IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CRISTHIAN HERRERA CARDENAS, *et al.*, on behalf of themselves and all others similarly situated, *Plaintiffs*, v. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *et al.*, *Defendants*.	No. 1:22-cv-00801-TWP-DML Chief Judge Tanya Walton Pratt Magistrate Judge Debra McVicker Lynch **CLASS ACTION**

PLAINTIFFS' OMNIBUS OPPOSITION
TO DEFENDANTS' MOTIONS TO DISMISS

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INTRODUCTION

U.S. Immigration and Customs Enforcement ("ICE") pays Clay County, Indiana, to detain noncitizens at the Clay County Jail. By law, ICE can make payments to the County only as long as the Jail complies with ICE's standards of care, the Performance-Based National Detention Standards ("PBNDS"). The County, however, has allowed individuals in ICE custody to suffer in substandard conditions. Plaintiffs and others detained at the Jail have been denied adequate medical care, food, warm clothing, and even sometimes working toilets—all of which are expressly required by the PBNDS. Instead of spending federal funds on fixing these problems, the County has diverted them to pay for unrelated expenses, such as repairing roads, raising salaries, and enhancing other County facilities. Officials at ICE have turned a blind eye to this reality so they can continue using the Jail to detain noncitizens.

This lawsuit seeks relief from these unlawful actions against both the Federal and the Clay County Defendants. Plaintiffs challenge three actions: (1) the Federal Defendants' certification of the Jail as compliant with the PBNDS in December 2021, despite widespread violations of those standards documented by inspectors and additional undocumented (and in some cases, incurable) deficiencies; (2) the Federal Defendants' continued payments to the County for use of the Jail under their contract ("Detention Contract"), despite the County's open misuse of federal funds; and (3) the Clay County Defendants' unlawful diversion of detention payments for unrelated County expenses in violation of directly applicable federal law and the Detention Contract.

The most striking aspect of Defendants' motions to dismiss is what they do *not* challenge. They do not dispute that conditions at the Jail, as alleged in the Complaint, violate the PBNDS in numerous ways and cannot support a certification of compliance. They do not dispute that Plaintiffs have been harmed as a result of those appalling conditions. And they do not dispute

that ICE's certification of the Jail, in light of the alleged conditions there, was arbitrary and capricious and contrary to law. Additionally, the Federal Defendants do not dispute that payments to Clay County are subject to federal laws governing costs that may be charged to federal awards, and they agree that Clay County is "responsible for the management and fiscal control of all funds provided by the United States and for complying with various provisions of federal law governing accounting and financial management." ECF No. 61 ("Federal MTD") at 3 (internal quotation marks omitted). And the Clay County Defendants do not dispute that they have spent significant amounts of their payments on expenses that had nothing to do with the Jail or the detention of noncitizens. Indeed, they double down on their view that they can profit from detaining noncitizens in ICE custody and do whatever they want with those funds. *See* ECF No. 57 ("Clay County MTD") at 22–24.

The strategy in both motions to dismiss is to close off any judicial scrutiny of Defendants' actions. The Federal Defendants, for instance, make the startling claim that, even assuming Plaintiffs would prevail on the merits, they lack standing because they "can do no more than speculate as to whether vacatur of the alleged agency actions would result in either an end to ICE detention at the Jail or an improvement of conditions." Federal MTD at 6–7. If Plaintiffs prevail, however, they will be entitled to declaratory and injunctive relief, and the Federal Defendants will be bound by that decision. The Federal Defendants also assert that their actions are unreviewable matters of discretion. But multiple laws impose specific limitations on the Federal Defendants' certification of the Jail and their payments to the County. The Federal Defendants' violations of those requirements are subject to judicial review.

The Clay County Defendants likewise argue that their diversion of funds is not reviewable. As they would have it, the County can do whatever it wants with federal funds. *See*

Clay County MTD at 22–24. But federal law and the Detention Contract itself regulate how "non-Federal" entities like the County may use federal funds, and in particular, prohibit them from earning or keeping profits. Yet that is what the County has admitted to doing. *See, e.g.*, Compl. ¶ 77 (Defendant Moss touting ICE's "profitable fee"). The Clay County Defendants also assert that Plaintiffs lack standing to complain about violations of the Detention Contract. In their view, only ICE can hold the County accountable—which, if true, would be convenient for the County given that the Federal Defendants have avoided holding them accountable and now disclaim that very authority. *See* Federal MTD at 8 ("Put simply, ICE cannot order Clay County to take any particular action regarding conditions at the Jail beyond incentivizing the County to do so."). The Detention Contract, however, clearly reflects the parties' intent to benefit Plaintiffs and other individuals in ICE custody in a number of ways, including by obligating the County to provide adequate medical care and other basic necessities, and by declaring that its purpose is "the housing, safekeeping, and subsistence" of Plaintiffs and others in detention. As a result, Plaintiffs can sue under the contract.

Plaintiffs and others like them are caught between two governments disclaiming responsibility for violations of the law. This Court can review these violations and grant relief. The motions to dismiss should be denied.

STATEMENT OF ISSUES

The Federal Defendants' motion to dismiss raises three issues:

1. Whether Plaintiffs' injuries are redressable.
2. Whether Plaintiffs challenge final agency actions.
3. Whether the Federal Defendants' payments for detention at the Jail are decisions committed to agency discretion.

The Clay County Defendants' motion to dismiss also raises three issues:

1. Whether federal law restricts how the Clay County Defendants can use federal funds paid under the Detention Contract.

2. Whether Plaintiffs have standing.

3. Whether all of the named Clay County Defendants are proper defendants.

BACKGROUND

In 2013, ICE began detaining noncitizens at the Clay County Jail under the Detention Contract. Compl. ¶¶ 27, 66. ICE pays a "per diem" rate to the County per detained person per day. *See* ECF No. 1-1 ("Detention Contract") at 2 (Box 11), 9 (Box 6). The contract, consistent with federal law, specifies that these payments are "for the housing, safekeeping, and subsistence" of individuals detained by ICE. *Id.* at 2 (Box 8). The contract has been lucrative for the County. In 2020 alone, the County received approximately $1.4 million in ICE payments. Compl. ¶ 72.

I. The Legal Framework Governing Detention Of Noncitizens At The Jail.

A. The Two Strikes Mandate.

Congress mandates that ICE regularly inspect the detention facilities it uses, and immediately terminate the use of any facility that fails two "overall performance evaluations." *Id.* ¶¶ 7, 91–93. "[N]one of the funds" appropriated to ICE for detention "may be used to continue any contract for the provision of detention services if the two most recent overall performance evaluations received by the contracted facility are less than 'adequate' or the equivalent median score in any subsequent performance evaluation system." Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, Div. F, Tit. II, § 215(a) (Dec. 27, 2020), 134 Stat. 1457 (the "Two Strikes Mandate").

The Two Strikes Mandate is a vital part of congressional oversight of ICE's detention operations. It was first enacted in 2008 in response to hearings on critical deficiencies in the medical care provided by ICE. Compl. ¶¶ 92–93. Following the mandate, ICE revised its detention standards "to more clearly delineate the results or outcomes to be accomplished by adherence to [the specified] requirements," creating the standards applicable here, the PBNDS. *Id.* ¶ 89.[1] These standards address a range of requirements, including environmental health and safety, personal hygiene, and medical care, all aimed at insuring the "safety, security and conditions of confinement" for noncitizens. *Id.* ¶¶ 89, 98, 103, 123, 128. Among other things, ICE designed these standards to "protect[]" individuals "from injury and illness by maintaining high facility standards of cleanliness and sanitation," to ensure that the "health care needs" of individuals in detention are "met in a timely and efficient manner," and to ensure that those individuals have access to adequate nutritional food, recreation, and basic necessities. *Id.* ¶¶ 98, 108, 123, 128, 148.

To conduct the statutorily required evaluations, ICE hires Nakamoto Group, Inc. ("Nakamoto"), a private company, to inspect facilities and make recommendations to ICE about compliance with the PBNDS. *Id.* ¶ 184. Nakamoto inspects facilities at least once a year and provides a report to ICE. *See id.* ¶ 199. After reviewing that report, ICE determines whether the facility satisfies the PBNDS, and issues a certification of its determination. *See id.* ¶¶ 194, 203. In the event of a failing grade, Nakamoto conducts a follow-up inspection within 180 days. *See id.* ¶ 221. If ICE finds and certifies two consecutive failing scores, the Two Strikes Mandate prohibits ICE from making any further payments for detention at the facility. *See id.* ¶¶ 205, 208.

[1] *See* U.S. ICE, *ICE Detention Standards* (Nov. 9, 2021) (cited at Compl. ¶ 89).

Nakamoto is notoriously lax, and its procedures for identifying violations of the PBNDS are flawed. *See id.* ¶¶ 184–95. ICE knows this; as ICE officials have admitted, Nakamoto inspections are "very, very, very difficult to fail." *Id.* ¶ 186. So even when Nakamoto says a facility is satisfactory, the flaws in its procedures—including preannouncing visits, relying on the word of detention staff, and failing to properly interview individuals in detention—render that conclusion unreliable. *Id.* ¶ 195.

B. 8 U.S.C. § 1103(a)(11).

The federal funds at issue in this case are also regulated by 8 U.S.C. § 1103(a)(11). That provision allows the federal government to "make payments" to local governments like the County "for" specific purposes only: "for necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by [ICE]." *Id.* Section 1103(a)(11) is not unique: A nearly identical law governs the use of federal funds for federal prisoners at non-Federal institutions. *See* 18 U.S.C. § 4013(a).

C. The UAR Regulations.

Also applicable are the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. Part 200 (the "UAR"). These regulations establish "uniform administrative requirements, cost principles, and audit requirements" for federal funds paid to "non-Federal entities" such as the County. 2 C.F.R. § 200.100(a). The UAR is mandatory and binding for the payments at issue here. *See id.* § 3002.10 (adoption by Department of Homeland Security in 2014). The UAR cost principles "must be used in determining the allowable costs of work performed by the non-Federal entity under Federal awards." *Id.* § 200.401(a). In addition, the federal agency issuing the funds "must manage and administer the Federal award . . . so as to ensure that Federal funding is expended . . . in full accordance with the U.S. Constitution, Federal Law and public policy requirements," including the requirements

of "general appropriations provisions" like the Two Strikes Mandate. *Id.* § 200.300(a). And the non-Federal entity receiving funds is "responsible for complying with all requirements of the Federal award," including applicable federal laws. *Id.* § 200.300(b).

Critically, the UAR expressly prohibits non-Federal entities like Clay County from "earn[ing] or keep[ing] any profit resulting from Federal financial assistance, unless explicitly authorized by the terms and conditions of the Federal award." 2 C.F.R. § 200.400(g). Such profits are not authorized by ICE's contract with the County. *See* Detention Contract. In addition, the UAR provides that only "allowable" costs may be paid using federal funds. 2 C.F.R. § 200.402. To be allowable, a cost must be "necessary and reasonable for the performance of the Federal award," and "adequately documented." 2 C.F.R. § 200.403(a), (g).

D. The Detention Contract.

ICE's contract with the County provides additional terms and conditions governing the detention of noncitizens at the Jail. Its purpose is to provide "for the housing, safekeeping, and subsistence of federal prisoners." Detention Contract at 2 (Box 8). It imposes "mandatory minimum conditions of confinement which are to be met during the entire period" of the agreement. *Id.* at 7 (Article XIII). For instance, the contract requires that the "Jail will provide 24-hour emergency medical care" and "adequate access to any prescription medications." *Id.*

The contract also recognizes and requires that the County's per diem rate must be "established on the basis of actual and allowable costs associated with the operation of the facility," as mandated by the UAR. *Id.* at 4 (Article VI(1)), 5 (Article IX(2)) (citing the predecessor to the UAR, 28 C.F.R. Part 66); *see also* Federal MTD at 2 (recognizing that the County is responsible for "complying with various provisions of federal law governing accounting and financial management"). For instance, in 2015, the County sought and received an increase in the per diem rate, to $55 per person per day. ECF No. 1-2 ("Per Diem

Amendment") at 4 (Box 9). To do so, the County submitted a form called the Cost Sheet for Detention Services (USM-243). Detention Contract at 4 (Article VI(4)). That form required the County to demonstrate that its "actual and allowable costs for each detained person" justified the increase. Compl. ¶ 68. The form reiterated that "[t]he fixed per diem will be computed on the basis of actual, allowable, and allocable direct and indirect costs associated with the operation of the facility and that benefit federal prisoners." *Id.* The form specifically warned the County that "[i]f the costs do not benefit federal prisoners, they cannot be claimed on the Cost Sheet." *Id.*

In addition to authorizing the per diem increase, the 2015 amendment also addressed the Jail's "compliance with PBNDS." Per Diem Amendment at 6 (Item 0003). It required the County to "purchase additional recreation equipment" "including stationary bikes and other cardiovascular equipment," as well as "purchase, install, maintain and keep operational 2 Helios 7 station outdoor gyms for detainee use." *Id.*

II. Defendants' Violations Of The Laws Governing Detention At The Jail.

A. ICE's Improper Certification Of The Jail In December 2021.

In May 2021, Nakamoto conducted its annual overall performance evaluation of the Jail. Compl. ¶ 199. Despite Nakamoto's flawed and unreliable inspection process, violations at the Jail were so widespread that Nakamoto had no choice but to recommend a failing grade, which ICE later certified. *See, e.g.*, *id.* ¶¶ 8, 200–04.

This failure was the Jail's first strike. As ICE's Assistant Director for Custody Management recognized, a second strike would trigger termination under the Two Strikes Mandate. *Id.* ¶ 205. In discussing the follow-up evaluation by Nakamoto, he wrote that "should the facility receive a subsequent rating of Does Not Meets Standards," "ICE will have no choice but to immediately discontinue use of the facility and remove all detainees within 5 days of

notification." *Id.* ¶ 208. ICE scheduled the second evaluation with Nakamoto for December 2021. *See id.* ¶¶ 215–19.

Prior to the official Nakamoto evaluation, ICE's Office of Detention Oversight (ODO) conducted a fully remote review of the Jail in November 2021. *Id.* ¶ 212. This review was *ad hoc* and not an overall performance evaluation. *Id.* ¶ 196, 212. ODO's remote review did not document even obvious, previously identified violations, like the fact that noncitizens do not have access to adequate toilets. *Id.* ¶ 213; *see also id.* ¶ 113 (noting that toilets could not be added because the Jail is "permanently configured"), ¶ 211. Based on its limited review, ODO rated the facility as "superior." *Id.* ¶¶ 213–14. ICE did not issue any certification based on the ODO review.

In December, Nakamoto conducted the second overall performance evaluation of 2021. Conditions at the Jail continued to violate the PBNDS in numerous ways. *Id.* ¶ 220. Nakamoto's inspection team identified 21 violations of the PBNDS across 8 different standards. *Id.* ¶ 222. The inspectors described what they found in stark terms:

> Sanitation levels and conditions of confinement were observed to be unacceptable in housing units dedicated to ICE detainees. Housing units do not provide adequate seating for meal service. Detainees were observed eating the lunch meal while seated on the stairs or bed because table seating was not available. Toilet and sink ratios are not within standard guidelines. Boat beds have been added to all three units housing detainees. Detainees were observed sleeping in boat beds. On day three of the inspection, no less than six detainees were assigned to a boat bed. The boat beds encroach on the unencumbered space in the dayroom. Graffiti was observed on the walls of all housing units. Sheets were observed hanging in front of the toilets in B unit. There are no privacy panels in the toilet area. One bunk is located parallel to the toilets. On day one, eight detainees in B unit complained that "toilets are not working." The maintenance supervisor confirmed that the toilets have "been malfunctioning because detainees have been throwing items in the stool." On day three, the toilets were still malfunctioning.

Id. ¶ 223.[2]

This extensive list of violations understated conditions at the Jail. Nakamoto's remote medical inspectors, for instance, failed to record continuing violations of the PBNDS' medical care standards that had been identified in May 2021 and remained unaddressed. *Id.* ¶¶ 229–32.

Despite numerous documented violations and additional undocumented ones, Nakamoto recommended a grade of "Meets Standards" in December 2021. *Id.* ¶ 235. This recommendation was directly contrary to the evidence Nakamoto reviewed and the conditions in the Jail. *Id.* ICE rubber-stamped Nakamoto's recommendation and certified that the Jail complied with the PBNDS. *Id.* ¶ 236. ICE adopted Nakamoto's recommendation not because the Jail had adequately remedied its deficiencies, but because ICE had to avoid a second failing grade to prevent mandatory termination of the Detention Contract. *Id.* ¶ 237.

As a result of the passing score, ICE did not stop using the Jail in December 2021, the widespread violations of the PBNDS persisted, and ICE continued to make regular payments to the County. *Id.* ¶ 238.

B. ICE's Improper Payments And The County's Misuse Of Funds.

As noted above, ICE pays the County a per diem rate that accounts for costs "associated with the operation of the facility and that benefit federal prisoners." *Id.* ¶ 68. No portion of those payments may be kept by the County as "profit," *i.e.*, money in excess of valid costs. 2 C.F.R. § 200.400(g). But for years, significant portions of the money paid to the County have not gone towards such costs. *See, e.g.*, Compl. ¶ 72 (alleging that "at least 56%" of the 2020 payments were diverted for other purposes). The County has spent hundreds of thousands of dollars on unrelated County expenditures. *Id.* ¶ 71. For instance, in 2021, the County purchased an $83,000

[2] "Boat beds" are thin, plastic tub-shaped pallets placed on the floor that are meant only for temporary sleeping arrangements when a housing unit's bunkbeds are full. Compl. ¶15 n.1.

air conditioning system for the courthouse, "paid for thanks to jail profits." *Id.* ¶ 73. The County also awarded raises and bonuses to County employees who are not involved with the Jail. *Id.* ¶ 72. The County has also used the funds to pay for road repairs and other County services. *Id.* ¶¶ 81, 85.

The County is open about this diversion of funds. Defendant Paul Sinders, President of the Clay County Commissioners, has publicly touted ICE payments under the contract as a way to avoid "rais[ing] our taxes" and to "subsidize the county budget." *Id.* ¶ 88. Defendant Larry Moss, a Clay County Councilmember, described the per diem rate as a "profitable fee" that generates a "net value" for the County. *Id.* ¶¶ 77–78. Defendant Paul Harden, the Clay County Sheriff, told a local newspaper that "it's only sensible to use the available space and collect on the opportunity for the county." *Id.* ¶ 74. When confronted with the federal laws that restrict the use of these funds, Defendant Moss declared that, once ICE makes payments to the County, "they can't tell us what to do with it." *Id.* ¶ 83.

PROCEDURAL HISTORY

On April 25, 2022, Plaintiffs filed this putative class action asserting three claims for declaratory and injunctive relief. In Counts I and II, they allege that the Federal Defendants violated the Administrative Procedure Act ("APA") by (I) certifying that the Jail complied with the PBNDS in December 2021, and (II) making payments to the County despite the County's open misuse of federal funds in violation of federal law. *See id.* ¶¶ 245–75. In Count III, Plaintiffs challenge the Clay County Defendants' misuse of federal funds in violation of applicable federal law and the Detention Contract, which is actionable under the Indiana Uniform Declaratory Judgment Act and Indiana Rule of Trial Procedure 57. *See id.* ¶¶ 276–82.

On July 15, 2022, the Clay County Defendants moved to dismiss Count III. ECF No. 56. One week later, the Federal Defendants moved to dismiss Counts I and II. ECF No. 60.

ARGUMENT

"In ruling on a motion to dismiss, the Court views the complaint in the light most favorable to the plaintiff, accepting all well-pleaded factual allegations as true and drawing all reasonable inferences from those allegations in favor of the plaintiff." *Brown v. Cho*, 2015 WL 7430803, at *1 (S.D. Ind. Nov. 20, 2015) (Pratt, C.J.); *see Carlson v. CSX Transp., Inc.*, 758 F.3d 819, 826–27 (7th Cir. 2014). As this stage, the Complaint must simply include "enough details about the subject-matter of the case to present a story that holds together." *Carlson*, 758 F.3d at 827. "Thus, a complaint should only be dismissed pursuant to Rule 12(b)(6) when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Brown*, 2015 WL 7430803, at *1 (cleaned up); *see Figgs v. GEO Group, Inc.*, 2019 WL 1428084, at *2 (S.D. Ind. Mar. 29, 2019) (Pratt, C.J.) ("The plaintiff receives the benefit of imagination at this stage [as] long as the hypotheses are consistent with the complaint.") (cleaned up). The same standard applies to a motion to dismiss for lack of standing. *See Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 498 (7th Cir. 2005) ("A motion to dismiss for lack of standing should not be granted unless there are no set of facts consistent with the complaint's allegations that could establish standing.").

Defendants have failed to show that any of Plaintiffs' claims should be dismissed.

I. The Federal Defendants' Motion to Dismiss Should Be Denied.

The Federal Defendants do not dispute much of Plaintiffs' case. They do not contest that the well-pleaded facts show that the Jail violated the PBNDS at the time of the second overall performance evaluation in December 2021. They also do not contest that those well-pleaded facts establish that ICE's December 2021 certification of the Jail was arbitrary and capricious. Nor do they contest that the federal funds at issue here are subject to the UAR and other federal laws, and that the continued payments of such funds given the facts alleged violates those laws.

Indeed, they all but *concede* the alleged legal violations. *See* Federal MTD at 17 ("Plaintiffs cannot prevail simply by showing a violation" of 8 U.S.C. § 1103(a)(11).).

Instead, the Federal Defendants rely on three narrow arguments. Regarding Count I, the improper certification of the Jail, they contend that Plaintiffs lack standing because their injuries are not redressable, and that Plaintiffs fail to allege a final agency action. The Federal Defendants raise these same arguments as to Count II, concerning improper payments for detention at the Jail, and add that their conduct is unreviewable because it is committed to agency discretion. These arguments mischaracterize the Complaint and are inconsistent with Plaintiffs' well-pleaded allegations and the law, and thus they should be rejected.

A. The Federal Defendants' Challenges To Count I (Improper Certification Of The Jail In December 2021) Fail.

1. Plaintiffs' Injuries Are Redressable.

To satisfy Article III standing, a plaintiff must show (1) she "has suffered an 'injury in fact,'" (2) "the injury is fairly traceable to the challenged action of the defendant," and (3) "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). In addressing standing, "the court must be careful not to decide the questions on the merits . . . and must therefore assume that on the merits the plaintiffs would be successful in their claims." *Sierra Club v. EPA*, 774 F.3d 383, 389 (7th Cir. 2014) (cleaned up).

The Federal Defendants do not contest that Plaintiffs have suffered injuries in fact or that those injuries are fairly traceable to the Federal Defendants' decision to certify the Jail as compliant with the PBNDS in December 2021 despite its substandard conditions. *See, e.g.*,

Compl. ¶ 20.[3] The Federal Defendants argue only that, assuming Plaintiffs prevail, Plaintiffs' injuries would not likely be redressed by the declaratory or injunctive relief they seek. Federal MTD at 5–6. They are wrong.

Declaratory Relief. Plaintiffs seek a declaration "that conditions at the Jail were not adequate under the PBNDS in May or December 2021." Compl. (Prayer for Relief) ¶ E. That relief alone would redress Plaintiffs' injuries by establishing that the Jail failed its second consecutive overall performance evaluation in December 2021, triggering mandatory termination under the Two Strikes Mandate. *See id.* ¶ 208. Indeed, ICE's own officials recognized that, if the Jail failed the December 2021 Nakamoto inspection, they would have "no choice but to immediately discontinue use of the facility." *Id*. This mandatory discontinuation would require ICE to "remove all detainees within 5 days of notification," and either release them or transfer them to a facility that complied with ICE's detention standards. *Id.* A declaration by this Court that the Jail did not comply with the PBNDS in December 2021 would give Plaintiffs certain relief from the conditions at the Jail. Indeed, the Federal Defendants do not dispute that such declaratory relief would redress Plaintiffs' injuries. *See* Federal MTD at 6–9.

Instead, the Federal Defendants argue that the APA authorizes only vacatur of the December 2021 certification, not declaratory relief. *See id.* at 6. But the APA expressly authorizes courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."

[3] Nor do the Federal Defendants contest that Plaintiffs fall within the "zone of interests" of the relevant provisions of law. *See Amgen, Inc. v. Smith*, 357 F.3d 103, 108 (D.C. Cir. 2004). Plaintiffs satisfy the test because their asserted interests are consistent with the purpose of these provisions, which include ensuring adequate levels of care for those in ICE custody. *See Cook County, Illinois v. Wolf*, 962 F.3d 208, 220 (7th Cir. 2020) (concluding that a county fell within the Immigration and Nationality Act's zone of interests because of its interest "in ensuring lawful immigrants' access to authorized federal and state public benefits").

5 U.S.C. § 706. In addition, the APA directs courts to "*hold unlawful* and set aside" illegal agency actions. *Id.* (emphasis added). These provisions establish that declaratory relief—*i.e.*, holding ICE's certification unlawful because the Jail did not comply with the PBNDS in December 2021— is appropriate, in addition to vacatur. *See Hammer v. U.S. Dep't of Health & Human Servs.*, 905 F.3d 517, 535 (7th Cir. 2018) (noting that the APA "waives the United States's sovereign immunity to declaratory relief in federal courts"). Indeed, courts regularly exercise their authority to "vacate an arbitrary and capricious decision, declare the action unlawful, and remand to the agency for further proceedings consistent with the APA and the Court's ruling." *Weingarten v. Devos*, 468 F. Supp. 3d 322, 336 (D.D.C. 2020); *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 821 (9th Cir. 2017) (holding that the plaintiff had "standing to pursue declaratory relief" under the APA); *Cal. by and through Becerra v. U.S. Dep't of Interior*, 381 F. Supp. 3d 1153, 1179 (N.D. Cal. 2019) ("The Court finds that both declaratory relief and vacatur are appropriate remedies based on the [agency's] violations of the APA.").

Vacatur itself would also address Plaintiffs' injuries. The Federal Defendants remarkably claim that Plaintiffs "can do no more than speculate as to whether vacatur of the alleged agency actions would result in either an end to ICE detention at the Jail or an improvement of conditions at the Jail to the level Plaintiffs deem appropriate." Federal MTD at 6–7. They further assert that vacatur "would simply prompt a further inspection," and "it is impermissibly speculative to suppose that any subsequent inspection would result in a failing grade." *Id.*

This contention mischaracterizes the effect of vacatur here. Vacatur would not simply result in a new, substitute inspection. Because of the failed May 2021 evaluation, the December 2021 evaluation was a make-or-break moment. As ICE recognized, a failing score in December

2021 would trigger the Two Strikes Mandate, leaving ICE with "no choice but to immediately discontinue use of the facility and remove all detainees within 5 days of notification." Compl. ¶ 208 (quoting ICE Assistant Director for Custody Management). And on Plaintiffs' well-pleaded allegations, conditions at the Jail undeniably violated the PBNDS in December 2021, and could not support a passing grade. *Id.* ¶¶ 96–175, 220–34. No subsequent inspection can change these facts, which must be taken as true at this stage.[4]

Moreover, vacatur of the December 2021 certification would still redress Plaintiffs' injuries even if it led to a new inspection by creating a "significant increase in the likelihood that [the plaintiffs] would obtain relief that directly redresses the injury suffered." *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 178 (D.D.C. 2015) (finding redressability satisfied even though ICE would still need to make a new determination based on remaining factors because "it is in no sense 'speculative' that enjoining ICE's consideration of [a specific] factor would render Plaintiffs' release far more likely"); *see Nat'l Parks Rsrv. Ass'n v. Manson*, 414 F.3d 1, 7 (D.C. Cir. 2005) ("A district court order setting aside Interior's letter withdrawing its adverse impact determination doubtless would significantly affect these ongoing [permitting] proceedings. That

[4] The Federal Defendants also point to the November 2021 review of the Jail by ODO, asserting—without any support—that it was an overall performance evaluation that intervened between the May and December evaluations. Federal MTD at 7. That is wrong and contrary to the well-pleaded allegations in the Complaint. ICE officials considered the December 2021 inspection by Nakamoto to be the critical overall performance evaluation, not ODO's limited review. Compl. ¶¶ 195–97, 209. Reflecting this, in late November 2021, *after* the ODO inspection, ICE officials warned Jail staff that the Jail was in jeopardy of potential termination because of the failed May 2021 evaluation and the upcoming December 2021 evaluation. *See id.* ¶ 218. ICE then relied on Nakamoto's inspection, not ODO's, to certify the Jail's compliance with the PBNDS. *See id.* ¶¶ 235–36. This is standard practice for ICE: Since 2007, the overall performance evaluations of the Jail have been conducted only by Nakamoto and have occurred under a different set of parameters than the *ad hoc* reviews conducted by ODO, which are entirely remote and cover "only a subset of the requirements of the PBNDS." *Id.* ¶¶ 184, 196. At this stage, these allegations must be taken as true, and the Federal Defendants' assertion cannot support dismissal.

is enough to satisfy redressability."). If the Court vacates the December 2021 certification on the grounds that it was arbitrary and capricious and contrary to law, any subsequent re-inspection and re-certification of the Jail must be reliable and not plagued by the well-documented flaws in Nakamoto's inspection process. Compl. ¶¶ 184–95. At a minimum, such an evaluation will—based on the facts alleged in the Complaint—identify numerous violations that have been documented on multiple occasions and that persist, including deficiencies that result from permanent issues at the Jail. *See id.* ¶ 149 ("[T]he Jail simply does not have such a space [for outdoor recreation]."); ¶ 211 ("Nakamoto noted that, according to the Jail's own compliance sergeant, 'this requirement [of adequate toilets] cannot be met because the cells are permanently configured.'"). Vacating the December 2021 certification and requiring a reliable follow-up inspection, therefore, would significantly increase the likelihood that Plaintiffs ultimately gain relief from conditions at the Jail, satisfying redressability.

Injunctive Relief. In addition to declaratory relief, Plaintiffs also seek an injunction to enjoin the Federal Defendants "from continuing to detain Plaintiffs and other Class members at the Jail." Compl. (Prayer for Relief) ¶ L. The Federal Defendants do not dispute that such an injunction would redress Plaintiffs' injuries. Instead, they contend that such an injunction (1) is "inconsistent with the APA," and (2) is barred by 8 U.S.C. § 1252(f). Federal MTD at 6–7, 10–11. Neither argument is correct.

First, the Federal Defendants assert that "the requested injunctive relief is impermissible as a matter of APA law because it represents specific relief not contemplated by section 706(2)." Federal MTD at 10. The APA, however, expressly contemplates injunctive relief, requiring that "any mandatory or injunctive decree shall specify the Federal officer[s] . . . personally responsible for compliance." 5 U.S.C. § 702; *see Thomas v. Watts*, 2013 WL 3043686, at *5

(S.D. Ind. June 17, 2013) (noting that the APA "allow[s] suits for injunctive relief to be brought against the United States"). Courts across the country regularly exercise this authority. *See, e.g.*, *Cook County*, 962 F.3d at 215 (concluding that "the district court did not abuse its discretion by granting preliminary injunctive relief" with respect to APA challenge to "public charge" standards for immigrants); *Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 59 (D.D.C. 2020) (enjoining use of DHS's changes to its credible fear lesson plans); *Washington v. Trump*, 441 F. Supp. 3d 1101, 1126–27 (W.D. Wash. 2020) (enjoining the federal government from using military construction funds based on violations of the APA); *see also Ramirez v. U.S. Immigration and Customs Enforcement*, 568 F. Supp. 3d 10, 22 (D.D.C. 2021), *appeal filed*, No. 22-5002 (D.C. Cir. 2022) ("[C]ourts use this broad remedial power to issue permanent injunctive relief for APA violations.").

To support their contention that injunctive relief is not allowed under the APA, the Federal Defendants rely on *PPG Industries, Inc. v. United States*, 52 F.3d 363 (D.C. Cir. 1995). Federal MTD at 6, 10. That case does not support their categorical position. It held only that, when an agency decision "rested on an incorrect legal standard," courts should generally "remand[] to the agency for further action consistent with the corrected legal standards." 52 F.3d at 365. *PPG Industries* does not establish that remand is the *only* permissible remedy under the APA. Where, as here, the plaintiffs allege that the agency's decision was not simply evaluated under an incorrect legal standard, but was directly contrary to the evidence before the agency and governing substantive law, further relief is warranted. *See, e.g.*, *Kiakombua*, 498 F. Supp. 3d at 51, 59 (providing injunctive relief "where the agency action is so crippled as to be unlawful, and not simply potentially lawful but insufficiently or inappropriately explained") (cleaned up).

The Federal Defendants also cite *Palisades General Hospital Inc. v. Leavitt*, 426 F.3d 400 (D.C. Cir. 2005). Federal MTD at 6. That case also did not hold that injunctive relief is barred under the APA. Rather, it held that a court could not "order reclassification" of a hospital's wage index for purposes of Medicare reimbursement because the hospital had not sought review of the reclassification decision, and instead had appealed only a subsidiary decision about wage data. 426 F.3d at 402–03. As the D.C. Circuit explained, "[t]he fact that two different determinations share a common input—the wage data—does not imply that the judicial review and remedial authority available for one determination must carry over to the other." *Id.* at 405. In other words, a court's review and remedy must only address the unlawful action presented. In this case, Plaintiffs seek review of and remedies for the same decision, *i.e.*, the Federal Defendants' certification of the Jail.

Second, 8 U.S.C. § 1252(f) does not bar Plaintiffs' requested injunctive relief and does not support dismissal. That statute provides that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [8 U.S.C. §§ 1221–1232]" on a class-wide basis. 8 U.S.C. § 1252(f)(1).

By its own terms, Section 1252(f) does not apply to Plaintiffs' requested class-wide injunctive relief because Plaintiffs do not seek any relief whatsoever concerning the operation of 8 U.S.C. §§ 1221–1232. From the INA, Plaintiffs cite only 8 U.S.C. § 1103(a)(11)(A), which is located in an entirely different subchapter. In addition, Plaintiffs' claims are based on the Two Strikes Mandate, the UAR, and the requirements of the Detention Contract—none of which are covered by Section 1252(f).

The Federal Defendants rely heavily on *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022), but that decision cuts against them. As the Supreme Court explained, "[t]he object of the

verbs 'enjoin or restrain' is the 'operation of' *certain provisions*" of federal law. *Aleman Gonzalez*, 142 S. Ct. at 2064 (emphasis added); *see also Biden v. Texas*, 142 S. Ct. 2528, 2539 (2022) ("Section 1252(f)(1) deprives courts of the power to issue a specific category of remedies: those that 'enjoin or restrain the operation of' the relevant sections of the statute."). These provisions govern "the inspection, apprehension, examination, and removal of aliens." *Aleman Gonzalez*, 142 S. Ct. at 2064. *Aleman Gonzalez* specifically noted that injunctions against the operation of other laws are not implicated. *See id.* at 2067 n.4 (indicating that "a court may enjoin the unlawful operation of a provision *that is not specified* § 1252(f)(1) even if that injunction has some collateral effect on the operation of a covered provision" (emphasis in original)).[5]

The Federal Defendants assert, without any support, that "Plaintiffs seek injunctive relief that would require the Government to 'take actions that (in the Government's view) are not required'" by the detention provisions covered by Section 1252(f). Federal MTD at 10–11. Plaintiffs do not seek an order that the Federal Defendants may not detain them pursuant to any provision in 8 U.S.C. §§ 1221–1232, or that the Federal Defendants must release Plaintiffs. In contrast, in *Aleman Gonzalez*, the plaintiffs sought an injunction against detention under 8 U.S.C. § 1231(a)(6), arguing that they were entitled to a bond hearing after 180 days of detention. 142 S. Ct. at 2065. In this case, Plaintiffs simply challenge the Federal Defendants' certification of the Jail as one lawful detention facility within the Federal Defendants' expansive detention network. *See McHenry County v. Kwame Raoul*, ---F. 4th---, 2022 WL 3206169, at *5 (7th Cir. Aug. 9,

[5] *United States v. Texas*, No. 22-58 (cert. granted July 21, 2022), concerns a claim that a memo by the Secretary of Homeland Security articulating enforcement priorities "conflicts with 8 U.S.C. §§ 1226(c) and 1231(a)," two enumerated provisions under Section 1252(f). *See Texas v. United States*, 40 F.4th 205, 215 (5th Cir. 2022). The issues in that case, therefore, should not affect this case.

2022) (distinguishing "tell[ing] the Attorney General of the United States where to house a particular detainee" from removing certain detention facilities "from the list of options").

Finally, Section 1252(f) does not support dismissal because the statute does not apply to injunctive relief on an individual basis or class-wide declaratory relief, either of which would redress Plaintiffs' injuries. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481–82 (1999) ("[Section 1252(f)] prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221–1231, but specifies that this ban does not extend to individual cases."); *Rodriguez v. Hayes*, 591 F.3d 1105, 1119–20 (9th Cir. 2010) (holding that Section 1252(f) also does not apply to declaratory relief); *Aleman Gonzalez*, 142 S. Ct. at 2065 n.2 (declining to address declaratory relief); *id.* at 2077 & n.9 (Sotomayor, J., concurring in judgment in part and dissenting in part) (noting that the Court declined to disturb decisions holding that Section 1252(f) does not bar declaratory relief).[6]

2. Certification Of The Jail Was A Final Agency Action.

The Federal Defendants also argue that "Count I should be dismissed because ICE inspections of the Jail do not constitute final agency actions." Federal MTD at 13. Rather, they contend, "ICE's inspections" are "ordinary, day-to-day activity" that are "antecedent to decisions by ICE." *Id.* Whether or not this is right, it is irrelevant. Count I does not challenge "ICE's *inspections*." It challenges ICE's *certification* of the Jail. Compl. ¶¶ 248, 253, 261.

There is no question that the certification was a reviewable final agency action. The APA defines "agency action" broadly to "include[] 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);

[6] Section 1252(f) also exempts the U.S. Supreme Court from its restrictions on class-wide injunctive relief, meaning that, even if the Federal Defendants were correct that the provision applies here (which it does not), Plaintiffs' claims would still be redressable in federal court and should not be dismissed.

see Ramirez v. U.S. Immigration & Customs Enforcement, 310 F. Supp. 3d 7, 20 (D.D.C. 2018) ("[T]he term 'agency action' undoubtedly has a broad sweep."). Case law adds that an agency action must be "circumscribed" and "discrete." *Nava v. Dep't of Homeland Sec.*, 435 F. Supp. 3d 880, 901 (N.D. Ill. 2020) (quoting *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62–63 (2004)). To be "final," the action must "mark the 'consummation' of the agency's decisionmaking process" and "be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

ICE's December 2021 certification satisfies these requirements. It fits within the statutory definition of "agency action," which includes "an agency permit, certificate, approval," or "order," because it certified the Jail's compliance with the PBNDS and approved the Jail for continued use. *See* 5 U.S.C. § 551(6), (7); Compl. ¶¶ 89, 92–93, 236–38. The certification was also discrete and circumscribed: It was a single decision that occurred in a defined timeframe and had legal force as a finding that specific detention standards were met. *See* Compl. ¶¶ 233–37 (alleging violations of the PBNDS directly contrary to ICE's certification decision). In addition, the certification was the consummation of the agency's decisionmaking process: It completed the statutorily required annual review of the Jail's compliance with the PBNDS, and was based on information provided to the agency in the form of the Nakamoto inspection report. *See id.* ¶¶ 236–38. And the certification had legal consequences: It allowed ICE to continue using the Jail under the Two Strikes Mandate. *See id.* ¶ 208 (ICE recognizing that it would have "no choice but to immediately discontinue use of the facility" if the Jail failed its December 2021 evaluation).

Two strands of case law confirm that the certification is reviewable. First, courts addressing other challenges concerning violations of the PBNDS have concluded that they involved reviewable final agency actions. *See Torres v. U.S. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1079–80 (C.D. Cal. 2019) (holding that the plaintiffs challenged a final agency action by alleging "non-compliance with the PBNDS" as a result of "an agency decision not to enforce the terms of its contract" requiring compliance with the PBNDS); *Innovation Law Lab v. Nielsen*, 342 F. Supp. 3d 1067, 1069 (D. Or. 2018) (holding the plaintiffs had demonstrated a likelihood of success challenging the failure to comply with the PBNDS under the APA). Second, courts have widely held that agency decisions that authorize conduct, such as licensing and permitting approvals, are reviewable final agency actions. *See, e.g.*, *Biden*, 142 S. Ct. at 2545 (holding that a memo terminating a program was a final agency action, and rejecting the federal government's argument that the memo merely explained a separate "abstract decision"); *People for Ethical Treatment of Animals, Inc. v. Perdue*, 464 F. Supp. 3d 300, 304–305 (D.D.C. 2020) ("[I]ndividual [license] renewal decisions are reviewable."); *W. Watersheds Project v. Bernhardt*, 428 F. Supp. 3d 327, 348 (D. Or. 2019) (holding that the issuance of a grazing permit violated the APA); *Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 619–20 (D.C. Cir. 2017) (vacating dismissal of APA claim challenging license renewal that ran "counter to the evidence allegedly before [the agency]"). Together, these cases demonstrate that a certification or licensing decision regarding compliance with the PBNDS is reviewable.

The Federal Defendants do not cite a single case holding that a challenge to violations of the PBNDS was not reviewable. Indeed, they appear to recognize that a "decision[] by ICE regarding which facilities it may fund" is a final agency action. Federal MTD at 13. Certification

is just that, because without it, the Two Strikes Mandate prohibits ICE from funding detention at the Jail. *See* Compl. ¶¶ 206–10, 236–37. The certification is reviewable by this Court.

B. The Federal Defendants' Challenges To Count II (Improper Payments Under The Detention Contract) Fail.

1. Plaintiffs' Injuries Are Redressable.

The Federal Defendants' redressability argument fares no better applied to Count II than to Count I. They suggest that injunctive relief will not help Plaintiffs because "ICE cannot order Clay County to take any particular action regarding conditions at the Jail." Federal MTD at 8. This attempt to pass the buck is nonresponsive. Plaintiffs seek an injunction prohibiting the Federal Defendants "from using federal funds to pay for detention at the Jail" and from "continuing to detain Plaintiffs and other Class members at the Jail," unless the payments are used properly. Compl. (Prayer for Relief) ¶¶ K–M. ICE does not need to order Clay County to do anything in order to comply with that injunction. Plaintiffs are in the Federal Defendants' legal custody; as the Federal Defendants admit, they have complete control over whether to remove Plaintiffs from the Jail, and whether to terminate the Detention Contract. Federal MTD at 8 (admitting that ICE could "cease sending detainees and federal funds to the Jail"), *id.* at 9 (noting that ICE could "terminate its relationship" with the County); Compl. ¶¶ 1, 3, 176, 237–38. If the Federal Defendants cannot (or will not) cause Clay County to spend federal funds properly, then they can and must remove Plaintiffs and other noncitizens from the Jail.[7]

The Federal Defendants' argument against declaratory relief is similarly weak. They say that "[e]ven if the Court had declared, *e.g.*, that the County has misused federal funds, it would

[7] *Cabral v. City of Evansville, Ind.*, 759 F.3d 639 (7th Cir. 2014), is inapposite. *See* Federal MTD at 8. There, the court held that a third-party lacked standing to challenge an injunction against Evansville because "the injunction does not compel [the third party] to act in any particular way." 759 F.3d at 642. Here, Plaintiffs seek an injunction against the Federal Defendants to prevent further injury.

remain only speculative whether ICE would subsequently use its enforcement discretion to take some adverse action against the County on that basis." Federal MTD at 7–8. The reference to "enforcement discretion" is a red herring. Plaintiffs are not asking that this Court compel the Federal Defendants to recover any funds it has already paid; redressability thus does not turn on whether the *Federal Defendants* can or will bring an enforcement action against the County. Rather, Count II seeks a declaration that ICE detention payments that are diverted for unrelated County expenditures violate the APA and substantive restrictions on federal funding, including 8 U.S.C. § 1103(a)(11) and the UAR, and that any further payments would also violate these laws. *See* Compl. (Prayer for Relief) ¶¶ G–H. Such a declaration would require ICE to stop paying for detention at the Jail—and thus remove Plaintiffs—unless and until any additional payments are properly directed toward the custody and care of noncitizens as required by federal law. It is not speculative whether the Federal Defendants will obey a declaration by this Court that continued detention of Plaintiffs and further payments to the County are unlawful. *See Banks v. Sec'y of Ind. Family & Soc. Servs. Admin.*, 997 F.2d 231, 241 (7th Cir. 1993) (presuming that a federal agency "would abide by this court's authoritative construction of the Medicaid regulations").

2. Payments Under The Detention Contract Are Final Agency Actions.

The Federal Defendants also repeat their final-agency-action argument against Count II. They characterize Plaintiffs' claim as a "programmatic challenge" or a "challenge to an ongoing state of affairs," "untethered to any particular rule, order, license etc." Federal MTD at 13–15. Once again, the Federal Defendants miss the mark.

Plaintiffs do not challenge ICE's entire program for detaining noncitizens in state and local jails. Plaintiffs challenge *specific payments* to *one county* for detention at *one facility*. Plaintiffs' Complaint shows that these payments were discrete and circumscribed, occurring at

regular intervals for a pre-defined per diem rate. *See* Detention Contract at 4–5 (Article VII) (providing for monthly invoices under the Detention Contract). These payments were also the culmination of ICE's decisionmaking as to whether to continue paying for detention at the Jail for each period covered by each payment. *See* Federal MTD at 13 (acknowledging the finality of "decisions by ICE regarding which facilities it may fund"). In addition, legal consequences flowed from these payments, as each one allowed ICE to continue detaining noncitizens at the Jail.

Contrary to the Federal Defendants' assertion that the payments were "untethered" to any law, the payments are governed by specific federal restrictions contained in 8 U.S.C. § 1103(a)(11) and the UAR. *See, e.g.*, Compl. ¶¶ 252–253, 267–71. Critically, the Federal Defendants do not contest that Plaintiffs have alleged facts that show that the Federal Defendants are paying for detention at the Jail despite knowing that payments are being misused in violation of federal law because of the County's open diversion of the funds. *See, e.g.*, Compl. ¶ 274 (alleging that "ICE has repeatedly been put on notice of the widespread misuse of its payments"); ¶ 74 (quoting Defendant Harden in 2018 describing the County's decision to "collect on the opportunity"); ¶ 77 (quoting Defendant Moss stating that ICE pays "a profitable fee"); ¶ 72 (citing public reporting on the County's diversion of $783,000 in funds), ¶¶ 70–88.

Knowingly making payments in violation of federal law is a reviewable final agency action. Indeed, courts regularly review claims challenging the unlawful expenditure of federal funds. *See, e.g.*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 405–06 (1971), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977) (reviewing allegedly unlawful authorizations of "the expenditure of federal funds" under the APA); *California v. Trump*, 963 F.3d 926, 941–44 (9th Cir. 2020) (holding that the plaintiffs could challenge the

diversion of federal funds under the APA), *vacated in light of changed circumstances*, 142 S. Ct. 46 (2021); *Lloyd v. Ill. Regional Transp. Auth.*, 548 F. Supp. 575, 588–89 (N.D. Ill. 1982) (reviewing "federal agencies' decision to approve grants" under the APA); *see also Scholl v. Mnuchin*, 489 F. Supp. 3d 1008, 1028 (N.D. Cal. 2020) ("Since the advance refund is a grant of money, the denial of the advance refund is an agency action.").

The cases cited by the Federal Defendants do not help them. They first point to *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), *see* Federal MTD at 13–14, but Plaintiffs' challenge is nothing like the claim there. In that case, the plaintiff alleged that "violation of the law is rampant" within a land management program, citing a litany of general abuses such as "failure to revise land use plans in proper fashion" and "failure to provide adequate environmental impact statements." 497 U.S. at 891. The Court explained that the APA required the plaintiff to "direct its attack against some particular 'agency action' that causes it harm." *Id.* Plaintiffs have done exactly that, challenging the specific payments that the Federal Defendants are making to pay for detention at the Jail in which Plaintiffs have been forced to suffer.

The Federal Defendants also cite dicta in *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765 (7th Cir. 2011), to argue that Plaintiffs are "shoehorn[ing]" a programmatic challenge. Federal MTD at 14. There, the Seventh Circuit noted that there was "a good chance" that certain actions did not constitute final agency actions. 667 F.3d at 786. But the actions at issue in that case, like the allegations in *Lujan*, were not at all comparable to those here: They included broad challenges to the "operation of the [Chicago Area Waterway System] in a manner that will let invasive carp into Lake Michigan," and "implementation of recommendations" in an interim report. *Id.* at 786–87. Again, Plaintiffs have focused their allegations on discrete and

circumscribed payments of federal funds, which are a type of agency action that courts regularly review under the APA.

3. The Federal Defendants' Use Of Federal Funds Is Not Committed To Agency Discretion.

Finally, the Federal Defendants argue that Count II "challenges matters committed to agency discretion by law." Federal MTD at 15–17. They assert that "Plaintiffs here directly challenge ICE's exercise of enforcement discretion," and "section 701(a)(2) generally bars review of agency enforcement decisions." *Id.* at 15.

The Federal Defendants attack a straw man. Count II challenges ICE's decision to continue making payments that, based on the well-pleaded facts of the Complaint, the Federal Defendants know violate particular federal laws. *See* Compl. ¶¶ 70–88, 274. The claim has nothing to do with ICE's authority to enforce or punish past violations, as noted above in response to the Federal Defendants' redressability argument. Plaintiffs are not asking (and have never asked) the Federal Defendants to prosecute Clay County or take any other enforcement action against them. What Plaintiffs seek, with respect to Count II, is for the Federal Defendants to *stop committing their own violations of federal law* by making unlawful payments. *See id.* ¶ 273 (alleging that the Federal Defendants' "payments violate the INA and the UAR"); *id.* (Prayer for Relief) ¶ K (seeking an injunction preventing the Federal Defendants from "using federal funds to pay for detention at the Jail"). Those payments are not "enforcement" decisions: They are reviewable final agency actions. *See Ctr. for Biological Diversity v. Trump*, 453 F. Supp. 3d 11, 38–39 (D.D.C. 2020) (rejecting similar argument because a statute "restricted [the] use of these particular funds to expenditures connected to 'law enforcement activities of any Federal agency'"); *Policy & Research, LLC v. U.S. Dep't of Health & Human Servs.*, 313 F. Supp. 3d 62, 76 (D.D.C. 2018) ("[A]gencies themselves frequently cabin their own discretionary

funding determinations by generating formal regulations or other binding policies that provide meaningful standards for a court to employ when reviewing agency decisions under the APA."); *Lloyd*, 548 F. Supp. at 588–89 ("The agencies' action here was at all times governed by comprehensive statutory and regulatory provisions that did not vest the decision to approve the funds and programs in the agencies' discretion."). Thus, the Federal Defendants' arguments about "ICE's exercise of enforcement discretion," "whether ICE must take corrective action," and ICE's discretion "about which remedy to adopt or whether to pursue any remedy at all," *see* Federal MTD at 16–17, are irrelevant.[8]

The Federal Defendants attempt to recharacterize Plaintiffs' claim as one about "enforcement discretion" because that is one of the very few decisions that fall within the narrow committed-to-agency-discretion exception. *See Citizens to Preserve Overton Park*, 401 U.S. at 410 (explaining that section 701(a)(2)'s limit on judicial review is a "very narrow exception," and applies only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply'"); *Head Start Family Educ. Program, Inc. v. Cooperative Educ. Serv. Agency 11*, 46 F.3d 629, 632 (7th Cir. 1995) ("The APA embodies a basic presumption of judicial review, and section 701(a)(2) is a very narrow exception to this presumption.") (cleaned up). The Federal Defendants invoke "a prosecutor's decision whether or not to indict" because that type of decision is one that courts are extremely reluctant to review, in part because there are no clear rules for courts to apply. Federal MTD at 16; *see id.* at 15–16 (discussing "judicially manageable standards" for review).

[8] The Federal Defendants' citation to *Heckler v. Chaney*, 470 U.S. 821 (1985), is inapposite for this reason. *Heckler* actually is a case about enforcement discretion: The plaintiffs there expressly challenged the FDA Commissioner's decision not to take various investigatory and enforcement actions, including recommending alleged violators for criminal prosecution. *Id.* at 824. That is nothing like Plaintiffs' claim here.

That is *not* the type of decision at issue here. As is common throughout the federal government, federal funds appropriated for ICE's detention operations are subject to clear and judicially manageable rules. For example, 8 U.S.C. § 1103(a)(11) expressly limits the authority of the "Attorney General"—and thus ICE[9]—to make payments under the Detention Contract, requiring all such payments to be for "necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by [ICE]."[10] And the UAR imposes further detailed requirements. *See, e.g.*, 2 C.F.R. § 200.403 (defining allowable costs); 2 C.F.R. § 200.404 (defining reasonable costs); 2 C.F.R. § 200.400(g) (prohibiting profits). None of the Defendants dispute that these restrictions govern the funds at issue,[11] and the Federal Defendants do not even attempt to engage with the plain text of these laws to argue that they do not contain "judicially manageable standards" that limit ICE's authority.

Instead, the Federal Defendants appear to *concede* that their payments violate these laws, and simply argue that it is not enough to "show[] a violation of a substantive legal provision." Federal MTD at 17 (claiming that Section 1103(a)(11) and the UAR do not also mandate "whether ICE must take corrective action in response to a violation"). That is incorrect: If the

[9] With the passage of the Homeland Security Act of 2002, immigration enforcement and detention functions were transferred to the newly created DHS. *See generally* Homeland Security Act of 2002, Pub. L. No. 107–296 (Nov. 25, 2002), 116 Stat. 2135 (codified at 6 U.S.C. §§ 101 *et seq.*); *see, e.g.*, 6 U.S.C. §§ 251, 275, 291, 557. Accordingly, this reference to the "Attorney General" now refers to the Secretary of Homeland Security. *See Clark v. Suarez Martinez*, 543 U.S. 371, 374 n.1 (2005).

[10] The Federal Defendants also reference 8 U.S.C. § 1103(a)(3), which provides residual authority for the Secretary of Homeland Security to "perform such other acts as he deems necessary for carrying out his authority." Federal MTD at 2. The Federal Defendants do not contend that this general provision overrides the specific restrictions of Section 1103(a)(11), nor could they, as it is well-established that "the specific governs the general." *See Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 21 (2012).

[11] The Clay County Defendants incorrectly take the remarkable position that the County has no obligations under these laws, as addressed below in Section II.A.

Federal Defendants are violating the law (and they are under the well-pleaded facts), they can and should be enjoined from continuing to do so. Whether they separately wish to go after the Clay County Defendants for past violations of the law is their business.

II. The Clay County Defendants' Motion To Dismiss Should Be Denied.

The Clay County Defendants, like the Federal Defendants, do not dispute much of Plaintiffs' case. They admit that federal law "prohibits earning a profit," and that they were required by law to calculate their per diem rate according to their "actual, allowable, and allocable" costs. Clay County MTD at 23. They do not deny, moreover, that Plaintiffs' well-pleaded allegations establish that (1) they have profited from the Detention Contract by spending far less on the custody and care of Plaintiffs and others detained at the Jail than they were paid by ICE, (2) they have used those profits to pay for expenses completely unrelated to "actual, allowable, and allocable" costs of detaining noncitizens at the Jail, (3) their diversion of funds has resulted in the substandard conditions at the Jail, and (4) those conditions egregiously violate the PBNDS, which the Jail is obligated to satisfy. Having effectively conceded that Plaintiffs state numerous violations of federal law, the Clay County Defendants also do not challenge Plaintiffs' standing to sue for violations of applicable federal law. And finally, they do not contest that the well-pleaded facts show that they have breached the Detention Contract.

Instead, the Clay County Defendants make three arguments for dismissal: (A) federal law does not restrict how they can spend federal funds paid under the Detention Contract; (B) Plaintiffs lack standing to challenge breaches of the Detention Contract; and (C) all other Clay County Defendants beside the County are "duplicative." None of these arguments has merit.

A. The Clay County Defendants' Challenge to Plaintiffs' Claim Concerning Direct Violations of Federal Law Fails.

The Clay County Defendants' argument was pithily summed up by Defendant Moss: Once ICE transfers money to Clay County, "they can't tell us what to do with it." Compl. ¶ 83. The Clay County Defendants reject any obligation to "spend more money on [Plaintiffs] and less money on other things" that are not related to the Jail, "like air conditioning at the courthouse, employee salaries, etc." Clay County MTD at 4. This is because, according to the Clay County Defendants, "[m]any"—but not all—of the federal laws cited in the Complaint "do not even apply to Clay County." *Id.* at 22–24. And as for the federal laws that the Clay County Defendants concede do apply to them, those laws do not "dictate that Clay County spend the money in any particular manner or create a private right of action." *Id.* They are wrong.

1. Applicable Federal Law Restricts How The Clay County Defendants Can Spend Federal Funds Under the Detention Contract.

The Clay County Defendants' argument falls apart most obviously for the UAR. They admit that the UAR applies to them as a "non-Federal entity." *See* Clay County MTD at 22–23. As they must: Clay County is a "non-Federal entity" receiving funds subject to the UAR. *See, e.g.*, 2 C.F.R. § 200.401(a). And contrary to Defendant Moss's view, the UAR does "tell [Clay County] what to do with [federal funds]." Compl. ¶ 83.

Start with Section 200.400(g) of the UAR. 2 C.F.R. § 200.400(g). That provision tells the Clay County Defendants that they "may not earn or keep any profit" from housing noncitizens in ICE custody. They admit this: "This [provision] prohibits earning a profit unless authorized." Clay County MTD at 23 (not contending that a profit is authorized by the Detention Contract). Yet the Clay County Defendants have done exactly that by keeping substantial portions of federal detention payments rather than spending them on the costs of housing noncitizens in ICE custody at the Jail. Indeed, the Clay County Defendants *have publicly admitted to profiting from*

housing noncitizens in ICE custody. See, e.g., Compl. ¶ 73 (reporting that the courthouse air conditioning system was "paid for thanks to jail profits"), ¶ 77 (Defendant Moss stating that ICE pays a "profitable fee"). The Clay County Defendants have admitted violating applicable federal law. That is more than sufficient for Plaintiffs' claim to survive a motion to dismiss.

The Clay County Defendants try to avoid this common sense conclusion by claiming that Section 200.400(g) "does not direct Clay County to spend money in any particular manner." Clay County MTD at 23. This is sophistry. The provision prohibits the Clay County Defendants from keeping federal funds if they are not used to pay for the costs of housing people in ICE custody at the Jail. It does not *also* have to tell the Clay County Defendants that they may not spend in particular ways money that they are not supposed to keep in the first place.

Sections 200.403 and 200.405 of the UAR works with section 200.400(g) by defining permissible costs. Section 200.403(a) provides that, "in order to be allowable under Federal awards," costs must be "necessary and reasonable for the performance of the Federal award and be allocable thereto." 2 C.F.R. § 200.403(a). Section 200.405(a) requires that costs must be "incurred specifically for the Federal award" and must "[b]enefit . . . the Federal award." 2 C.F.R. § 200.405(a)(1)–(2). In short, a fundamental requirement of the UAR is that Clay County use the funds paid under the Detention Contract only for necessary and reasonable costs related to the purposes of the contract, *i.e.*, "the housing, safekeeping, and subsistence" of Plaintiffs and other detained noncitizens. Detention Contract at 2 (Box 8); *see also* 8 U.S.C. § 1103(a)(11). Using funds for anything other than permissible costs would amount to earning and keeping a "profit," which the Clay County Defendants acknowledge is forbidden. *See* 2 C.F.R. § 200.400(g). Yet that is exactly what the Clay County Defendants are doing. *See* Compl. ¶¶ 70–88. Their motion says nothing about these provisions of the UAR. Clay County

MTD at 22–24. And they do not argue that Plaintiffs have failed to allege specific facts that show violations of these provisions.

The Clay County Defendants' attempt to evade Section 200.303 of the UAR is incredible. They acknowledge that, under 2 C.F.R. § 200.303(a), the County, as a "non-Federal entity," is required to maintain effective internal controls over federal funds. But they tell this Court that Plaintiffs' claim should be dismissed because the alleged misuse of funds is the result of the County "*intentionally* improperly spending money," and Section 200.303 only prohibits "*unintentionally* improperly spending funds." Clay County MTD at 22–23 (emphases added). In other words, the Clay County Defendants appear to argue that Plaintiffs would have a claim based on an unintentional violation of the law, but not an intentional one. To state the proposition is to refute it. The UAR mandates that funds be used and accounted for properly regardless of the recipient's intent. *See* 2 C.F.R. § 200.303(a) (requiring the non-Federal entity to "[e]stablish and *maintain* effective internal control over the Federal award that provides reasonable assurance that the non-Federal entity is managing the Federal award in compliance with Federal statutes, regulations, and the terms and conditions of the Federal award") (emphasis added). An intentional circumvention of those internal controls is just as actionable as an unintentional one.

In addition to the UAR, 8 U.S.C. § 1103(a)(11) limits the use of the detention payments to specific purposes: the "support of persons in administrative detention in non-Federal institutions," and in particular, "necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by [ICE]." In keeping with this provision, Clay County was required to justify the per diem rate it requested under the Detention Contract, as well as document the costs underlying its request. *See* U.S. Marshals Service, USM-243: Cost Sheet for Detention Services; Compl. ¶ 68. Clay County was warned that "[i]f the costs do not

benefit federal prisoners, they cannot be claimed on the cost sheet." Compl. ¶ 68. Accepting federal funds on the pretense of using them for permissible purposes, and then diverting them improperly, as Plaintiffs have alleged, is nothing less than theft. *See id.* ¶¶ 70–88.

The Clay County Defendants' only response is that Section 1103(a)(11) states that the "Attorney General" is authorized to make payments for limited purposes, and therefore, in the Clay County Defendants' view, the provision "does not apply to Clay County." Clay County MTD at 23. But in focusing solely on the text of Section 1103(a)(11), the Clay County Defendants ignore the fact that a "non-Federal entity" like Clay County must "[c]omply with the U.S. Constitution, Federal statutes, regulations, and the terms and conditions of the Federal awards." 2 C.F.R. § 200.303(b). Section 1103(a)(11) is one of those "Federal statutes." The Detention Contract also reflects the Clay County Defendants' obligations under the statute. *Compare* 8 U.S.C. § 1103(a)(11) (requiring funds be used for the "housing, care, and security of persons detained by [ICE]") *with* Detention Contract at 2 (Box 8) ("[T]his agreement is for the housing, safekeeping, and subsistence of federal prisoners").[12]

[12] In their reply in support of their stay motion (but not their motion to dismiss), the Clay County Defendants assert that Plaintiffs do not adequately allege that the Clay County Defendants directly violated federal law. *See* ECF No. 66 at 3–4. The Clay County Defendants failed to make this argument in their motion to dismiss, and thus it is waived. *See United States v. Lake County Bd. of Comm'rs*, 2006 WL 2038589 (N.D. Ind. July 19, 2006) (treating an unraised issue as waived, and rejecting an argument that it was not waived because it "had been raised in other briefs during different discovery disputes"). And in any event, the Clay County Defendants again mischaracterize Plaintiffs' claim. Plaintiffs repeatedly allege that the Clay County Defendants were subject to federal law not just by virtue of signing the Detention Contract, but also as a non-Federal entity receiving federal funds to detain noncitizens in federal custody. *See, e.g.*, Compl. ¶¶ 63–65, 67–68 ("The County was well aware of these limitations on federal payments for the detention of people in ICE custody."). To address violations of these laws, Plaintiffs have sought a declaration not just that "the Clay County Defendants have violated and continue to violate . . . the Agreement," but also "that the Clay County Defendants have violated and continue to violate 8 U.S.C. § 1103(a)(11)(A), 2 C.F.R. Part 200, and other federal laws." *Id.* (Prayer for Relief) ¶¶ I–J.

Notably, the Federal Defendants expressly disagree with the Clay County Defendants. The Federal Defendants' motion to dismiss explains that "[t]he Jail *is* 'responsible for the management and fiscal control of all funds' provided by the United States and for complying with various provisions of federal law governing accounting and financial management." Federal MTD at 3 (emphasis added). Only the Clay County Defendants believe they are completely free from responsibility for the federal funds at issue here. They are wrong.

2. The Clay County Defendants' Breaches Of Federal Law Are Actionable.

The Indiana Declaratory Judgment Act and Rule of Trial Procedure 57 authorize Plaintiffs to seek a declaration that the Clay County Defendants are violating federal law. The Indiana Declaratory Judgment Act, for instance, permits "[a]ny person interested under a . . . written contract . . . or whose rights, status, or other legal relations are affected by a statute [or] contract" to "have determined any question of construction or validity arising under the . . . statute [or] contract" and "obtain a declaration of rights, status, or other legal relations thereunder." Ind. Code § 34-14-1-2; *see also* Ind. Code 34-14-1-12 (providing that the statute "is to be liberally construed and administered"). Indiana Rule of Trial Procedure 57, moreover, provides that "[d]eclaratory relief shall be allowed even though a property right is not involved," and "[a]ffirmative relief shall be allowed under such remedy when the right thereto is established." Ind. R. Trial P. 57. These provisions provide for review of violations of federal law by Indiana municipal entities and officials, and reflect a choice by Indiana to allow such suits. *See Greer v. Buss*, 918 N.E.2d 607, 615 (Ind. Ct. App. 2009) (permitting declaratory judgment action challenging a state policy under both the state and federal constitutions); *Young v. S. Bend Common Council*, 2022 WL 2349928, at *15 (Ind. Ct. App. June 30, 2022) (remanding for factual development of alleged violations of state and federal wiretap laws).

The Clay County Defendants argue that Plaintiffs cannot rely on the Indiana Uniform Declaratory Judgment Act and Rule of Trial Procedure 57 in federal court because they are "procedural" rules only. *See* Clay County MTD at 11. But as the Indiana Supreme Court recently clarified, the Indiana Uniform Declaratory Judgment Act is more than a procedural rule: It provides a substantive cause of action that permits plaintiffs to challenge a violation of law if they satisfy the statute's requirements, including standing, which requires a showing of injury that is "personal, direct, and one that the plaintiff has suffered or is in imminent danger of suffering." *Holcomb v. Bray*, 187 N.E.3d 1268, 1284, 1286 (Ind. 2022) (discussing Ind. Code § 34-14-1-2). If those requirements are met, no separate private right of action is required. *See id.* at 1288 (permitting suit because "the Governor is a person under the DJA who has alleged a sufficient injury to establish standing with claims that are ripe for adjudication"). Indiana Rule of Trial Procedure 57 does the same thing, providing an independent cause of action. *See Holcomb v. Bray*, No. 49D12-2104-PL-014068 (Ind. Sup. Ct. Oct. 7, 2021) (slip op. at 12) ("The Defendants also argue that Trial Rule 57 does not provide a substantive cause of action upon which the Governor can bring this action. That argument fails. . . . [T]he law in Indiana appears to be that a party may seek a declaratory judgment as well as a request for additional relief (here, an injunction) without relying on the Indiana Declaratory Judgment Act to do so."). Accordingly, federal courts can hear claims under these state laws. *See Global Parking Sys. of Ind., Inc. v. Parking Solutions, Inc.*, 2015 WL 1186787, at *10–*11 (S.D. Ind. Mar 16, 2015) (evaluating claim under the Indiana Declaratory Judgment Act).

The Clay County Defendants cite a case, *Consolidated City of Indianapolis v. Ace Ins. Co. of N. Am.*, 2004 WL 2538648 (S.D. Ind. Sept. 20, 2004), that substituted the Federal Declaratory Judgment Act for the Indiana statute. *Id.* at *2 n.1. But that case was decided prior to

Holcomb, and did not consider the substantive nature of the declaratory judgment laws in Indiana. In light of *Holcomb*, this Court can and should address Plaintiffs' claims as pleaded.

B. Plaintiffs Have Standing To Challenge Breaches Of The Detention Contract.

The Clay County Defendants do not dispute that Plaintiffs have properly alleged breaches of the Detention Agreement,[13] but they argue that Plaintiffs lack standing to sue because they are not third-party beneficiaries. *See* Clay County MTD at 14–22. The Clay County Defendants compare Plaintiffs to ordinary "members of the public." *Id.* at 15. But Plaintiffs are no ordinary members of the public: They are being detained in the very Jail the Clay County Defendants control and operate, and from which they are diverting federal funds. Importantly, the Detention Contract reflects a clear intent to benefit and protect Plaintiffs and others detained at the Jail. As a result, Plaintiffs have standing to sue as third-party beneficiaries. *See* Ind. Code § 34-14-1-2 (permitting "[a]ny person interested under a . . . written contract" to seek a declaration).

As an initial matter, the Clay County Defendants argue that federal common law, not state law, governs the question whether Plaintiffs are third-party beneficiaries. Clay County MTD at 11–14. This Court need not resolve that issue because, under either body of law, the question is the same: whether the parties to the contract intended to benefit Plaintiffs and create obligations in their favor. *Compare Holbrook v. Pitt*, 643 F.2d 1261, 1270 (7th Cir. 1981) ("Under settled principles of federal common law, a third party may have enforceable rights

[13] For instance, the agreement requires that "[p]er diem rates shall be established on the basis of actual and allowable costs associated with the operation of the facility." Detention Contract at 4 (Article VI(1)). As discussed, the County has sought and received funds under a per diem rate that far exceeds what it actually spends on the custody and care of Plaintiffs and other individuals in ICE custody, leaving them in deplorable conditions. *See supra* § II.A. Additionally, the contract establishes "mandatory minimum conditions of confinement," including "24-hour emergency medical care" and "adequate access to prescription medications." Detention Contract at 7 (Article XIII). The conditions at the Jail fall far below these minimum requirements. *See, e.g.*, Compl. ¶ 8.

under a contract if the contract was made for his direct benefit.") *and id.* at 1270 n.17 (noting "the central interpretative question involved in third-party beneficiary problems [is]: did the contracting parties intend that the third party benefit from the contract?") *with Centennial Morg., Inc. v. Blumenfeld*, 745 N.E.2d 268, 276 (Ind. Ct. App. 2001) (requiring "clear intent by the actual parties to the contract to benefit the third party, a "duty imposed on one of the contracting parties in favor of the third party," and that "[p]erformance of the contract terms is necessary to render the third party a direct benefit intended by the parties") *and id.* (noting that the "controlling factor" is "the intent of the contracting parties to benefit the third-party"); *accord* Restatement (Second) of Contracts § 302(1) (May 2022 Update) ("[A] beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.").[14]

Plaintiffs meet this standard because they are members of a limited class of people who were intended to benefit from the parties' duties under the Detention Contract. This is evident from the plain language of the Detention Contract. The Detention Contract's stated purpose is "for the housing, safekeeping, and subsistence of federal prisoners," including detained noncitizens. Detention Contract at 2 (Box 8). The agreement requires the County to render specific, tangible benefits to Plaintiffs, including "24-hour emergency medical care" and "adequate access to any prescription medications." *Id.* at 7 (Article XIII(4)). It requires the County to "purchase additional recreation[al] equipment," including "stationary bikes and other cardiovascular equipment" for use by people detained by ICE pursuant to the PBNDS. Per Diem

[14] Moreover, even where federal law applies, state law may be "consulted." *Owens v. Haas*, 601 F.2d 1242, 1250 (2d Cir. 1979) (looking to state law to determine whether plaintiff was a third party beneficiary of a detention contract between a county and the United States).

Amendment at 6 (Item 0003). And the per diem rate that the County is paid under the contract is specifically tied to expenses "that benefit federal prisoners." Compl. ¶ 68. When the County requested an increase in that rate, it was warned that if its claimed costs "do not benefit federal prisoners, they cannot be claimed." *Id.* These provisions make clear that the contractual parties intended "to give [Plaintiffs] the benefit of the promised performance." Restatement (Second) of Contracts § 302(1) (May 2022 Update). They are therefore third-party beneficiaries. *See Flickinger v. Harold C. Brown & Co.*, 947 F.2d 595, 600 (2d Cir. 1991) ("Where performance is to be rendered directly to a third party under the terms of an agreement, that party must be considered an intended beneficiary.").

Courts regularly treated detained individuals like Plaintiffs as third-party beneficiaries of similar detention contracts based on these sorts of provisions. For example, in *Zikianda v. County of Albany*, 2015 WL 5510956 (N.D.N.Y. Sept. 15, 2015), the court held that an individual in ICE custody was "clearly" a third-party beneficiary of an agreement between ICE and a local government because, as here, "the terms of the contract explicitly require the Defendant County to provide her with medical services to treat and care for her condition." *Id.* at *37. "Since the contract's performance [was] rendered *directly to the* [detained individual]," the court "presumed that the contract was for his [or her] benefit." *Id.* (internal quotation marks omitted). Numerous other courts have reached the same conclusion. *See, e.g.*, *Melvin v. County of Westchester*, 2016 WL 1254394, at *22 (S.D.N.Y. Mar. 29, 2016) ("Decedent was indeed the intended beneficiary of the NYCCS-Westchester Contract 'for the provision of health care services to inmates and detainees.'"); *Murns v. City of New York*, 2001 WL 515201, at *5 (S.D.N.Y. May 15, 2001) ("St. Barnabas agreed to provide medical services to the inmates of City correctional facilities, and it performed the contract by providing medical services directly

to the inmates. As alleged by plaintiff, the inmates were the intended beneficiaries of the contract between St. Barnabas and the City."); *Owens*, 601 F.2d at 1251 ("[I]t would appear likely that the prisoners can claim third party beneficiary status as ones to whom a duty is owed [under detention contracts with local authorities]."); *Ogunde v. Prison Health Servs., Inc.*, 645 S.E.2d 520, 525 (Va. 2007) (finding that a contract for inmate health care services "clearly and definitely" indicated the parties' intent to confer third-party beneficiary status on inmates).[15]

The Seventh Circuit's decision in *Holbrook* reinforces these decisions. There, the Seventh Circuit applied federal common law to conclude that Section 8 tenants were third-party beneficiaries of contracts between the federal government and housing providers. *See* 643 F.2d at 1272. The court rejected the federal government's argument that the tenants were not intended beneficiaries of the contracts, concluding that "the function of the Section 8 subprogram we are considering is to assist low income families in securing decent, safe and sanitary housing." *Id.* at 1271–72. The court identified this intent from provisions in the contract stating that the federal government was required to "make housing assistance payments on behalf of Families," and that the housing providers were obligated to "maintain and operate the Contract unit and related facilities so as to provide Decent, Safe and Sanitary housing." *Id.* at 1272. Such provisions

[15] In their reply in support of their stay motion, the Clay County Defendants argue that cases like *Zikianda* are not applicable because they apply New York law. *See* ECF No. 66 at 8. But that is a distinction without a difference, as New York law unsurprisingly applies the same test for third-party beneficiary status as federal law and Indiana law, as well as the Restatement (Second) of Contracts. *See Stile v. Dubois*, 2019 WL 3317322, at *3 (D.N.H. July 24, 2019) (considering *Zikianda* in a case governed by New Hampshire law); *see also* Williston on Contracts § 37:8 ("[T]here is in general broad agreement among the courts that intent is the principal touchstone for determining whether a third party beneficiary contract exists."); *Comm'r of Dep't of Soc. Servs. of City of N.Y. v. N.Y. Presbyterian Hosp.*, 164 A.D. 3d 93, 100 (N.Y. Sup. Ct. App. Div. 2018); *Town & County Homecenter of Crawfordsville, Ind., Inc. v. Woods*, 725 N.E.2d 1006, 1010 (Ind. Ct. App. 2000); *Holbrook*, 643 F.2d at 1270 n.17.

"make it clear that the Contracts were executed primarily for the tenants' benefit." *Id.* Accordingly, the court concluded that the plaintiffs were third party beneficiaries. *Id.* at 1273.

Holbrook applies here. Just like the Section 8 contracts in *Holbrook*, the Detention Contract here obligates the federal government to make payments for the benefit of Plaintiffs and other noncitizens—"for the housing, safekeeping, and subsistence of federal prisoners," based on a per diem rate tied to each individual. Detention Contract at 2 (Box 8), 3 (Article VI(1)). In addition, like the Section 8 housing providers in *Holbrook*, the County is obligated to provide decent, safe, and sanitary housing—as reflected in the contract's mandatory minimum conditions of confinement, as well as the Jail's required compliance with the PBNDS. *Id.* at 7 (Article XIII); Per Diem Amendment at 6 (Item 0003). Together, these provisions "make it clear" that the contract was "executed primarily for [Plaintiffs'] benefit." *Holbrook*, 643 F.2d at 1272; *see also Audio Odyssey, Ltd. v. United States*, 255 F.3d 512, 521 (8th Cir. 2001) (applying *Holbrook* to find that the plaintiff was a third-party beneficiary because it was "clearly part of a class intended to be benefitted by this agreement"); *Ashton v. Pierce*, 716 F.2d 56, 66 (D.C. Cir. 1983) ("The mutual promises contained in the Contract were intended by the parties to benefit appellee. Indeed, it is difficult to imagine any purpose for the Contract other than to benefit the tenants of public housing.") (citation omitted).

The Clay County Defendants ignore decisions like *Holbrook*, and instead rely primarily on three cases. Most importantly, they cite *Cash v. United States*, 2015 WL 194353 (Fed. Cl. Ct. Jan. 13, 2015). In *Cash*, a federal prisoner claimed he was a third-party beneficiary of an agreement between the United States and an Oklahoma county. *Id.* at *1. The plaintiff alleged that the federal government breached the contract's "care and safekeeping" requirements by failing to protect him from assaults by other inmates. *Id.* In a single paragraph, the court

concluded that "while the agreement does provide certain minimum standards for the confinement of the prisoners—which do not include protection of prisoners from other prisoners—it is clear that the principal intent of the agreement is to house the prisoners in a way that keeps the *public safe* and the minimum standards are designed for this purpose." *Id.* at *3 (emphasis added). Accordingly, the court held that the plaintiff was not a third-party beneficiary. *Id.*

Cash's reasoning is not persuasive and is easily distinguishable. The court's brief analysis relied heavily on the fact that the agreement did not require the type of "protection of prisoners from other prisoners" that was the basis for the plaintiff's claim. *Id.* As a result, the court failed to discuss any specific obligations under the contract that would be performed directly to the detained individual. *Id.* Here, in contrast, Plaintiffs' claims directly relate to contractual requirements that benefit them and others like them, such as providing adequate access to prescription medications and 24-hour medical care, and complying with the PBNDS. *See, e.g.*, Compl. ¶ 141 ("Medical staff at the Jail regularly fail to respond to requests for medical care for days, and sometimes a week or more. Plaintiffs have all experienced delays in the receipt of medical care."); *id.* ¶ 145 (alleging that the guards, not trained medical staff, dispense medications on the weekends and sometimes provide the wrong medication). Contrary to *Cash*'s conclusion, these and other provisions of the detention agreement show that its purpose was for "the housing, safekeeping, and subsistence" of Plaintiffs and other noncitizens, not the protection of the public. Detention Contract at 2 (Box 8). That the contract may also benefit the public does not affect the parties' intent to benefit Plaintiffs. *See Holbrook*, 643 F.2d at 1273 ("Subsidiary purposes, such as HUD's interest in minimizing claims on its insurance funds, do not defeat plaintiffs' status as protected beneficiaries.").

In addition, the Clay County Defendants cite *Stile v. Dubois*, 2019 WL 3317322 (D.N.H. July 24, 2019), but *Stile* concerned a different kind of claim. In *Stile*, the plaintiff was detained in a county jail under a contract that provided for housing federal prisoners as well as transporting the prisoners. *Id.* at *1. The plaintiff sought to sue the county for using excessive force against him while transporting him. *Id.* The court determined that the contract's provisions "pertaining to transportation of detainees" did not specify obligations for the benefit of those detained, but rather "to maintain the secure detention . . . during transport," such as providing adequate security personnel. *Id.* at *3. Applying state law governing third-party beneficiary status, the court concluded that the contract did not clearly reflect an "intent to allow federal detainees to enforce the housing agreements for purposes of transport." *Id.*

Plaintiffs are not suing for violations of the Clay County Defendants' transportation-related obligations. Rather, they are suing because the County has misappropriated funds that should have been used to provide for Plaintiffs' and others' care and custody, using those funds for unrelated purposes and ignoring serious deficiencies at the Jail. The result of this misappropriation of funds is the appalling conditions at the Jail, which violate the mandatory minimum conditions of confinement. Plaintiffs have standing to enforce these obligations.

Finally, the Clay County Defendants also rely on *Harper v. Corizon Health Inc.*, 2018 WL 6019595 (S.D. Ind. Nov. 16, 2018), but that case was decided at summary judgment,[16] and the court expressly noted that it was forced to rule without proper briefing from the parties. *Id.* at *8. The court reviewed the contract and concluded that it only mentioned detained individuals

[16] Several other cases cited by the Clay County Defendants are similarly distinguishable because they were decided at summary judgment, after fact discovery. *See Weaver v. Wexford Health Sources, Inc.*, 2021 WL 1175257, at *8 (S.D. Ind. Mar. 29, 2021); *Barnett v. Wexford Health Sources, Inc.*, 2019 WL 6909581, at *7 (S.D. Ind. Dec. 19, 2019).

once in the first line of the agreement. *Id.* *9. The court's conclusion also was not dispositive because it found that the plaintiff had not alleged a breach, in any event. *Id.* Here, by contrast, the detention agreement contains a number of direct references to noncitizens detained by ICE and the parties' obligations to them. Plaintiffs have alleged violations of those obligations—a point that the Clay County Defendants do not dispute.

Aside from these decisions, the Clay County Defendants cite several cases that highlight a key omission from the contract in this case: the lack of any express clause prohibiting third-party beneficiaries. *See Penrod v. Quality Corr. Care LLC*, 2020 WL 564163, at *3 (N.D. Ind. Feb. 5, 2020) ("Here, the contract specifically states, 'this agreement is not intended to create a private action for the benefit of a third party.'"); *Larue v. Mills*, 2019 WL 3195140, at *6 (N.D. Ill. July 15, 2019) ("[T]he IDOC Contract provides, 'The parties do not intend to create in any other individual or entity, offender or patient, the status of third party beneficiary, and this Contract shall not be construed as to create such status.'"). These cases demonstrate that parties (including local governments) wishing to categorically exclude enforcement by third-party beneficiaries can choose to do so by agreeing to an express "no-third-party-beneficiaries" clause. *Penrod*, 2020 WL 564163, at *3 ("[B]y its express terms, the contract is intended to benefit Tippecanoe County and Quality Correctional Care, and no one else."). Here, the parties chose *not* to express such an intent. That silence weighs heavily in Plaintiffs' favor.

The Clay County Defendants also point to a provision of the contract stating that the federal government "will hold [Clay County] accountable for any overpayment, audit disallowance, or any breach of this agreement that results in a debt owed to the Federal Government." Clay County MTD at 18 (citing Detention Contract at 6 (Article X(4)). The Clay County Defendants contend that this provision means "the federal government enforces 'any

breach.'" *Id.* at 19. But that is *not* what the provision says. To the contrary, the provision addresses only breaches "that result[] in a debt owed to the Federal Government." Detention Contract at 6 (Article X(4)). It says nothing about breaches of provisions like the mandatory minimum conditions of confinement in Article XIII, which harm Plaintiffs but do not "result[] in a debt owed to the Federal Government." A separate provision of the contract, meanwhile, refers to "litigation" involving Clay County's financial records without limiting such litigation to the Federal Government. *See id.* (Article X(2)).

In their motion to dismiss, the Federal Defendants also expressly disavow any authority to raise the kinds of issues that Plaintiffs have asserted. *See* Federal MTD at 3, 8 (noting that ICE "has no supervisory control over the Jail" and its conditions, and that the Jail is "responsible for the management and fiscal control of all funds"). Thus, the Clay County Defendants' suggestion that the federal government will enforce the contract provisions at issue here is false. Rather, on their view, *no one* will enforce the relevant obligations that exist for the protection of Plaintiffs. That is not the law. Plaintiffs have standing to sue.

At a minimum, the Clay County Defendants' motion should be denied because they have not shown that Plaintiffs *unambiguously* are not third-party beneficiaries. Where there is ambiguity about the parties' intent, discovery on the issue is necessary. *See City of Whiting, Ind. v. Whitney, Bailey, Cox & Magnani, LLC*, 2015 WL 6756857, at *6 (N.D. Ind. Nov. 5, 2015) (finding that "the parties' intent is ambiguous," and thus the plaintiff was "entitled to seek discovery on the parties' intent"); *Best Flooring, Inc. v. M & I Marshall & Ilsley Bank*, 2012 WL 3242111, at *4 (S.D. Ind. July 20, 2012) ("[T]he contracting parties' intent to benefit a third party can be a question of contract interpretation that is not appropriate for resolution by a motion to dismiss."); *Woods v. Foster*, 884 F. Supp. 1169, 1176 (N.D. Ill. 1995) ("As Defendants

have not established that Plaintiffs cannot recover on the facts alleged in the First Amended Complaint, the motion to dismiss must be denied."). Here, the provisions of the Detention Contract demonstrate that Plaintiffs *are* third-party beneficiaries. The Clay County Defendants have failed to carry their burden of showing that Plaintiffs unambiguously are not third-party beneficiaries. Accordingly, the Clay County Defendants' standing argument fails.

C. The Clay County Defendants Are Not Duplicative Of The County.

Finally, the Clay County Defendants argue that all County Defendants aside from the County "are duplicative and should be dismissed." Clay County MTD at 8–9. Citing only cases brought under 42 U.S.C. § 1983, they contend that "[t]he only necessary party for this claim is the County itself," and the other Clay County Defendants are "redundant." *Id.* at 6–8 (quoting *Ball v. City of Muncie*, 28 F. Supp. 3d 797, 802 (S.D. Ind. 2014)).

As the Clay County Defendants' own motion shows, however, the other Clay County Defendants play different roles in the alleged violations and thus are proper defendants. Under the Indiana Uniform Declaratory Judgment Act, "all persons shall be made parties who have or claim any interest that would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." Ind. Code § 34-14-1-11; *see Ind. State Bd. of Public Welfare v. Tioga Pines Living Ctr., Inc.*, 637 N.E.2d 1306, 1310 (Ind. Ct. App. 1994) (hearing declaratory judgment suit against a state agency and its administrator). A declaration that the Clay County Defendants are unlawfully diverting federal funds under the Detention Contract would affect the Defendants in different ways. It would affect the County Council as "the county fiscal body" that makes appropriations from the County treasury; the County Board of Commissioners as the body responsible for "enter[ing] into contracts" and maintaining the Jail; the County Treasurer as the "disburse[r]" of county funds; and the County Sheriff as the

official charged with the "care of the county jail and the prisoners there." *See* Clay County MTD at 6–7.

The Clay County Defendants aside from the County would be "redundant" only if the Clay County Defendants could demonstrate (or stipulate) that Plaintiffs' requested relief would be fully enforceable against all relevant officials if only the County were a party. The Clay County Defendants would also need to concede that sovereign immunity does not apply.[17] Absent such concessions, the Clay County Defendants are not duplicative. *See LBLHA, LLC v. Town of Long Beach*, 28 N.E.3d 1077, 1087 (Ind. Ct. App. 2015) (remanding a case under the Indiana Declaratory Judgment Act to join "the State or appropriate State officials as individuals in their official capacity as a party or parties").

Finally, at a minimum, the Clay County Defendants' motion must be denied as to the Clay County Sheriff. Under Indiana law, the Sheriff does not answer to the County, and therefore he cannot be redundant with the County. *See Burton v. Lacy*, 2008 WL 187552, at *5 (S.D. Ind. Jan. 18, 2008) (explaining that Indiana counties lack authority over sheriffs, and therefore "naming the Sheriff in his official capacity is the same thing as bringing a suit against the Sheriff's Department," not the county).

* * *

To the extent the Court determines that any of Plaintiffs' claims have not been adequately pleaded, Plaintiffs request leave to file an amended complaint. Federal Rule of Civil Procedure 15 directs that courts should "freely" grant leave to amend "when justice so requires." Fed. R.

[17] Municipalities like the County cannot invoke sovereign immunity. *See N. Ins. Co. of New York v. Chatham Cnty., Ga.*, 547 U.S. 189, 193 (2006) ("[T]his Court has repeatedly refused to extend sovereign immunity to counties."). But if the Clay County Defendants attempted to assert sovereign immunity, any such argument would not apply to individual officials. *See Brown v. Budz*, 398 F.3d 904, 917–18 (7th Cir. 2005); *Vermillion v. Ind. State Prison Disciplinary Body*, 2011 WL 181453, at *3 (Ind. Ct. App. 2011).

Civ. P. 15(a)(2). The Seventh Circuit has also held that "a plaintiff whose original complaint has been dismissed under Rule 12(b)(6) should be given at least one opportunity to try to amend her complaint before the entire action is dismissed." *Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 519–20 (7th Cir. 2015). Such an opportunity would be warranted here to the extent the Court dismisses any of Plaintiffs' claims.

CONCLUSION

For the foregoing reasons, the Court should deny the Clay County Defendants' motion to dismiss and the Federal Defendants' motion to dismiss.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically. Service of this filing will be made on all ECF-registered counsel via the Court's CM/ECF system.

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