir. 2021) ("*EBSC II*")).

2. All Individual Plaintiffs Have Standing.

In a single footnote, Defendants argue that four Individual Plaintiffs suffered no injury. MTD 10 n.3. Defendants thus concede that the seven other Individual Plaintiffs have standing. Moreover, the remaining four Individual Plaintiffs have been attempting to access the U.S. asylum system at a POE, and Defendants' challenged policies have prevented that access. *See* Compl. ¶¶ 29–32, 137–38, 140–41, 144–45, 147–48, 160. Denial of access to the asylum process is a cognizable injury. *See Al Otro Lado, Inc. v. Wolf*, 336 F.R.D. 494, 504 (S.D. Cal. 2020) (certifying class based on common injury of loss of access to U.S. asylum process). There is no basis to dismiss any of the Individual Plaintiffs' claims for lack of standing.

B. Defendants Fundamentally Misunderstand the Scope of § 1182(f), Which Regulates Only Lawful Entry.

In interpreting the authority that Congress delegated to the executive in

§ 1182(f), Defendants vastly overread their power and conflate "entry" with seeking asylum. *See, e.g.*, MTD 12–13, 15, 17–18. This misunderstanding permeates their motion and thoroughly undermines their arguments.

The power to determine, through legislation, who may be granted or denied lawful entry rests with Congress.[8] *EBSC I*, 932 F.3d at 755 ("The Supreme Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of [noncitizens].") (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)) (citation modified).[9] Congress has defined "the pool of individuals who are admissible"—those permitted to lawfully enter the United States—in 8 U.S.C. § 1182. *Trump v. Hawai'i*, 585 U.S. 667, 694–95 (2018). As the Supreme Court explained:

> [Section 1182's] restrictions come into play at two points in the process of gaining entry (or admission) into the United States. First, any [noncitizen] who is inadmissible under § 1182[a] (based on, for example, health risks, criminal history, or foreign policy consequences) is screened out as "ineligible to receive a visa." 8 U.S.C. § 1201(g). Second, even if a consular officer issues a visa, entry into the United States is not guaranteed. As every visa application explains, a visa does not entitle [a noncitizen] to enter the United States "if, upon arrival," an immigration officer determines that the applicant is "inadmissible under this chapter, or any other provision of law" . . . . § 1201(h).

Id. (footnote omitted).

Besides designating the statutory grounds of inadmissibility in § 1182(a), Congress authorized the President, in a separate subsection of § 1182, to impose additional grounds of inadmissibility by suspending the "entry" of noncitizens under specific circumstances. That provision, § 1182(f), provides in relevant part:

---

[8]Before 1996, the INA used the term "exclusion" to refer to denial of admission, *i.e.*, denial of lawful entry. Exclusion took place in an administrative proceeding (exclusion proceedings), the form and substance of which were defined by statute, based on statutory exclusion grounds. The statute set forth different standards (deportation grounds) and a different process (deportation proceedings) for people who had "entered," whether lawfully or unlawfully. *See Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958); *Torres v. Barr*, 976 F.3d 918, 927–28 (9th Cir. 2020).

[9]Defendants omit essential language from *Fiallo*, MTD 12; that case says that determining who may "enter" and on what grounds and conditions are "matters solely for the responsibility of the Congress." 430 U.S. at 796 (citation omitted).

> Whenever the President finds that the entry of any [noncitizens] or of any class of [noncitizens] into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all [noncitizens] or any class of [noncitizens] as immigrants or nonimmigrants, or impose on the entry of [noncitizens] any restrictions he may deem to be appropriate.

The power to suspend entry in § 1182(f) is "broad," in that Congress delegated to the President the task of determining whether certain "entries" not already barred by § 1182(a) would be detrimental to U.S. interests. *Hawai'i*, 585 U.S. at 684–85. However, the President's delegated power cannot exceed the terms of the statute—it is not a blank check. And the specific, well-understood definition of "entry" establishes § 1182(f)'s limits.

"Entry" is a technical immigration law term of art distinct from physical presence in the country or arrival at the border. Rather, "entry" as used in § 1182(f) has the same meaning as "admission." *Hawai'i*, 585 U.S. at 695 n.4 ("entry" in § 1182(f) is "used interchangeably" with "admission"); 8 U.S.C. § 1101(a)(13)(A) (equating "admission" with "lawful entry").[10] "'[A]dmission' occurs when the inspecting officer communicates to the applicant that he has determined that the applicant is not inadmissible" based on the inadmissibility grounds in § 1182. *Hing Sum v. Holder*, 602 F.3d 1092, 1100 (9th Cir. 2010) (citation omitted); *see In re V-Q-*, 9 I.&N. Dec. 78, 79 (BIA 1960) (the noncitizen "plays a passive role in the interplay from which an 'admission' may result").

The longstanding "entry fiction" doctrine rests on this term of art. That doctrine provides that noncitizens "standing on the threshold of entry" are legally

[10]The term "entry" also has a separate technical definition with respect to *unlawful* entry. *See, e.g.*, *United States v. Argueta-Rosales*, 819 F.3d 1149, 1158 (9th Cir. 2016); *Espinoza-Gutierrez v. Smith*, 94 F.3d 1270, 1273 n.2 (9th Cir. 1996) (citing *Correa v. Thornburgh*, 901 F.2d 1166, 1171 (2d Cir. 1990)); *In re Pierre*, 14 I.&N. Dec. 467, 468–69 (BIA 1973) (entry occurs, albeit unlawfully, if a person who has come into the United States has evaded inspection and is free from "official restraint"); *cf.* 8 U.S.C. § 1325 (specifying "improper entry"); *id.* § 1231(a)(5) (discussing "reenter[ing] the United States illegally"). But that definition of "entry" is not relevant to § 1182(f), which "defines the pool of individuals who are admissible to [i.e., may lawfully enter] the United States." *Hawai'i*, 585 U.S. at 695.

considered "as never having effected entry into this country" despite being physically present in the United States. *Aguilera-Montero v. Mukasey*, 548 F.3d 1248, 1253 (9th Cir. 2008). Consequently, mere physical presence within U.S. territory at a POE prior to admission does not constitute "entry." *See, e.g.*, *In re Pierre*, 14 I.&N. Dec. at 469 (no entry where noncitizen crosses border to present for inspection). Likewise, a noncitizen "paroled" into the United States from a POE pending an admission decision has not "entered" the country under immigration law and is "treated as if stopped at the border." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953); *see Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citing *Leng May Ma*, 357 U.S. at 188–90); *Kaplan v. Tod*, 267 U.S. 228, 230–31 (1925); 8 U.S.C. § 1101(a)(13)(B) (one who is "paroled . . . shall not be considered to have been admitted"); *Vazquez Romero v. Garland*, 999 F.3d 656, 661 (9th Cir. 2021).

The technical definition of "entry" predates the 1952 INA—when § 1182(f) was adopted—and remains controlling. *Argueta-Rosales*, 819 F.3d at 1158–59 (noting that the meaning of "entry" "was established more than a century ago," the same meaning attaches to the modern INA, and collecting cases); *In re Pierre*, 14 I.&N. Dec. at 468 (collecting precedent). As such, "entry" as used in § 1182(f) refers to *lawful* entry (admission).[11] *Hawai'i*, 585 U.S. at 695 n.4. Thus, § 1182(f) operates in a specific "sphere"—as part of § 1182, it "defines the universe of [noncitizens] who are admissible into the United States." *Id.* at 695. It gives the President authority to specify additional grounds of inadmissibility, but it does *not* control who may access a POE to seek asylum.

Distinct from the statutory framework governing entry and admissibility, Congress created a right to seek asylum through the Refugee Act of 1980, Pub. L.

[11]This is clear from § 1182(f)'s text, which mentions only "entry," not physical presence, arrival, or any other immigration legal concept. "The doctrine of *expressio unius est exclusio alterius* as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions." *Silvers v. Sony Pictures Ent., Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (en banc) (internal quotation marks omitted).

No. 96-212, 94 Stat. 102 (1980). 8 U.S.C. § 1158. Asylum provides humanitarian protection to people fleeing persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Any person who is "physically present in" or "arrives in" the United States may apply for asylum, regardless of immigration status or inadmissibility under § 1182 unless one of three narrow statutory exceptions applies. *Id.* § 1158(a)(1), (a)(2)(A)–(C).

For noncitizens arriving at POEs, the process for seeking asylum can take different forms, but must begin with mandatory inspection by a CBP officer. 8 U.S.C. § 1225(a)(3). When a person expresses fear of persecution or a desire to seek asylum, the officer must refer them for processing, which may take several forms. They may be: (1) referred for credible fear screening under § 1225(b)(1), followed by additional adjudication if they receive a positive determination; (2) placed directly into removal proceedings under § 1229a, in which they may apply for asylum, *see* § 1225(b)(2); or (3) paroled into the United States to apply for asylum affirmatively with USCIS, *see* § 1182(d)(5)(A); 8 C.F.R. § 208.2(a)(1)(i); U.S. Citizenship and Immigration Services, Asylum Division, Affirmative Asylum Procedures Manual § III.N (Feb. 2025), https://www.uscis.gov/sites/default/files/document/guides/AAPM.pdf.

"Asylum is a concept distinct from admission" and entry. *EBSC I*, 932 F.3d at 757; *see, e.g.*, *Bare v. Barr*, 975 F.3d 952, 973 (9th Cir. 2020) ("applicant for admission" status continues after an asylum grant); *In re V-X-*, 26 I.&N. Dec. 147, 150–51 (BIA 2013) ("nothing" in the INA supports idea that "Congress understood a grant of asylum to be a form of 'admission'"). And a person may apply for asylum "irrespective of" immigration status. § 1158(a)(1).[12] Thus, the inadmissibility grounds in § 1182, including suspension via § 1182(f), do not preclude seeking

[12]Regardless of whether the phrase "arrives in" in 8 U.S.C. § 1158(a) covers certain noncitizens just on the Mexican side of the southern border at POEs, the statutory scheme requires that individuals be permitted to seek asylum at POEs. Defendants' argument that the Proclamation's suspension of entry alters this requirement, *see* MTD 16–17, is plainly erroneous because a bar on entry cannot bar seeking asylum at POEs, as explained *supra*.

asylum, even though they are bars to "entry."[13] Defendants fail to acknowledge this crucial distinction in their motion.

C. Plaintiffs' Challenges to the Proclamation and the Asylum Shutdown Policy Are Justiciable.

Defendants argue that the Proclamation and Asylum Shutdown Policy cannot be enjoined, declared unlawful, or reviewed at all. MTD 13–16. But there is a "'strong presumption that Congress did not mean to prohibit all judicial review' of executive action." *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 680–81 (1986) (citation omitted); *accord Hyatt v. OMB*, 908 F.3d 1165, 1170–71 (9th Cir. 2018). That presumption is "particularly strong" regarding action that exceeds delegated authority. *Amgen Inc. v. Smith*, 357 F.3d 103, 111–12 (D.C. Cir. 2004). Each of Defendants' arguments against justiciability fails.

1. The Proclamation Is Reviewable, and Declaratory and Injunctive Relief Are Available.

Defendants claim no relief is available against the Proclamation or its implementation, and therefore, review is also unavailable. MTD 13–14, 19. In effect, they claim that they can insulate unlawful executive action from judicial review by first issuing an executive order. That is not the law.

The parties agree the Proclamation is not directly subject to APA review. MTD 14. But the Court is not therefore powerless to address unlawful executive action. Without recourse under the APA to review the Proclamation itself, Plaintiffs may use nonstatutory review. *California v. Trump*, No. 25-CV-10810-DJC, 2025 WL 2663106, at *7–8 (D. Mass. Sept. 17, 2025) (citing *Murphy Co. v. Biden*, 65 F.4th 1122, 1128–31 (9th Cir. 2023)); *see generally Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 288 (4th Cir. 2018) (history of nonstatutory review) (Gregory, J., concurring), *vacated on other grounds*, 585 U.S. 1028 (2018). Under this doctrine,

[13] One year after receiving asylum, an asylee may apply for permanent residence, at which point they must prove admissibility for the first time, including under the health-, criminal-, and security-related grounds at § 1182(a)(1)–(3). § 1159(b), (c).

"the President's actions may still be reviewed" for constitutionality and compliance with statutory authority. *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 6–9 (2015) (challenging "[t]he President's position" on Jerusalem as violating a binding statute); *Hawai'i v. Trump*, 878 F.3d 662, 682–83 (9th Cir. 2017), *rev'd on other grounds*, *Hawai'i*, 585 U.S. 667; *AFGE v. Trump*, 139 F.4th 1020, 1033–37 (9th Cir. 2025); *PFLAG, Inc. v. Trump*, 769 F. Supp. 3d 405, 442 (D. Md. 2025) (courts may decide if executive orders are "incompatible with the will of Congress").

Defendants' arguments to the contrary fail. ***First***, Defendants incorrectly claim the Proclamation itself "cannot be enjoined"[14] and that agency officials remain bound by a presidential directive regardless of any court order. MTD 13–14. As Defendants' cases make clear, courts may enjoin executive officials from implementing unlawful proclamations and executive orders. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588–89 (1952); *Franklin*, 505 U.S. at 802–03; *Hawai'i v. Trump*, 859 F.3d 741, 788 (9th Cir. 2017), *vacated as moot*, 583 U.S. 941 (2017); *see INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (executive action "is always subject to check by the terms of the legislation that authorized it"). Justice Gorsuch's concurrence on prosecutorial discretion in *Texas*, 599 U.S. at 691, *see* MTD 14, is inapposite because here, if the Court enjoins Agency Defendants from implementing the Proclamation, they would not "retain[] the same authority" to act as if there were no injunction.

Second, Defendants broadly assert that courts "cannot issue declaratory relief with respect to presidential actions," without citing on-point authority. MTD 13. The authority they do cite does not help: *Newdow v. Roberts* involved personal religious expression, *not* presidential policymaking. 603 F.3d 1002, 1012 (D.C. Cir. 2010). In *Rosebud Sioux Tribe v. Trump*, the court found it *could* issue declaratory relief. 428 F. Supp. 3d 282, 291 (D. Mont. 2019). Indeed, courts have declared presidential

[14]Defendants' assertion that injunctions cannot issue against the President, MTD 13, is a strawman; Plaintiffs seek to enjoin Defendants other than the President ("Agency Defendants") from implementing the Proclamation. Compl. at 51–52.

actions unlawful. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 425 n.9 (1998) (declaring presidential action unconstitutional); *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 433 (1935) (declaring executive orders unlawful); *see League of Conservation Voters v. Trump*, 303 F. Supp. 3d 985, 995 (D. Alaska 2018) (denying dismissal of claim for declaratory relief against President).

Third, Defendants' argument that Claim 1 must be dismissed as to Agency Defendants because it "cannot displace an APA claim, even if the APA claim is not viable," MTD 19, is incorrect. To the extent Plaintiffs' APA claims (Claims 2 & 3) and nonstatutory claims (Claims 1 & 6) seek functionally the same relief,[15] they may proceed as alternative claims, at least at the pleading stage. In *Hawai'i*, the agencies' implementation of a § 1182(f) proclamation was a "final agency action" reviewable under the APA, and nonstatutory review was "an additional avenue" that would be viable "[e]ven if there were no 'final agency action' review under the APA." 878 F.3d at 680–83. So too in *Sierra Club*, 929 F.3d at 694–700 (equitable cause of action, including to challenge "federal officials violating federal law," could coexist with APA challenge to final agency action); *accord California v. Trump*, 963 F.3d 926, 941 n.12 (9th Cir. 2020). *Graham v. FEMA* also supports Plaintiffs. MTD 19. There, the court clarified a nonstatutory claim should be dismissed *without* prejudice and declined to address its merits precisely because the plaintiffs could "obtain all the relief they request[ed] under . . . the APA." 149 F.3d 997, 1001 n.2 (9th Cir. 1998). The Ninth Circuit has rejected, and not adopted, the view in the *Webster v. Doe* dissent. MTD 19 (quoting 486 U.S. 592, 607 n.* (1988) (Scalia, J., dissenting)).[16]

[15]If Defendants were correct that APA relief regarding the Asylum Shutdown Policy would be meaningless because it would leave the Proclamation intact, MTD 14–16, nonstatutory review would be all the more viable. "Either way, it cannot be that both an equitable claim and an APA claim foreclose the other, leaving Plaintiffs with no recourse." *Sierra Club v. Trump*, 929 F.3d 670, 699 (9th Cir. 2019).

[16]*Ninilchik Traditional Council v. United States* is irrelevant. MTD 19. *Ninilchik* held that an agency's factual finding that size restrictions on moose hunting were needed to protect the moose population was subject to APA "arbitrary and capricious," not *de novo*, review. 227 F.3d 1186, 1194 (9th Cir. 2000).

2. Whether Defendants Complied with § 1182(f) Is Justiciable.

Courts may reach the question of whether the President lawfully exercised his delegated authority under § 1182(f). The relevant question is not whether Congress has "authorized review," MTD 12, but whether Congress has barred review, *Bowen*, 476 U.S. at 672–73, and it has not. As in *Hawai'i*, Defendants point only to the political branches' powers of "exclusion" and cite no other doctrine or provision that would strip this Court of authority to review the statutory interpretation question presented here.[17] 585 U.S. at 682–83; *see* MTD 12–13. While noting that § 1182(f) "exudes deference to the President in every clause," the *Hawai'i* Court nonetheless analyzed whether the President had indeed complied with those clauses. *Id.* at 684–88 (examining whether the President had made sufficient findings, had "suspended" entry, and had correctly identified a "class of aliens"). This Court may do the same.

To the extent Defendants argue, by reference to an "exclusion" power, that the Court cannot examine the Agency Defendants' implementation of the Proclamation, MTD 12–13, that too is wrong. Plaintiffs do not challenge any specific decision to exclude a noncitizen.[18] What Defendants are doing is not "exclusion," *i.e.*, denial of

[17]Defendants make the same argument about 8 U.S.C. § 1252, MTD 13, that failed in *Hawai'i*, *see* 585 U.S. at 682 (noting government's argument that § 1252 "authorizes judicial review only for [noncitizens] physically present in the United States," but finding jurisdiction because no provision of the INA "expressly strip[ped]" it); *see also EBSC II*, 993 F.3d at 666 ("none" of § 1252's provisions "have any bearing" on review of asylum eligibility rule tied to § 1182(f) proclamation). Section 1252 "is focused on orders of removal," not challenges to policies that unlawfully block access to asylum. *Singh v. Gonzales*, 499 F.3d 969, 977 (9th Cir. 2007). Plaintiffs have no removal orders; Defendants' unlawful actions prevent them from accessing the very statutory processes that could give rise to such orders. *See* Compl. ¶¶ 6, 12, 14.

[18]Defendants' cases, MTD 12–13, 15, all concern entry and admission. *See Fiallo*, 430 U.S. at 790–91 (constitutionality of statutory immigrant visa classifications), *Kleindienst v. Mandel*, 408 U.S. 753, 758–62 (1972) (denial of waiver of inadmissibility); *Nishimura Ekiu v. United States*, 142 U.S. 651, 661–62 (1892) (denial of admission); *Allen v. Milas*, 896 F.3d 1094, 1097–98 (9th Cir. 2018) (denial of visa due to inadmissibility); *Saavedra Bruno v. Albright,* 197 F.3d 1153, 1155–56 (D.C. Cir. 1999) (visa revocation due to inadmissibility). Not one addresses asylum seekers at POEs, and they thus provide no support for Defendants' jurisdictional argument. To the extent Defendants are referring obliquely to the doctrine of consular nonreviewability, MTD 12, that too has no relevance. That doctrine concerns "judicial review of a consular officer's denial of a visa." *Dep't of State v. Muñoz*, 602 U.S. 899, 908 (2024). If Individual Plaintiffs had sought visas abroad and challenged

admission—rather, they are blocking access to the asylum process at POEs without the authority to do so. *See infra* Part IV(D).

3. APA Review of the Asylum Shutdown Policy Is Available.

a. The Asylum Shutdown Policy Is Reviewable Agency Action.

Defendants argue APA review is unavailable because Plaintiffs identify no discrete "agency action." MTD 14–16, 19–20. But agency action is a broad concept, "cover[ing] comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001). "[A]gency action includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13).

Here, DHS Defendants exercised their power by barring access to POEs for people seeking asylum beginning January 20, 2025. Compl. ¶¶ 102–05. They memorialized their policy in written guidance, the currently operative version of which states that it is implementing Section 3 of the Proclamation. Compl. Ex. A. DHS Defendants directed CBP officers to "suspend[] entry to the U.S. at all [POEs] for [noncitizens] who fail to provide sufficient medical information and reliable criminal history and background information to enable fulfillment of the requirements of [8 U.S.C. §1182(a)(1)–(3)]." *Id.* at USA00023–24. They further directed that asylum seekers "subject to the Proclamation shall not be permitted to cross the international boundary," including noncitizens "who claim[] or manifest[] a fear" of persecution.[19] *Id.* These actions are properly characterized as a "rule": "the

---

the government's decision in their individual cases, consular nonreviewability might apply. *See Hawai'i*, 585 U.S. at 682–83, 694–95. But Plaintiffs only seek access to the asylum process, bringing their claims entirely outside the doctrine's scope.

[19]Defendants mischaracterize Plaintiffs' allegations regarding the actions of Mexican officials. MTD 20. Although the Complaint contains "some allegations that touch on alleged coordination with Mexican government officials," Compl. ¶¶ 93, 119, 127, 147, 173, 183, 190, this "coordination . . . is merely an outgrowth of the alleged underlying conduct by U.S. officials," and therefore dismissal is improper, particularly where the factual record is not yet developed. *Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1192–93 (S.D. Cal. 2019). Defendants' "conclusory assertion[]" of the political question doctrine "without citation to pertinent authority," MTD 20 n.6, is not "argument[]." *In re Keenan*, No. 07cv451-L(RBB), 2008 WL 878913, at *3 (S.D. Cal. Mar. 28, 2008).

whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4). A "'rule' includes 'nearly every statement an agency may make.'" *Prutehi Litekyan: Save Ritidian v. U.S. Dep't of Airforce*, 128 F.4th 1089, 1107 (9th Cir. 2025) (citation omitted) (permit renewal application was a "rule"). If not a "rule," these actions amount to an "order," which is "virtually any authoritative agency action other than a rule." *N.Y. Stock Exch. LLC v. SEC*, 2 F.4th 989, 992 (D.C. Cir. 2021); *see* 5 U.S.C. § 551(6) (defining "order"); *Drs. for Am. v. OPM*, 766 F. Supp. 3d 39, 50 (D.D.C. 2025) (removal of agency webpages was an "order").

Because DHS Defendants' action so clearly fits the APA's definition of "agency action," it is per se discrete. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004). Accordingly, there is no need to engage in a separate analysis of "discreteness," which is relevant only to agency actions that fall under the catch-all "equivalent . . . thereof" part of that definition. *See id*. But even if that separate analysis is needed, the standard is easily satisfied. DHS's categorical actions involve no individualized decision making; the decision to deny access to POEs to asylum seekers applies "across the board" and thus can "of course be challenged under the APA." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 n.2 (1990).

Defendants also refer in passing to the APA's finality requirement. MTD 14–15. The Asylum Shutdown Policy is "final" as (1) it "mark[s] the 'consummation' of the agency's decision making process," rather than being merely "tentative or interlocutory," and (2) as a result of the action, "'rights or obligations have been determined,' or . . . 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (cleaned up).

The Asylum Shutdown Policy easily satisfies the first prong. *See Hawai'i*, 878 F.3d at 681. Defendants appear to challenge the second prong, likening DHS's written guidance to informational or interpretive statements that restate existing law.

MTD 15. Not so. When CBP officers block asylum seekers from accessing POEs, and thus the asylum process, they do so pursuant to the written guidance of their DHS superiors. That guidance thus has "actual or immediately threatened effect[s]" on asylum seekers at POEs, determining both their "rights" and the government's "obligations."[20] *Lujan*, 497 U.S. at 894. Defendants likewise assert the Policy is unreviewable because it is not "distinct from" the Proclamation. MTD 14. But the fact that the Policy implements the Proclamation does not "insulate [it] from judicial review under the APA, even if the validity of the [Proclamation is] thereby drawn into question." *Chamber of Com. v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996); *see, e.g.*, *Hawai'i*, 878 F.3d at 680–81; *EBSC I*, 932 F.3d at 770–71.

b. 5 U.S.C. § 701(a)(2) Does Not Bar Review.

Defendants mistakenly invoke 5 U.S.C. § 701(a)(2), which bars APA review of action "committed to agency discretion by law." This narrow exception does not displace the presumption of APA review of most discretionary decisions. *Dep't of Com. v. New York*, 588 U.S. 752, 772 (2019). Section 701(a)(2) applies only in "rare" circumstances where a statute provides "no meaningful standard against which to judge the agency's exercise of discretion," generally reserved for situations where, unlike here, there is an established judicial tradition of nonreviewability. *Id.*; *Thakur v. Trump*, 148 F.4th 1096, 1105 (9th Cir. 2025).

First, Defendants argue the Proclamation is unreviewable because § 1182(f) and § 1185(a)(1) give the President "broad discretionary authority." MTD 15. But Plaintiffs do not challenge any presidential "find[ing]" that "entry would be detrimental" under § 1182(f); indeed, they do not directly challenge the Proclamation under the APA at all. To the extent the Proclamation's validity is implicated in Plaintiffs' APA claims regarding *agency* action, the question is not whether the Proclamation reflects a wise exercise of discretion under § 1182(f), but whether that

[20]Moreover, Section 3 of the Proclamation merely suspends "entry," whereas the guidance goes beyond the Proclamation by directing officers not to permit people to "cross the international boundary" at POEs. Compl. ¶¶ 98, 103.

statute allows the President to go beyond suspending lawful "entry," *i.e.*, admission, to prohibit noncitizens from seeking asylum at a POE (it does not).

Second, Defendants seek dismissal of Claim 3 because "the management of intake at POEs" is complex. *Id.* at 20–21, 24.[21] But arbitrary-and-capricious review of the Asylum Shutdown Policy is not precluded simply because ports require management and resource-allocation decisions. *Id*. Defendants cite several exceedingly general authorizing statutes—6 U.S.C. §§ 111(b)(1), 202, 211(c), (g)(3); 8 U.S.C. § 1103(a)(1), (3), (5)—that do not establish discretion, let alone *unreviewable* discretion, to end asylum at POEs due to the exigencies of managing POEs. This is not the "rare" circumstance where courts lack all meaningful standards for review. *Thakur*, 148 F.4th at 1105. The agency also never relied on those statutes or rationale in adopting the Policy; such post hoc reasoning cannot now justify it. *See DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 23–24 (2020). *Heckler v. Chaney* is equally unhelpful. MTD 24. It addressed unreviewability of prosecutorial discretion, which is not at issue here. 470 U.S. 821, 826, 832–33 (1985).

D. The Proclamation and Asylum Shutdown Policy Are Unlawful Because They Conflict with § 1158 and Exceed § 1182(f)'s Limits.

The Court should reject Defendants' argument for dismissal of Plaintiffs' claims on the merits. *See* MTD 16–19. Congress granted the President limited authority under § 1182(f) to suspend or restrict lawful entry, not to rewrite the INA or eliminate the statutory right to seek asylum. *See supra* Part IV(B). The Proclamation and Asylum Shutdown Policy far exceed those limits and are therefore unlawful and *ultra vires*.

1. The President Lacks Authority Under § 1182(f) to Deny Access to the Asylum Process.

As discussed above, "entry" in § 1182(f) means "admission." *Hawai'i*, 585

[21]Defendants also raise the complexity argument with regard to Claim 5 (challenging CBP One Cancellation as arbitrary and capricious). MTD 24. It fails there for the same reasons as it does with regard to Claim 3, as described *infra*.

U.S. at 695 n.4. A noncitizen who presents at a POE and is paroled into the United States to seek asylum has not "entered" despite her physical presence on U.S. soil; indeed, even an asylum grant would not constitute an "admission." 8 U.S.C. § 1101(a)(13)(B) (one who is "paroled . . . shall not be considered to have been admitted"); *see supra* Part IV(B). Because § 1182(f) authorizes the President to suspend only "entry," it does not permit him to block access to the asylum process at POEs. More broadly, the statute confers no power to impose additional legal consequences for inadmissibility under § 1182(a); those already flow from the INA itself, and lack of asylum access is not one of them. *EBSC I*, 932 F.3d at 773–74; § 1182(a) ("[Noncitizens] inadmissible under [§ 1182(a)] are ineligible to receive visas [or] be admitted to the United States.").

Further, the President's attempt to use § 1182(f) to suspend entry based on inadmissibility under § 1182(a) is nonsensical; it "does not have any practical effect" because it is redundant with existing law. *EBSC I*, 932 F.3d at 774 & n.14. Section 1182(f) only allows the President "to impose entry restrictions in addition to those elsewhere enumerated" in § 1182(a). *Hawai'i*, 585 U.S. at 684–85; *accord Abourezk v. Reagan*, 785 F.2d 1043, 1049 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987). Yet the Asylum Shutdown Policy, implementing Section 3 of the Proclamation, exceeds that statutory power by barring access to POEs to seek asylum for noncitizens who fail to provide information under § 1182(a)(1)–(3). Those individuals are already inadmissible under the very provisions the Proclamation invokes. Thus, even if admissibility were relevant for asylum, which it is not, *see supra* Part IV(B), § 1182(a) inadmissibility grounds already function as "entry" bars, and § 1182(f) has no role to play in applying those existing grounds in a non-entry context.

2. The Proclamation and Asylum Shutdown Policy Conflict with the INA's Text and Statutory Scheme.

The Proclamation and the Policy also violate § 1158(a) and undermine Congress's "comprehensive federal statutory scheme for regulation of immigration

and naturalization." *Chamber of Com. of the U.S. v. Whiting*, 563 U.S. 582, 587 (2011) (quoting *De Canas v. Bica,* 424 U.S. 351, 353, 359 (1976)). Courts must interpret statutes "in a way that renders them compatible, not contradictory." *Nu Image, Inc. v. Int'l All. of Theatrical Stage Emps.*, 893 F.3d 636, 646–47 n.5 (9th Cir. 2018). As discussed *supra* Part IV(B), § 1182 sets "the boundaries of admissibility," *Hawai'i*, 585 U.S. at 695, while § 1158(a) governs access to asylum. These provisions coexist without conflict. By construing § 1182(f) to permit agency action inconsistent with § 1158(a), the Proclamation and Policy contravene the INA's text and structure. Basic canons of statutory construction confirm this point.

Congress used the term "entry" in § 1182 and omitted it from § 1158—an intentional distinction. *Asarco LLC v. Atl. Richfield Co.*, 866 F.3d 1108, 1118–19 (9th Cir. 2017) ("it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of particular language in different sections of the same Act (citation omitted)). When Congress enacted § 1182 in 1952, the immigration-law meaning of "entry" was established. When Congress later adopted § 1158, it was fully aware of § 1182(f). *Cf. United States v. Merrell*, 37 F.4th 571, 576 (9th Cir. 2022). Section 1158 enumerates specific exceptions to the right to seek asylum but does not contain an "entry bar." *See* § 1158(a)(2), (b)(2). The omission should be understood as deliberate—*expressio unius est exclusio alterius*. *See supra* n.11. Congress's repeated amendments to the immigration laws—in 1986, 1996, and beyond—without extending § 1182(f) to physical presence or arrival further confirm this intent. *See Kimbrough v. United States*, 552 U.S. 85, 106 (2007) ("If nothing else, this tacit acceptance . . . undermines the Government's position.").

The Asylum Shutdown Policy also violates § 1158(a)(1), which provides that noncitizens "at a designated port of arrival" may apply for asylum, "irrespective of [] status." The Policy, however, bars noncitizens "subject to the Proclamation"—*i.e.*, asylum seekers who are inadmissible under § 1182(a)(1)–(3)—from crossing the international boundary at a POE, even when they "claim[] or manifest[] fear" to CBP

officers. Compl. ¶ 103, Ex. A. The Policy operates as a categorical ban, preventing asylum seekers from accessing POEs based on inadmissibility, despite Congress's explicit authorization to the contrary. *EBSC II*, 993 F.3d at 669–70. This "direct conflict" with federal law renders the Policy unlawful. *Id.* at 670.[22]

3. The Executive Possesses No Inherent Authority to Block Asylum Seekers at Ports of Entry.

Although the political branches both have some authority over immigration, it is "Congress [that] is vested with the principal power to control the nation's borders."[23] *EBSC I*, 932 F.3d at 755; *see also Fiallo*, 430 U.S. at 792; *supra* Part IV(B). The executive does not possess any inherent authority to block asylum seekers at POEs, and Defendants do not identify any. MTD 18.

Knauff is not to the contrary. In that case, a war bride was denied admission at Ellis Island under authority Congress had delegated to the executive branch "during a time of national emergency." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). The Supreme Court held only that "the decision to admit or to

[22] The recent grant of certiorari in a similarly-named but substantively distinct case, *Al Otro Lado v. Exec. Off. for Immigr. Rev.*, 138 F.4th 1102 (9th Cir. 2025), *cert. granted sub nom. Noem v. Al Otro Lado*, --- S. Ct. ---, No. 25-5 (U.S. Nov. 17, 2025), will not impact the resolution of this motion and should not delay the Court in deciding it. *Noem v. Al Otro Lado* is narrowly focused on whether DHS officials have a mandatory ministerial duty under 8 U.S.C. §§ 1158 and 1225, enforceable via § 706(1) of the APA, to allow asylum seekers who are standing just on the Mexican side of the border to be inspected and processed in the United States. The government did not invoke § 1182(f) in that case, and the case on appeal deals solely with the plaintiffs' § 706(1) claim. *See Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 5–7 (9th Cir. 1997) (§ 706(1) in essence creates a mandamus claim allowing enforcement of ministerial duties). Here, by contrast, Plaintiffs do not invoke § 706(1) at all; they bring APA § 706(2), *ultra vires*, and nonstatutory review claims that turn on the limits of the authority delegated by Congress in § 1182(f).

[23] Justice Kennedy's concurrence in *Kerry v. Din*, which concerns overseas visa processing, notes that the Court should have "respect for *the political branches*' broad power over the creation and administration of the immigration system," not for the President's power alone, whatever it may be. *See* MTD 18 (quoting 576 U.S. 86, 106 (2015) (Kennedy, J., concurring) (emphasis added)). The majority opinion in *Kerry* reiterates that the power to set the rules for who may enter (as opposed to administering those rules) belongs to Congress. *See, e.g.*, *Kerry*, 576 U.S. at 97 (Congress's policy choices regarding visas and entry are the types of "policy questions entrusted exclusively to the political branches" and courts thus must defer to *Congress's* political judgment (quoting *Fiallo*, 430 U.S. at 798)).

exclude an alien may be lawfully placed with the President," and that such a decision properly made within the delegated authority was final. *Id. Knauff* did not establish that the executive has independent exclusion authority. Nor does it support blocking access to asylum, which did not exist when *Knauff* was decided.[24]

This Court should also reject Defendants' effort to stretch *Sale*'s narrow holding to justify restricting access to asylum at POEs. MTD 16. *Sale* held that (1) a (now abrogated) withholding-of-removal statute, which specifically regulated the Attorney General, did not bind the government as to noncitizens interdicted on the high seas (*i.e.*, outside U.S. territorial waters); and (2) Article 33 of the 1951 Refugee Convention did not compel a different result.[25] *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 159, 187 (1993); *cf. United States v. Delgado-Garcia*, 374 F.3d 1337, 1348 (D.C. Cir. 2004) (distinguishing *Sale*). Its holding is limited to those issues.

In addition to being dicta, *Sale*'s statement regarding authority for a naval blockade on the high seas is irrelevant. *Sale* concerned a bilateral agreement to interdict Haitian citizens in international waters and return them to Haiti. *Sale*, 509 U.S. at 160. The Court determined that the U.S. government was under no obligation to bring them to the United States to comply with its *nonrefoulement* obligations under the withholding provisions. *Id.* at 176–77. Here, by contrast, asylum seekers are "attempting to come into the United States at a [land] port of entry," 8 C.F.R. § 1.2. *Sale* strongly suggests that Defendants have, at the very least, treaty obligations to allow proposed class members to seek protection. *See id.* at 160 (the INA offers

[24]The D.C. Circuit's stay order in another case challenging the § 1182(f) Proclamation as applied to asylum seekers already on U.S. soil is not relevant to this case or binding on this Court. *See Refugee & Immigrant Ctr. for Educ. & Legal Servs. v. Noem*, No. 25-5243 (D.C. Cir. Aug. 1, 2025). Importantly, the *RAICES* stay panel unanimously concluded that the Proclamation and its implementation violate the INA on their face and overstate the executive's authority under § 1182(f). *Id.* (Millett, J., at 22–24, 28–33) (Pillard, J., at 1) (Katsas, J., 1–2). Judge Millett's discussion of whether § 1182(f) authorizes the executive to "prevent noncitizens from entering the territorial land or waters of the United States" is dicta; it has no bearing on the stay panel's decision and is an observation by a single judge. *Id.* (Millett, J., at 22).

[25]Plaintiffs do not argue that asylum proceedings should occur outside the United States. *See* MTD 16.

asylum protection to individuals who have "arrived at the border of the United States"); *id.* at 182 (Article 33's *nonrefoulement* obligations apply at the border); *id.* at 159, 180 (those "arriving at the border" are given a hearing; treaty obligations extend to those "on the threshold of initial entry"); *id.* at 196 (Blackmun, J. dissenting) ("[T]he majority agrees that the Convention *does* apply to refugees who have reached the border.") (emphasis in original).

4. The Proclamation and Asylum Shutdown Policy Are *Ultra Vires*.

Defendants briefly contend that Claim 6, Plaintiffs' nonstatutory *ultra vires* claim, brought in the alternative, fails because the President's authority under § 1182(f) includes "issuing the Proclamation." MTD 25. Defendants' argument is based on the standard for determining when sovereign immunity is inapplicable even if it is not statutorily waived. *Id.* (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101–02 n.11 (1984); *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689 (1949)). Here, Agency Defendants' sovereign immunity is waived, 5 U.S.C. § 702; *Juliana v. United States*, 947 F.3d 1159, 1167 (9th Cir. 2020), so Defendants' "business of the sovereign" reference, MTD 25, is irrelevant to claims against Agency Defendants. To the extent Defendants argue the Proclamation is not *ultra vires* <u>*enough*</u> to justify nonstatutory review against the President himself, that argument fails in light of the extensive, controlling caselaw allowing nonstatutory review of the validity of a § 1182(f) proclamation. *See supra* Parts IV(C)(1)–(2). Those cases are especially applicable here, where the President is purporting to suspend something that is *not* "entry" under a statute that only allows suspension of "entry." Thus, even if *ultra vires* review of a presidential proclamation is as limited as Defendants claim, the Complaint pleads *ultra vires* conduct. *Cf. Fed. Educ. Ass'n v. Trump*, No. 25-5303, 2025 WL 2738626, at *9 (D.C. Cir. Sept. 25, 2025) (Pan. J., concurring) ("*Ultra vires* review can play a particularly important role . . . where the President has grossly exceeded the bounds of his statutory authority . . . .").

E. The CBP One Cancellation Is Final Agency Action and Required Notice and Comment.

1. The CBP One Cancellation Is Final Agency Action.

Contrary to Defendants' arguments, MTD 23–24, the CBP One Cancellation is a final agency action subject to APA review because it satisfies *Bennett*, *see supra* Part IV(C)(3)(a). On January 20, CBP canceled all CBP One appointments and ended the app's scheduling functionality, Compl. ¶¶ 90–91, giving no indication that the decision was temporary or subject to additional review. This was CBP's "last word on the matter." *Whitman*, 531 U.S. at 478. The Cancellation produced immediate legal consequences, eliminating the sole mechanism to access the asylum process at POEs and "affecting individual rights and obligations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). In substance and effect, it erased asylum seekers' statutory right to seek protection, satisfying *Bennett*'s second prong. *See City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003).[26]

2. The CBP One Cancellation Is a Substantive Rule Subject to Notice and Comment.

Defendants' notice-and-comment argument is also incorrect. MTD 21–23. The APA mandates that agencies publish proposed substantive rules in the Federal Register and provide the public an opportunity to comment. *See Erringer v. Thompson*, 371 F.3d 625, 629 (9th Cir. 2004) (citing 5 U.S.C. § 553(b) and (c)); *see also* 5 U.S.C. § 706(2)(D). Substantive rules "create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress." *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994).

Defendants' 2023 Circumvention of Lawful Pathways Rule ("CLP Rule") changed how noncitizens could seek asylum, making the "CBP One mobile application . . . the primary, if not exclusive, mechanism to seek . . . asylum at the

[26] *Center for Biological Diversity v. Haaland* is inapposite because it considered a non-binding recovery plan to protect bears, unlike the final decision here to cancel *all* CBP One appointments. 58 F.4th 412 (9th Cir. 2023).

southwestern border." *Coal. for Humane Immigrant Rights v. Noem*, No. 25-CV-872 (JMC), 2025 WL 2192986, at *8 (D.D.C. Aug. 1, 2025); *see Circumvention of Lawful Pathways*, 88 Fed. Reg. 31314, 31317–18. (May 16, 2023); 8 C.F.R. §§ 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B). The CLP Rule was substantive; it "set forth substantive rules," "ma[de] specific statements of policy," "conform[ed] to procedural standards," and reflected the "agency's public policy statement after reasoned consideration." *Al Otro Lado*, 2024 WL 4370577, at *9. When an agency action directly amends or repeals a prior substantive rule—as the CBP One Cancellation did—it too is substantive and must similarly undergo notice and comment. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1091 (9th Cir. 2003).

The CBP One Cancellation was also a substantive rule in its own right. 5 U.S.C. § 551(5). It closed off the only available method to seek asylum at a southern border POE, nullifying statutory rights and duties codified at 8 U.S.C. §§ 1158 and 1225.[27] If a rule that merely narrows access to asylum is substantive, as was the CLP Rule, then a rule that eliminates access altogether is also substantive. *See Mora-Meraz v. Thomas*, 601 F.3d 933, 940 (9th Cir. 2010) (to bypass notice-and-comment, new rules cannot be "inconsistent with" prior legislative rules because they "impose new rights or obligations").[28]

V. CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion.

[27]The elimination of access to the asylum process distinguishes the CBP One Cancellation from the cases Defendants cite. *See Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 246, 250 (D.C. Cir. 2014) (addition of screening step to mining permit process neither altered substantive criteria nor eliminated review process); *James V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277 (D.C. Cir. 2000) (eliminating one of several available methods to obtain food label approval is not substantive rule).

[28]Defendants claim—without explanation or support—that the rule's effect on migrants implicates the United States' relationship with Mexico. But "the foreign affairs exception [to rulemaking] requires the Government to do more than merely recite that the Rule 'implicates' foreign affairs." *EBSC I*, 932 F.3d at 775; *see also Yassini v. Crosland*, 618 F.2d 1356, 1360 (9th Cir. 1980). A mere reference to the "southern border with Mexico," for example, is insufficient to trigger 5 U.S.C. § 553's exceptions. *EBSC I*, 932 F.3d at 775.

Dated: November 24, 2025

Respectfully Submitted,

MORRISON & FOERSTER LLP

/s/ Eric M. Acker

Attorney for Plaintiffs
eacker@mofo.com
Eric M. Acker
John R. Lanham
Robert W. Manoso*

CENTER FOR GENDER AND REFUGEE STUDIES
Melissa Crow*
Blaine Bookey
Peter Habib
Robert Pauw*

CENTER FOR CONSTITUTIONAL RIGHTS
Baher Azmy*
Angelo Guisado*
Adina Marx-Arpadi*

AMERICAN IMMIGRATION COUNCIL
Michelle Lapointe*
Rebecca Cassler*
Suchita Mathur*

DEMOCRACY FORWARD FOUNDATION
Brian Netter*
Sarah M. Rich*
Adnan Perwez*