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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

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LAS AMERICAS IMMIGRANT ADVOCACY CENTER, et al., Plaintiffs, v. JOSEPH R. BIDEN, et al., Defendants.	CASE NO. 3:19-cv-02051-IM **DEFENDANTS' RESPONSE TO MOTION TO COMPEL DISCOVERY BEYOND THE ADMINISTRATIVE RECORD**

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INTRODUCTION

The Court should deny Plaintiffs' motion to take discovery. Absent a separate statutory cause of action providing different procedures for review, the Administrative Procedure Act ("APA") sets out the mechanism by which plaintiffs may challenge agency action. The APA provides for claims challenging final agency action, challenges to agency inaction in certain circumstances, and claims that an agency's actions violate the Constitution, but it also has important limits, including limiting review to the record provided by the agency, not a new record created by the reviewing court or by plaintiffs through discovery. These limits must be narrowly construed in favor of the government because the APA provides the waiver of sovereign immunity on which Plaintiffs rely to bring suit against the federal government. Because Congress has waived sovereign immunity for claims brought under the APA's specific mechanisms, allowing litigation to proceed by broader means than what the APA authorizes would expand litigation beyond the limits Congress has placed on the Federal Government's consent to be sued, and would undermine Congress's carefully constructed mechanisms for challenges to agency action.

In this case, Plaintiffs challenge the Executive Office for Immigration Review's ("EOIR") management of the nation's immigration courts. They argue that certain actions the agency has taken—and in some cases argue it has failed to take—violate the Plaintiff organizations' statutory and constitutional rights. In doing so, they raise overlapping claims based on the APA, the Take Care Clause, and the Immigration and Nationality Act ("INA"). But Plaintiffs do not identify a separate statutory cause of action or waiver of sovereign immunity for the INA and Take Care claims on which they now seek discovery, and these claims challenge the same agency management of immigration courts. Accordingly, to the extent Plaintiffs can pursue these claims at all, they may do so only under the procedures provided for by the APA, which do not permit

discovery. Finally, even if discovery were appropriate, the specific types of discovery Plaintiffs say they seek here would not be. The Court should deny the motion for discovery.

ARGUMENT

I. The APA's waiver of sovereign immunity limits claims based on this waiver to the procedures contemplated by the APA.

"It is elementary that 'the United States, as sovereign, is immune from suit save as it consents to be sued.'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); *see FDIC v. Meyer*, 510 U.S. 471, 475 (1994). "A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Mitchell*, 445 U.S. at 538 (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). Any ambiguity must be construed in favor of immunity "so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires." *FAA v. Cooper*, 566 U.S. 284, 290-91 (2012).

The APA contains a waiver of sovereign immunity providing that "a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States." *See* 5 U.S.C. § 702 ("Right to review"). But Congress placed that waiver *in* the APA, which also limits the nature and scope of review that is permissible. *Id*. § 704 ("Actions reviewable"); § 706 ("Scope of review"). The waiver was added in the 1976 amendments to the APA, *see* Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721, which sought to respond to a line of cases addressing APA claims and whether "the APA, where applicable, constitutes a waiver by the government of sovereign immunity" where there was no separate statute authorizing suit and waiving immunity for the particular claim at issue, *see Littell v. Morton*, 445 F.2d 1207, 1212 (4th Cir. 1971) (summarizing state of sovereign immunity jurisprudence prior to 1976 amendment). The 1976 amendments to the APA were designed to clarify that sovereign immunity

was no longer a defense to claims *raised under the APA*. *See* H.R. Rep. 94-1656, 11-13, (1976), 1976 U.S.C.C.A.N. 6121, 6131-33 (noting that the amendment "brought about" a "partial abolition of sovereign immunity" and that "[s]ince the amendment is to be added to 5 U.S.C. section 702" it was subject to certain other limitations provided for in other provisions of the APA); S. Rep. No. 94-1556, 10 (1976) (addressing the proposed "Partial Elimination of Sovereign Immunity" and the amendment would add "to the existing language of 5 U.S.C. section 702, which deals with the right to judicial review of Federal administrative action"); H.R. Rep. 94-1656, 27 (1976), 1976 U.S.C.C.A.N. 6121, 6146 (statement of Assistant Atty. Gen. Antonin Scalia) (noting that "an important factor" in DOJ's "support for the bill" was "that the waiver of immunity, since it is made via Sec. 702, will only apply to claims relating to improper official action; and will be subject to the other limitations of the Administrative Procedure Act" including on "the form of proceeding").

One limitation on judicial review under the APA, and thus on suits premised on the APA's waiver of sovereign immunity, is that discovery is generally not appropriate in litigation challenging agency action, *see* 5 U.S.C. § 706 ("the court shall review the whole record or those parts of it cited by a party"), and the "focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court," *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001) (noting a "fundamental principle[ ] of judicial review of agency action" is that "judicial review" should be based on "the administrative record already in existence" and denying "discovery outside the administrative record"). Because "the Government's consent to be sued must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires," *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992) (citation and alterations omitted), challenges to agency action should be limited to review based on the administrative record, *see Ramos v. Wolf*, 975 F.3d 872, 900 (9th Cir. 2020) (Nelson,

J., concurring) (explaining that "the record-review requirement" is also a limit on the scope of the United States' waiver of sovereign immunity). Because the APA's waiver of sovereign immunity "is subject to certain limitations, one of which is the APA's record-review requirement," and these limitations must be strictly construed in favor of the government, "the record-review requirement is not just a meaningless procedural hurdle to overcome, but a fundamental constitutional protection to government agency action." *Id*; *see also No Casino in Plymouth v. Jewell*, No. 2:12-cv-01748, 2014 WL 3939585, at *3 (E.D. Cal. Aug. 11, 2014) (agreeing that APA provides "limited waiver" to "seek administrative record-based review of agency action"); *Sierra Club v. Eubanks*, 335 F. Supp. 2d 1070, 1077 (E.D. Cal. 2004) (review based on statutes without their own waiver limited to APA waiver for suit "based on a review of the agency's administrative record").

Plaintiffs rely exclusively on the waiver of sovereign immunity contained in the APA. *See* ECF No. 1, Compl. ¶ 15 (alleging only that "[t]he federal government has waived its sovereign immunity pursuant to 5 U.S.C. § 702."). Plaintiffs' first two claims, on which they now seek discovery, allege violations of the Take Care Clause and the INA. ECF No. 1, Compl. ¶¶ 193-207. But there is no waiver of sovereign immunity under the INA, and Plaintiffs cite no other cause of action for these claims that contains a broader waiver of sovereign immunity than the APA's consent to be sued based on record review. *See San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1096-97 (9th Cir. 2005) (allowing plaintiffs "to proceed directly under a federal statute" and "sidestep the traditional requirements of administrative review under the APA without express Congressional authorization … makes little sense in light of the administrative review scheme set out in the APA"). Unlike some agencies for which Congress has waived sovereign immunity generally by including a "sue and be sued" clause in the agency's enabling legislation, *see, e.g.*, *MB Fin. Grp., Inc. v. U.S. Postal Serv.*, 545 F.3d 814, 816 (9th Cir. 2008), Congress has not

generally waived immunity to suit for EOIR, *see* 6 U.S.C. § 521. And the Court allowed Plaintiffs' claims to proceed based only on the consent to suit contained in the APA. *See* ECF No. 79 at 26 ("this Court … finds that the APA waiver of immunity applies here").[1]

In their motion, Plaintiffs acknowledge cases addressing "the 'APA's record-review requirement' as a condition for the government's waiver of sovereign immunity" but offer no response, stating without explanation only that these cases are "inapplicable." Mot. at 8 & n.4. But Plaintiffs' have based their entire suit on the APA's waiver of sovereign immunity, and cannot simply dismiss the limits on consent to be sued contained in the associated provisions of the APA because they have now become a less convenient avenue for them to advance their claims. Having hitched their suit to the review permitted by the APA's consent to suit, they should now be subject to the APA's limits on review, including limiting review to an administrative record. When

[1] A waiver of sovereign immunity must be enacted by statute, *Lane v. Pena*, 518 U.S. 187, 192, (1996), is required regardless of "the character of the proceedings or the source of the right sought to be enforced," and "applies alike to causes of action arising under acts of congress, and those arising from some violation of rights conferred upon the citizen by the Constitution." *Lynch v. United States*, 292 U.S. 571, 582 (1934) (citations omitted); *see also Sanai v. Kozinski*, No. 4:19-CV-08162-YGR, 2021 WL 1339072, at *5 (N.D. Cal. Apr. 9, 2021) (same).

As the government previously argued, the Take Care Clause has long been thought, based on Supreme Court decisions, to be nonjusticiable. *See* ECF No. 24; *Mississippi v. Johnson*, 71 U.S. 475, 499-500 (1866) (explaining clause is "purely executive and political," and that attempts to "enforce the performance of such duties" are "without a precedent," barred by "general principles which forbid judicial interference"); *CREW v. Trump*, 302 F. Supp. 3d 127, 139 (D.D.C. 2018), *aff'd*, 924 F.3d 602 (D.C. Cir. 2019) (noting that "*Johnson* can be fairly read to suggest that a Take Care Clause claim is outright non-justiciable" and finding no cases holding otherwise). There is thus no basis to conclude that when Congress added a waiver of sovereign immunity to the APA in 1976 in the context of the APA's provisions allowing a court to "interpret constitutional" "provisions" and "set aside agency action … contrary to constitutional right," based on a "record," 5 U.S.C. § 706, that Congress thought it was waiving immunity for a free-floating claim based on the Take Care Clause when the Supreme Court had held that there was no such claim. Since Plaintiffs have "the burden of establishing the existence of such a waiver," *Sanai*, 2021 WL 1339072, at *5, and have cited only the APA's waiver, and because that waiver must be narrowly construed in the government's favor, the Court should at a minimum hold that Congress has not waived immunity for a Take Care claim independent of the APA's limits on the form of review.

Congress attaches conditions to legislation waiving sovereign immunity, those conditions must be strictly observed. *Gallo Cattle Co. v. U.S. Dep't of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998) (holding that "the APA's waiver of sovereign immunity contains several limitations" including those set out in in other provisions of the APA); *Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983) (noting, for example, that "[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity"); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 230–31 (2012) (same); *Cf. Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1091 (9th Cir. 2007) (statutory waivers of sovereign immunity "must be read in conformity with other statutory provisions which qualify" the right to bring suit, such as any "statutorily-imposed exhaustion requirement, which is an inseverable condition on Congress's waiver of sovereign immunity").

II. Even courts that have failed to narrowly construe the government's waiver of sovereign immunity have denied discovery where, as here, the Plaintiffs attempt to raise overlapping APA and other claims.

In cases where parties attempt to raise overlapping APA and non-APA claims against a federal agency, discovery is not appropriate. This is because statutory or constitutional challenges to agency action are still assessed under the principles of administrative law when such challenges are directed at a federal agency. *See Mendez v. Immigration & Naturalization Serv.*, 563 F.2d 956, 959 (9th Cir. 1977) ("While courts have generally invalidated adjudicatory actions by federal agencies which violated their own … procedural safeguard[s], … the basis for reversals is not … the Due Process Clause, but rather a rule of administrative law."); *Brown v. Holder*, 763 F.3d 1141, 1148 (9th Cir. 2014) (challenge by noncitizen to denial of citizenship based on allegations that agency failed to follow proper procedures assessed under principles of administrative law rather than Due Process Clause); *Ursack, Inc. v. Sierra Interagency Black Bear Grp.*, 639 F.3d 949, 955

(9th Cir. 2011) (where plaintiff "separately argues that the decision also violated equal protection principles, the equal protection argument can be folded into the APA argument"). Plaintiffs' claims here, which allege violations of statutes and the Take Care Clause based on the same statutory provisions, can similarly be folded under the APA framework. *See* 5 U.S.C. § 706 (permitting court reviewing APA claim to "set aside agency action … found to be … not in accordance with law" or "contrary to constitutional right" and "interpret constitutional and statutory provisions").

Plaintiffs argue that their "first two claims should be treated as distinct and afforded complete discovery" because they are based "on grounds separate from the APA," mot. at 5, and that their "Take Care Clause and impartial adjudicator claims stand on their own, apart from whatever conclusions this Court might draw regarding the lawfulness of" the policies Plaintiffs challenge under the APA, *id* at 6. But their own complaint shows otherwise. Plaintiffs' complaint raises APA claims challenging performance metrics for immigration judges and the FAMU memorandum. ECF No. 1, Compl. ¶¶ 208-42 (Claims III-VI). They argue that the metrics violate the APA because they are inconsistent with the "impartial adjudicator" requirement they say is provided for by statute in 8 U.S.C. § 1229a, *Id*. ¶ 210 (Claim III, challenging the metrics under the APA), and similarly that the FAMU memo violates the APA because it is inconsistent with the "impartial adjudicator" requirement they base in § 1229a, *Id*. ¶ 228 (Claim V, challenging the FAMU memo under the APA). Plaintiffs' second claim based on the INA, on which they now seek discovery, is based on an identical argument that Defendants have "Violate[d] the Immigration and Nationality Act's Impartial Adjudicator Requirement" which they allege is based in the same statute that is the basis of their APA claims, 8 U.S.C. § 1229a. *Id*. ¶ 202 (Claim II). Plaintiffs' INA claim arguing that Defendants' management of the immigration courts violated § 1229a, and their later claims that the FAMU memo and the performance metrics used to manage immigration courts

are not in accordance with law, specifically § 1229a, and thus violate the APA, not only overlap, they are essentially the same claim. If there was any doubt on this point, Plaintiffs' allegations of how the agency has violated the INA under Claim II resolve it by explicitly challenging the same agency actions that form the basis of their APA claims, alleging that EOIR has "[i]n direct contravention of the INA, … impose[d] the [Performance] Metrics Policy … implement[ed] the FAMU [memo]" and "perpetuat[ed] asylum free zones." *Id.* ¶ 204.[2]

Plaintiffs' first claim, alleging that Defendants have violated the Take Care Clause, is no different. There, Plaintiffs allege that Defendants have failed to comply with the INA's "statutory scheme," which they argue "requires that immigration court proceedings occur before an impartial adjudicator," as required by the same statute cited in their other claims, § 1229a, *id*. ¶ 195, and that the Attorney General has "fail[ed] to faithfully execute this statutory scheme," *id*. ¶ 197. *See also id*. ¶ 198 (alleging the Take Care Clause claim is based on the "Attorney General's violations of the INA"); Mot. at 2 (explaining that their claim that the "Attorney General has violated the Take Care Clause" is based on their allegation that the agency has violated "the INA's case-by-case adjudication standards"). This is nothing more than an attempt to constitutionalize the same statutory argument that forms the basis of their APA claims, and a party may not transform a "garden variety administrative action into a case of constitutional magnitude" by cloaking it in constitutional terms. *See Markham v. United States*, 434 F.3d 1185, 1186-88 (9th Cir. 2006) (rejecting attempt to "transform" review of Secretary's "administrative decisions" in overseeing statutory scheme, and "disagreement with the Secretary's administrative structure and claims process" despite "effort to hitch these alleged inadequacies to a constitutional star"); *see also*

[2] The Court dismissed "Plaintiffs' claims relating to 'asylum-free zones'" as falling "within the jurisdictional bar imposed by § 1252(b)(9)." ECF 79 at 16. Plaintiffs' second claim is otherwise based only on the same performance metrics and FAMU memo as their APA claims.

United States v. Litton Indus., Inc., 462 F.2d 14, 18 (9th Cir. 1972); *Dalton v. Specter*, 511 U.S. 462, 474 (1994) (holding that claims that executive branch actions are inconsistent with carrying out their "statutory authority are not 'constitutional' claims" but rather statutory claims, and that the "distinction between claims that an official exceeded his statutory authority, on one hand, and claims that he acted in violation of the Constitution, on the other, is too well established to permit this sort of evisceration"). In sum, Plaintiffs argue that agency policies violate § 1229a and thus the APA, that the same agency policies violate § 1229a and thus the INA (Claim II), and that the agency has also violated the Take Care Clause by taking actions that violate § 1229a (Claims I). These overlapping claims provided no basis for discovery when Congress has limited Plaintiffs' claims raising these challenges under the APA to review based on a record.

Plaintiffs cite several cases in support of their argument for discovery but none ultimately support the result they seek here. Plaintiffs rely heavily on *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019), which they argue stands for the proposition that "the presence of" APA claims "does not preclude plaintiffs from *independently* litigating other causes of action arising from the same basic facts." Mot. at 4. But *Sierra Club* is distinguishable in several key respects. First, *Sierra Club* addressed a request to stay a preliminary injunction entered by a district court, and so applied only the standard for stay motions, including assessing whether plaintiffs were likely to succeed on the merits of their claims. *Id*. at 699. In doing so, the court addressed whether plaintiffs had "at least one cause of action" that could survive and held that they did because even if their equitable claim could not proceed, plaintiffs "would have an APA claim." *Id*. Accordingly, the court did not ultimately resolve whether plaintiffs could maintain a claim outside the APA, just that even if the APA and non-APA claims overlapped "there is no reason to believe they both go up in smoke." *Id*. at 700; *see also id.* at 699 (noting that "[i]t is true that the APA is the general mechanism by

which to challenge final agency action"); *id*. at 698 (explaining that "[a]ny constitutional challenge that Plaintiffs may advance *under the APA* would exist regardless of whether they could also assert an APA claim" based on a violation of statutory authority (emphasis added)); *id.* ("plaintiff may raise *under the APA* a constitutional challenge to agency action even where the plaintiff lacks an avenue under the APA to argue that the same agency action is invalid for statutory or procedural reasons" (citing *Webster v. Doe*, 486 U.S. 598 (1988) (emphasis added)). And the Supreme Court ultimately stayed the injunction at issue in *Sierra Club* after finding that the government had made a "sufficient showing" that "the plaintiffs ha[d] no cause of action to obtain review of the Acting Secretary's compliance with [the statute]." *Trump v. Sierra Club*, 140 S. Ct. 1 (2019).

Second, *Sierra Club* says nothing about discovery or whether a party may avoid the APA's limits by attempting to also raise claims directly under a statute or the Constitution. The other cases Plaintiffs cite allowing discovery were cases where courts held that the APA and non-APA claims did *not* overlap. *See, e.g.*, *State v. U.S. Dep't of Homeland Sec*., No. 19-CV-04975-PJH, 2020 WL 1557424, at *15 (N.D. Cal. Apr. 1, 2020) (permitting discovery on equal protection claim in case raising APA claims after concluding that "the claims do not fundamentally overlap"); *Washington v. U.S. Dep't of Homeland Sec*., No. 4:19-CV-5210-RMP, 2020 WL 4667543, at *7 (E.D. Wash. Apr. 17, 2020) (allowing "reasonable discovery" on "separate equal protection claims" the court found were "dissimilar from, and do not fundamentally overlap with, their allegations regarding their APA claims").[3] Here, as set out above, the opposite is true, with Plaintiffs' first two claims

[3] Plaintiffs rely on cases raising APA and equal protection claims but, as those courts noted, the Supreme Court "has already settled that a cause of action may be implied directly under the equal protection" clause. *Davis v. Passman*, 442 U.S. 228, 242 (1979). In contrast, there is no Supreme Court case holding that a Take Care claim can be raised at all, let alone outside of the APA's provisions. Nor is there any case holding that such a claim, which necessarily involves an allegation of failure to take care that certain laws are executed, could be stated that did not overlap with an APA claim that an agency's actions were contrary to those same laws.

overlapping with the allegations they raise under the APA.

As plaintiffs correctly concede in other portions of their motion, "courts have declined to permit full discovery even for claims alleged on other grounds when those claims are extremely similar and reliant on the same underlying factual allegations as a parallel claim being alleged under the APA." Mot. at 3 (collecting cases); *see Jiahao Kuang v. U.S. Dep't of Def.*, No.18-cv-03698, 2019 WL 293379, at *2 (N.D. Cal. Jan. 23, 2019) (rejecting discovery on merits of equal protection and due process challenges to agency policy that required similar analysis as APA claims); *J.L. v. Cissna*, No. 18-CV-4914, 2019 WL 2224851, at *1 (N.D. Cal. Mar. 8, 2019) (denying discovery on due process claim alleging "Defendants failed to properly apply the relevant statutes" because it "substantially overlaps with Plaintiffs' APA claims"); *see also Harkness v. Sec. of Navy*, 858 F.3d 437, 451 & n.9 (6th Cir. 2017) (rejecting argument that discovery is necessary for constitutional claims against agency because APA permits review of constitutional claims using an admin record); *Bellion Spirits, LLC v. United States*, 335 F. Supp. 3d 32, 43 (D.D.C. 2018) (explaining that "district courts have been hesitant to permit a plaintiff asserting a constitutional challenge to agency action to avoid the APA's bar on extra-record evidence").

To hold otherwise, would render the APA's carefully thought-out limitations on review meaningless by allowing plaintiffs to avoid them through artful pleading of overlapping claims. For example, it is black letter law that review of an APA claim under 5 U.S.C. § 706 alleging agency action is "not in accordance with law" must be reviewed only on an administrative record, but that limitation would be meaningless if any plaintiff could seek "full discovery," as Plaintiffs seek here, mot. at 5, simply by adding a Take Care Clause claim alleging that an agency had failed to faithfully execute the very same law. Courts have rightfully rejected such an attempt to water down the APA's limitations. *See Block*, 461 U.S. at 285-877 (noting that when "waiver legislation"

contains limitations they are "a condition on the waiver of sovereign immunity" and that it "would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading"); *Carlsson v. U.S. Citizenship & Immigr. Servs*., No. 2:12-CV-07893-CAS, 2015 WL 1467174, at *13 (C.D. Cal. Mar. 23, 2015) (rejecting argument for discovery based on due process claim against agency because "[i]f this were sufficient for obtaining broad discovery including depositions, almost any APA plaintiff could skirt the record rule simply by alleging a parallel due process claim"); *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1238 (D.N.M. 2014) (contrary rule would "incentivize every unsuccessful party to agency action to allege bad faith, retaliatory animus, and constitutional violations to trade in the APA's restrictive procedures for the more even-handed ones of the Federal Rules of Civil Procedure"); *Charlton Mem'l Hosp. v. Sullivan*, 816 F. Supp. 50, 51 (D. Mass. 1993) (adding constitutional claims in an APA case "cannot so transform the case that it ceases to be primarily a case involving judicial review of agency action").

III. Other factors weigh against permitting the discovery Plaintiffs seek.

Several other factors weigh against permitting discovery here. First, the discovery Plaintiffs say they need largely relates to "asylum-free zones," a claim this Court has already dismissed. Plaintiffs first argue that they want discovery into the backlog of cases in immigration court, but concede that the administrative records are already "replete with reference to the *existence* of the backlog." Mot. 10. Beyond that, Plaintiffs argue that the Court would be left without evidence on "key factual issues" without discovery, mot. at 11, but all five factual issues they list relate to the dismissed "asylum-free zones" claim, *id.* (discussing evidence related to "creation and proliferation of 'asylum-free zones,'" and "[o]ther particular facts underlying the existence and proliferation of 'asylum-free zones'"). Plaintiffs argue for discovery into "unlawful local operating

procedures that … restrict access to case files, prevent expert testimony …, and deny adequate time to gather requisite evidence." Mot. at 11. But they do not challenge any of these procedures directly in their complaint, nor do they claim that challenges to these procedures could not be raised in a petition for review if they affected the evidence that was allowed into immigration court, thus bringing these allegations within the bar to review in § 1252(b)(9) that the Court held applies to claims like their "asylum-free zones" claim that would "require a ruling that would interfere with immigration courts' disposition of asylum cases." ECF No. 79 at 16. Moreover, the only allegation in their complaint Plaintiffs cite related to this issue clarifies that they believe these local operating procedures similarly relate to their claim that Defendants have created "asylum-free zones" through these procedures. Compl. ¶ 167; Mot. at 11. Finally, Plaintiffs say they need discovery on "reorganization" "of the Board of Immigration Appeals (BIA)," mot. at 11 (citing Compl. ¶ 103), but the allegation they reference argues that the BIA was reorganized under an interim final rule *Organization of the Executive Office of Immigration Review*, 84 Fed. Reg. 44,537 (Aug. 26, 2019), that they do not challenge directly in their complaint but rather cite only as alleged evidence of "intent to turn the entire country into an asylum-free zone."

Second, to the extent Plaintiffs attempt to seek discovery into the intent of agency officials in adopting certain practices, this is impermissible, not only because it is inconsistent with the APA, but also because it would violate "a fundamental constitutional protection to government agency action" grounded not just in the APA, but in "separation-of-powers concerns." *Ramos*, 975 F.3d at 900 (9th Cir. 2020) (Nelson, J., concurring). The "APA's record-review limitation reflects a desire to avoid interfering with the decisionmaking process of a co-equal branch of government" and "the recognition that further judicial inquiry into executive motivation represents a substantial intrusion into the workings of another branch of Government and should normally be avoided."

Id. (quoting *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019)).[4] It is "not the function of the court to probe the mental processes" of agency decisionmakers. *Morgan v. United States*, 304 U.S. 1, 18 (1938): *see also United States v. Morgan*, 313 U.S. 409, 422 (1941) ("[j]ust as a judge cannot be subjected to such scrutiny" "the integrity of the administrative process must be equally respected"); *Grant v. Shalala*, 989 F.2d 1332, 1344 (3d Cir. 1993) (Alito, J.) ("It has long been recognized that attempts to probe the thought and decision making processes of judges and administrators are … improper."); *San Luis Obispo Mothers for Peace v. U.S. N.R.C.*, 789 F.2d 26, 44-45 (D.C. Cir. 1986) (en banc). Moreover, as noted in Defendants' motion to stay this case, there is new leadership at the agency, and the President recently issued several executive orders directing review of the practices such as those at issue in this case related to "adjudication of asylum claims" to "identify barriers that impede access to immigration benefits and fair, efficient adjudications of these benefits" and ensure "immigration processes and other benefits are delivered effectively and efficiently." ECF No. 103 at 2, so any relevance of discovery with respect to prior government officials' choices, even if such inquiry were ever appropriate, is now moot.[5]

CONCLUSION

Ultimately, Plaintiffs challenge agency "action (and inaction)" they allege "violates distinct constitutional and statutory obligations." Mot. at 9. To the extent plaintiffs challenge specific agency actions, Defendants have supplied administrative records on which those actions must be judged, if at all, under the APA. Alternatively, if Plaintiffs challenge agency inaction, they

[4] While *Citizens to Preserve Overton Park v. Volpe* left open a possible exception if there is a "strong showing of bad faith or improper behavior," 401 U.S. 402, 420 (1977), Plaintiffs do not argue for discovery on that theory in their motion, and have waived any claim to discovery on that basis. Moreover, one Justice recently noted that the Supreme Court has "never before found *Overton Park*'s exception satisfied," *Dep't of Com.*, 139 S. Ct. at 2579 (Thomas, J., concurring).

[5] In fact, EOIR recently rescinded the FAMU memo Plaintiffs challenge, making that claim moot, and continues to review other agency practices related to the issues in this case.

must point to a specific, discreet action that a statute requires the agency to take because a court's "ability to 'compel agency action' is carefully circumscribed to situations where an agency has ignored a specific legislative command" that "must not only be 'discrete,' but also 'legally *required*.'" *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010). In such cases, a claim raises a purely legal question that does not require discovery to resolve.

Without "a specific, unequivocal command" or reviewable final agency action, there is nothing to review, and certainly no reason for discovery, as it is not the "task of [a] supervising court, rather than the agency, to work out compliance with [a] broad statutory mandate, injecting the judge into day-to-day agency management." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63, 66-67 (2004). "[R]eview is not to be had if statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion"—otherwise, an "agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Heckler v. Chaney*, 470 U.S. 821, 830-32 (1985). "Except where Congress explicitly provides for [judicial] correction of the administrative process at a higher level of generality, [courts] intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect.'" *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S 871, 894 (1990). Plaintiffs cannot seek discovery into discretionary agency choices based on "the many individual actions referenced in the complaint" in hopes that they could "be laid before the courts for wholesale correction"—Plaintiffs "cannot seek *wholesale* improvement of" agency actions "by court degree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Id*. at 891, 893.

Accordingly, because Plaintiffs seek discovery that is both irrelevant and barred by various basic principles of constitutional and administrative law, and the Court should deny their motion.

Dated: June 7, 2021

Respectfully submitted,

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