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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Al Otro Lado, Inc., *et al.*,

Plaintiffs,

v.

Kirstjen Nielsen, *et al.*,

Defendants.

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

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

Hearing Date: February 12, 2018

NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

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MEMORANDUM OF POINTS AND AUTHORITIES

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

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

II. FACTUAL BACKGROUND

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

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

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

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

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

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

B. Class Representatives Were Denied Access to the Asylum Process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. ARGUMENT

A. Class Representatives' Claims Are Not Moot.

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

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

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

1. B.D.'s Claims Are Not Moot Because She Did Not Accept Defendants' Offer.

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

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

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

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

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

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

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

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

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

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

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

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

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

Plaintiffs' interests in representing the class continue "even if there is no indication that they may again be subject to the acts that gave rise to their claims." *Garcia*, 2014 WL 6657591, at *11.

3. Defendants Provided Only Partial Relief to Class Representatives.

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

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

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

Defendants argue that Al Otro Lado lacks standing because Plaintiffs have not pointed to a specific statutory provision that provides Al Otro Lado standing to

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

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

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[4] Defendants note the prior court's reference to Al Otro Lado's standing in its order transferring the case. (Mot. 10 n.4 (citing ECF No. 113).) The court's lone reference to Al Otro Lado as being "(with questionable standing)" was in the context of deciding the motion to transfer venue. The prior court did not rule on or even discuss the merits of Al Otro Lado's standing. Indeed, the court received no briefing on this topic because Defendants did not address Al Otro Lado's standing in their prior motion to dismiss. (*See* ECF No. 58.)

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

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

Defendants cite two non-precedential cases to argue that Al Otro Lado lacks standing because its claims do not fall within the "zone of interests" that the INA was intended to protect.[5] (Mot. 10.) The zone of interests test asks whether a plaintiff bringing a statutory cause of action is asserting interests which are

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

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

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

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

C. Plaintiffs' Claims Are Adequately Pled and Judicable.

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

conclusion that Defendants will continue to deny asylum seekers access to the asylum process.[6] (Mot. 11.)

Fundamentally, Defendants ignore that, in considering a Rule 12(b)(6) motion to dismiss, courts must accept the allegations of the complaint as true and construe the pleading "in the light most favorable to the plaintiff." *Williams,* 552 F.3d at 937. The complaint need only contain "a short and plain statement of the claim showing that [the plaintiff] is entitled to relief," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), and "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). This plausibility standard "is not akin to a probability requirement," *id.*; "weighing [of evidence] is inappropriate . . . at the dismissal stage." *Weisbuch v. Cnty. of Los Angeles*, 119 F.3d 778, 785 (9th Cir. 1997).

1. Plaintiffs Have Stated a Claim Under the APA.

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

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

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

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

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

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

2. Plaintiffs Have Alleged an Illegal Policy or Practice.

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

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

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

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

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

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

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

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

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

3. This Court Has Jurisdiction to Grant Prospective Injunctive Relief.

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

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

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

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

IV. CONCLUSION

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

Dated: January 29, 2018

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

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

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Al Otro Lado, Inc., *et al.*,

Plaintiffs,

v.

Kirstjen Nielsen, *et al.*,

Defendants.

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

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

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

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

DATED: January 29, 2018

LATHAM & WATKINS LLP

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