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**

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

This lawsuit challenging conditions of confinement is peculiar. Ordinarily, such litigation proceeds in equity against the executive authority detaining the individual by directly challenging those conditions of confinement through claims that those conditions violate the U.S. Constitution's guarantees under the Fifth or Eighth Amendments. Plaintiffs have chosen not to do that. Instead, Plaintiffs have attempted a bank shot, challenging the manner in which ICE inspects its contracted detention facilities and the agency's purported failure to take enforcement action against a grantee that is allegedly misspending federal funds. Plaintiffs' attempt misses the mark. Review under the Administrative Procedure Act is strictly cabined by Congress in various ways, including two that are fatal to Plaintiffs' claims here—the limitation to review of final agency action and the prohibition on review of matters committed to agency discretion by law. Unsurprisingly, Plaintiffs' re-routed attack at their conditions of confinement via their claims against Federal Defendants suffers fatal redressability deficits as well: Plaintiffs fail to show that such claims, if successful, would redress those conditions. Federal Defendants' motion to dismiss does not "disclaim[] responsibility" for any violations of the law. Pls.' Opp'n at 3, ECF No. 68. It simply takes this lawsuit for what it is—a *habeas* action disguised as an APA case that does not comply with the rules for obtaining relief under that statute. Plaintiffs' Complaint should be dismissed.

ARGUMENT

To begin, Federal Defendants note that throughout their brief, Plaintiffs erroneously contend that the Federal Defendants have conceded various matters of fact. Opp'n at 1, 12–13, 26, 30. Plaintiffs appear to mistake for concessions the legal standard on a motion to dismiss, which requires that "facts stated in the operative complaint" be treated as "true" for purposes of

the motion. *Muskegan Hotels, LLC v. Patel*, 986 F.3d 692, 695 (7th Cir. 2021). Federal Defendants reserve their right to challenge any legal or factual issue raised by Plaintiffs' Complaint at a later stage of these proceedings if necessary.

I. PLAINTIFFS HAVE FAILED TO ESTABLISH REDRESSABILITY.

As to the issues actually raised by the motion to dismiss, Plaintiffs' Complaint should be dismissed first and foremost for lack of jurisdiction because Plaintiffs have failed to establish the redressability prong of Article III standing. *See* Fed. Defs.' Mem. in Supp. of Mot. to Dismiss at 5–11, ECF No. 61 ("Mem."). Plaintiffs have not established that they are permitted to obtain many of the forms of relief they seek in this APA litigation that challenges the operation of ICE detention authority on a putative classwide basis. And even as to the relief Plaintiffs *could* obtain if they could prevail on the merits—a judicial decision vacating the challenged alleged agency actions—this would do no more than raise a speculative prospect that conditions would change at the Jail or ICE would terminate its relationship with the Jail.

A. Declaratory and Injunctive Relief

Plaintiffs cannot obtain specific declaratory and injunctive relief under the APA that would, for example, declare that the Jail failed its December 2021 inspection or that would enjoin ICE to pursue enforcement proceedings in regard to the Jail's alleged unlawful expenditure of federal funds. That is because of the general rule under the APA's cause of action providing that a reviewing court may do no more than hold agency action unlawful, identify the relevant legal error, and "set aside" the action. *See* 5 U.S.C. § 706(2).

Declaratory Relief. Plaintiffs respond first that they may obtain declaratory relief under the APA and that this establishes redressability. Opp'n at 14–15. No doubt, federal courts may "hold unlawful and set aside" agency actions in order to provide relief to the parties before them,

see 5 U.S.C. § 706(2), but here, neither a vacatur of the relevant agency undertakings or alleged omissions nor a declaration that such matters were unlawful would redress Plaintiffs' injuries as discussed in the section below regarding vacatur. Plaintiffs' point is thus merely academic.

Plaintiffs seek more than such a declaration akin to vacatur. With respect to Count I's claim regarding allegedly faulty ICE inspections, Plaintiffs also seek a declaration that the Jail actually *failed* the December 2021 inspection based on the Court's own review of the administrative record, substituting its judgment for that of the agency. *See* Opp'n at 14. The APA does not permit that form of relief. Plaintiffs are wrong, therefore, to assume through contention that their injuries would be redressed by relief on their claims. *Compare* Opp'n at 14 (asserting that a declaration that conditions at the Jail were not adequate would "trigger[] mandatory termination" of ICE's relationship with the Jail) *with PPG Indus., Inc. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995) ("[W]hen a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end . . . ."). Similar problems are endemic to Plaintiffs' request for a declaration as to Count II. Plaintiffs argue that a declaration regarding the allegedly unlawful use of federal funds by the County "would require ICE to stop paying for detention at the Jail." Opp'n at 25. But such a declaration, even in the context of a vacatur, would not require the outcome that Plaintiffs posit because ICE would still have discretion on remand to determine, under its enforcement authority, whether to terminate its contract with the Jail or otherwise take action in regard to the alleged diversion of federal funds. Mem. at 8.

Injunctive Relief. Next, Plaintiffs contend that they may obtain specific injunctive relief under the APA. Plaintiffs are mistaken on this point as well. Plaintiffs point to the fact that 5 U.S.C. § 702 appears to contemplate the issuance of injunctive relief. Plaintiffs misread the effect of this APA provision. Section 702's contemplation of injunctive relief relates to at least three

other provisions of the APA that have nothing to do with the relief sought in this litigation: sections 706(1) and 705 and the APA's waiver of sovereign immunity for non-APA claims.

First, Section 706(1) permits that agency action "unlawfully withheld or unreasonably delayed" may be "compel[led]." 5 U.S.C. § 706(1). Thus, section 706(1) specifically uses language indicating a right to injunctive relief, in contrast to section 706(2), which only permits courts to "hold unlawful and set aside" agency action. *See* 5 U.S.C. § 706(2).[1] To be clear, Plaintiffs are not pursuing a section 706(1) claim in this litigation. *See generally* Compl.

Second, section 705 contemplates the issuance of *preliminary* injunctive relief, stating that a court may "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. The sole 7th Circuit case cited by Plaintiffs addressed the permissibility of preliminary injunctive relief in an APA case, rather than final relief. *See Cook Cty., Ill. v. Wolf*, 962 F.3d 208, 215 (7th Cir. 2020). It therefore avails Plaintiffs nothing.

Finally, section 702 itself waives sovereign immunity to seek equitable relief against the United States for claims beyond the APA's cause of action. *See Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006) ("[T]he APA's waiver of sovereign immunity applies to any suit whether under the APA or not." (citation omitted)). Put another way, section 702 waives sovereign immunity for persons to bring claims for equitable relief against the United States both for claims (like those here) brought under the APA itself and pursuant to other sources of law, such as the Constitution. Specific equitable relief may be permissible in some circumstances under those other

[1] The availability of injunctive relief under section 706(1) is also exceptionally narrow. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63–65 (2004) (explaining that while the APA authorizes a court to "compel agency action unlawfully withheld," 5 U.S.C. § 706(1), a court may order an agency to take action only when it is strictly required by law).

sources of law, as appeared to be the case in the unpublished decision by another Judge of this Court cited by Plaintiffs. *See Thomas v. Watts*, 2013 WL 3043686, at *5 (S.D. Ind. June 17, 2013) (citing authorities for the proposition that the APA's waiver of sovereign immunity applies in cases not brought under the APA). But that does not change the fact that Plaintiffs are proceeding under the APA's cause of action and, under section 706(2), are entitled to no more than a setting-aside of an erroneous agency action. *See N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 861 (D.C. Cir. 2012) (holding it is "quite anomalous to issue an injunction" in an APA case and that "[w]hen a district court reverses agency action and determines that the agency acted unlawfully, ordinarily the appropriate course is simply to identify a legal error and remand to the agency").

INA section 1252(f). Plaintiffs also dispute that section 1252(f) of the INA forbids classwide injunctive relief here. Opp'n at 19. Plaintiffs appear to make two primary arguments on this front: first, that section 1252(f) only prevents classwide injunctive relief where the relief sought would take the form of an order to release the plaintiffs; and second, that section 1252(f) only governs where the plaintiffs allege a violation of 8 U.S.C. §§ 1221–1232. *See* Opp'n at 20. Plaintiffs' arguments misread section 1252(f) and *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022). To begin, section 1252(f)(1) is not limited by the cause of action or legal basis for a claim in prohibiting classwide relief. 8 U.S.C. § 1252(f)(1) (restricting classwide injunctive relief "[r]egardless of the nature of the action or claim"). Instead, the statute is directed only against the *effect* of any classwide relief on the operation of the INA. *See id.* (restricting injunctions that "restrain the operation of the provisions" of the INA). Similarly, *Aleman Gonzalez* explained that section 1252(f)(1) "generally prohibits lower courts from entering injunctions that order federal officials to take or refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." Mem. at 10 (quoting *Aleman Gonzalez*, 142 S. Ct. at 2065).

The classwide relief sought in this case is on all fours with *Aleman Gonzalez* and squarely within the scope of section 1252(f). Just as the petitioners in *Aleman Gonzalez* were detained pursuant to one of the provisions of the INA covered by section 1252(f)(1), so is it undisputed that the Plaintiffs are here. And just as in *Aleman Gonzalez*, any injunctive relief in this case requiring, for example, ICE to transfer Plaintiffs to a different detention facility would "require officials to take actions that (in the Government's view) are not required by" the provisions of the INA authorizing Plaintiffs' detention. *See Aleman Gonzalez*, 142 S. Ct. at 2065. Nor is *McHenry County. v. Kwame Raoul*, 44 F.4th 581 (7th Cir. 2022), cited by Plaintiffs, to the contrary. That case and the portion quoted by Plaintiffs, Opp'n at 21, did not analyze and had nothing to say about the scope of section 1252(f). *See McHenry Cty. v. Kwame Raoul*, 44 F.4th 581, 585, 589 (7th Cir. 2022) (considering whether federal immigration law preempted a state from prohibiting its agencies and political subdivisions from contracting with the Federal Government to house immigration detainees).

Plaintiffs last argue that regardless of the effect of section 1252(f) on their ability to obtain classwide injunctive relief, the statute does not affect their right to declaratory or *individual* injunctive relief. Opp'n at 21. While Federal Defendants do not dispute that section 1252(f) does not bear on the Plaintiffs' claims for individual relief, any claim by Plaintiffs that their request for classwide injunctive relief could somehow sustain this litigation fails in light of INA section 1252(f). Individual relief is not available or inadequate for the reasons discussed elsewhere in this section.

B. Vacatur

Vacatur of the alleged agency actions here also would not raise a sufficient likelihood of redressing Plaintiffs' alleged injuries based on conditions at the Jail. Plaintiffs do not separately

address vacatur as to Count II's request for relief regarding ICE's purported failure to prevent the County's alleged erroneous expenditure of federal funds. *See* Opp'n at 24–25. Federal Defendants therefore stand on their arguments above regarding declaratory and injunctive relief for this claim. *See supra*.

As for Count I's challenge to the December 2021 inspection of the Jail, Plaintiffs contend that vacatur would not result in a "new, substitute inspection" but would instead result in the December 2021 inspection being treated as a failure, triggering the appropriations restriction on funding ICE facilities that have failed their "two most recent overall performance evaluations." *See* Consolidated Appropriations Act of 2022, Pub. L. No. 117-103, Div. F, Tit. II, §215(a) (Mar. 15, 2022), 134 Stat. 322. That is simply another request for specific relief in the guise of purported vacatur. The APA does not permit that outcome, whatever label Plaintiffs put on it. *See supra*.

Next, Plaintiffs argue that setting aside the December 2021 inspection would sufficiently redress their injuries because "any subsequent re-inspection and re-certification of the Jail must be reliable" and conducted in accordance with legal standards articulated by the Court in this case. Opp'n at 17. Plaintiffs argue that this change in circumstances would "significant[ly] increase" the likelihood they obtain relief from conditions at the Jail. Opp'n at 16–17.

But regardless of the legal standards that would be applied in any subsequent inspection, it is impermissibly speculative to establish redressability whether that subsequent inspection would result in a failing grade where it is unknowable what conditions will be like at the Jail when that future inspection is conducted. *Lujan*, 504 U.S. at 561 (redressability requires that it be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision").

Moreover, an end to ICE funding of the Jail could only be required under the cited appropriations provision upon the completion of *two* consecutive failing inspections in light of the

November 2021 inspection by ICE's Office of Detention Oversight, which found the Jail to be "superior," Compl. ¶ 214. This renders redress still more speculative. On this point, Plaintiffs simply assert that ODO's inspection was not an "overall performance evaluation" and that this is a factual allegation entitled to acceptance at the motion to dismiss stage. Opp'n at 16 n.4. Plaintiffs' attempts to muddy the waters cannot overcome the fact that their own Complaint identifies a passing inspection of the Jail conducted by ICE in November 2021, intervening before the December 2021 inspection by ICE's contractor. *See* Compl. ¶ 214.

And whether an inspection constitutes an "overall performance evaluation" is a legal question, not a factual allegation. The appropriations rider to which Plaintiffs point—the so-called Two Strikes Mandate—is the source of the term "overall performance evaluation," establishing that the "two most recent overall performance evaluations" are to be considered in deciding whether funding must cease. *See* Consolidated Appropriations Act of 2022, Pub. L. No. 117-103, Div. F, Tit. II, §215(a) (Mar. 15, 2022), 134 Stat. 322. This statute establishes no standards defining what constitutes an "overall performance evaluation" save one: that such evaluations are conducted by ICE's Office of Professional Responsibility. *See id.*, 134 Stat. 323. Plaintiffs' Complaint alleges that ICE conducted an inspection of the Jail in November 2021 and that it did so through its Office of Detention Oversight, a component of the Office of Professional Responsibility. *See* Compl. ¶ 214. Plaintiffs' attacks on the quality of that inspection, Opp'n at 16 n.4, are more akin to allegations regarding an unpled APA claim against that inspection. But they do not change the legal determination that this was an "overall performance evaluation" within the meaning of the appropriations statute.

II. PLAINTIFFS DO NOT CHALLENGE FINAL AGENCY ACTION.

Plaintiffs' claims should also be dismissed on the merits because they do not challenge final agency action as required by the APA.

A. Count I

Count I challenges day-to-day program operations in the form of periodic ICE inspections of its contracted detention facilities. But the APA does not encompass review of such garden variety agency actions like "performing a contract." Mem. at 12–13. And Plaintiffs' request for relief does not challenge *final* agency action where the inspection Plaintiffs challenge are merely antecedent to any consequences regarding the facilities that ICE will fund. *Id.*

Plaintiffs ignore these points, and therefore concede that ICE inspections are not reviewable agency action. *See* Opp'n at 21 (taking no position on "[w]hether or not this is right"); *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument . . . results in waiver."). Instead, Plaintiffs contend that ICE has made a "certification" that the Jail complies with the PBNDS, which Plaintiffs argue is a reviewable agency action. Plaintiffs' gambit fails, however, because they have alleged no facts indicating what this purported "certification" is and whether it bears any legally significant resemblance to a "rule, order, license, sanction, relief, or the equivalent or denial thereof," 5 U.S.C. 551(13), such that Plaintiffs' reference to cases challenging "agency decisions that authorize conduct," Opp'n at 23, would have any relevance at all. *See Biden v. Texas*, 142 S. Ct. 2528, 2545 (2022) (lawsuit challenged agency termination of program); *Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 619–20 (D.C. Cir. 2017) (lawsuit challenged agency license renewal). At the motion to dismiss stage, a Complaint must allege facts raising a plausible right to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). And

here, Plaintiffs' vague reference to a "certification" by ICE cannot establish that Count I challenges anything more than unreviewable agency inspections pursuant to contract and policy.

B. Count II

Count II also fails to challenge final agency action because, rather than challenge any discrete agency action at all, Plaintiffs here simply challenge an ongoing state of affairs, specifically the continued maintenance of ICE's contract with the County and continued payments pursuant to it. Such a "programmatic attack," *Norton*, 542 U.S. at 64, fails to show any discrete, circumscribed "agency action" that may be challenged under the APA, nor does it show any *final* action reflecting, e.g., the "consummation of the agency's decision-making process." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016).

Plaintiffs protest that they are not waging a programmatic challenge but rather "challenge *specific payments* to *one county* for detention at *one facility*." Opp'n at 25–26. This is a distinction without a relevant difference. What matters is not the number of payments, grantees, or facilities but, rather, the character of the challenge made. Plaintiffs do not challenge, for example, the original decision to award a contract to the Jail or a decision to renew that agreement. They instead challenge the aggregate of payments to the County over years on the ground that collectively, those payments demonstrate a failure to take "any corrective action or otherwise ensure compliance with federal law." Compl. ¶ 274. Courts have repeatedly rejected similar programmatic challenges. For example, in *Louisiana v. United States*, 948 F.3d 317 (5th Cir. 2020), the state sued the United States for allegedly failing to maintain *one* location, the Gulf Intracoastal Waterway, in compliance with a relevant statute. *Id.* at 319. The Fifth Circuit held that allegations regarding "inaction" by the Government in maintaining the Waterway did not allege a specific agency action for purposes of section 702 of the APA. *Id.* at 322. The same lessons can be gleaned from *Michigan v. U.S.*

Army Corps of Eng'rs, 667 F.3d 765 (7th Cir. 2011), where the Seventh Circuit considered another challenge to the Government's maintenance of one location, the Chicago Area Waterway System. *Id.* at 768. Albeit in dicta, the Court of Appeals expressed skepticism that allegations of, *e.g.*, operation of the waterway in a manner that would allow harm to persist alleged any "discrete" or "final" agency action. *Id.* at 786–87. Plaintiffs assert that the allegations in that case were "not comparable" to those made here. Opp'n at 27–28. Respectfully, Plaintiffs are mistaken.

Plaintiffs also contend that "courts regularly review claims challenging the unlawful expenditure of federal funds." Opp'n at 26. But each of the cases Plaintiffs cite involved claims regarding manifestly discrete agency actions, rather than an alleged failure to take action in response to alleged misconduct over years. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 406 (1971) (challenging agency decision to authorize federal funding for construction project); *California v. Trump*, 963 F.3d 926, 931 (9th Cir. 2020) (challenging agency budgetary transfer to fund construction project); *Scholl v. Mnuchin* , 489 F. Supp. 3d 1008, 1022 (N.D. Cal. 2020) (challenging agency policy regarding eligibility for statutory benefit payments); *Lloyd v. Ill. Regional Trasp. Authority*, 548 F. Supp. 575, 578–79 (N.D. Ill. 1982) (considering approval of grants where approval was an alleged violation of civil rights laws). Plaintiffs' citations are inapposite.

III. COUNT II CHALLENGES MATTERS COMMITTED TO AGENCY DISCRETION BY LAW.

Finally, Count II is barred for the separate reason that it challenges matters committed to agency discretion by law, specifically ICE's enforcement discretion regarding whether and how to respond to alleged unlawful expenditure of grant funds issued to the Jail. Such enforcement decisions—akin to the decision a prosecutor makes in deciding whether to charge a crime—is

"presumed immune from judicial review under § 701(a)(2)" of the APA. Mem. at 15–17 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985)).

Plaintiffs do not explain how they could overcome the *Heckler* presumption against review of enforcement discretion, essentially conceding the point. Instead, Plaintiffs attempt to dodge the dispositive effect of this argument by contending that they do not ask ICE "to prosecute Clay County or take any other enforcement action against them" but, rather, to stop "making unlawful payments." Opp'n at 29. Plaintiffs assert that claims regarding enforcement discretion would only apply if they were asking the Government to punish past actions, rather than seeking prospective relief. But Plaintiffs' argument simply obscures the reality of what they seek here.[2]

There is no dispute that ICE is permitted to contract with state and local facilities for detention services. Nor have Plaintiffs contended that the contracts attached to their Complaint demonstrate any action by ICE to authorize or permit expenditure of funds for purposes inconsistent with applicable law. This case is thus distinguishable from the district court decisions Plaintiffs cite, all of which involved agency decisions to initiate or cease funding, which were themselves unlawful. *See Ctr. for Biological Diversity v. Trump*, 453 F. Supp. 3d 11, 38–39 (D.D.C. 2020) (holding that agency decision to use funds for border wall construction was unlawful in light of statutory limitation on use of funds to "law enforcement activities of any Federal agency"); *Policy & Research, LLC v. U.S. Dep't of HHS*, 313 F. Supp. 3d 62, 76–77 (D.D.C. 2018) (judging agency's decision to stop funding a grant using agency regulations that provided standards to assess whether the termination of the grant was lawful); *Lloyd*, 548 F. Supp.

[2] For the reasons discussed herein, Plaintiffs are also mistaken that the issue before this Court as to APA section 701(a)(2) is whether "Federal Defendants' payments for detention at the Jail are decisions committed to agency discretion." Opp'n at 3. The focus of Count II, and the matter committed to agency discretion, is ICE's enforcement discretion to police the use of those payments, not the authority to make the payments at all.

at 578–79 (considering approval of grants in alleged violation of civil rights laws because the grants were funding a transit system that "had been and would continue to be inaccessible to the elderly and handicapped").

Rather than challenge an ICE decision to unlawfully award a grant or contract, Plaintiffs allege that Clay County is misspending the funds that ICE lawfully approved. Plaintiffs contend that they want ICE to stop issuing any further funds but that is simply another way of describing a remedial action that ICE may take in response to the alleged unlawful expenditures. As described in the Government's opening brief, the regulation Plaintiffs principally rely on, the UAR, contains a regulation establishing the "[r]emedies for noncompliance" by a grantee with "the U.S. Constitution, Federal statutes, regulations or the terms and conditions of a federal award." 2 C.F.R. § 200.339. Among the remedies that an awarding agency "may" pursue are to "wholly or partly suspend or terminate the Federal award" or to "withhold further Federal awards for the project or program." 2 C.F.R. §§ 200.339(c), (e). A request that ICE stop making grant payments based on alleged bad behavior by the County is certainly a request for enforcement action, as demonstrated by the very set of regulations upon which Plaintiffs rely. The APA does not permit claims seeking such enforcement action.

CONCLUSION

For reasons set forth above and in the Federal Defendants' Motion to Dismiss, Plaintiffs' claims against the United States should be dismissed.

Dated: September 14, 2022

Respectfully submitted,

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