BRIAN M. BOYNTON
Acting Assistant Attorney General
Civil Division
WILLIAM C. PEACHEY
Director
Office of Immigration Litigation
District Court Section
EREZ REUVENI
Assistant Director
BRIAN C. WARD
Senior Litigation Counsel
ELISSA FUDIM
Trial Attorney
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Tel.: (202) 598-6073
Email: elissa.p.fudim@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

LAS AMERICAS IMMIGRANT ADVOCACY CENTER, et al., Plaintiffs, v. JOSEPH R. BIDEN, et al., Defendants.	CASE NO. 3:19-cv-02051-IM **DEFENDANTS' SUPPLEMENTAL BRIEF**

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INTRODUCTION

The Court ordered the Parties to "submit supplemental briefing on the following two issues: (1) Whether the Take Care Clause provides a private cause of action which a plaintiff may bring against the President of the United States or his administration; and (2) Whether the 'impartial adjudicator requirement' in § 1229a of the INA proves a 'private cause of action.'" Minute Order (Aug. 11, 2021). As set out below, neither the Take Care Clause nor 8 U.S.C. § 1229a of the Immigration and Nationality Act ("INA") provides a private cause of action for plaintiffs to sue the Executive Branch or its agencies, such as the Executive Office for Immigration Review ("EOIR"). Accordingly, the Court should dismiss plaintiffs' first and second causes of action.

ARGUMENT

I. The Take Care Clause does not provide a private cause of action for plaintiffs to sue the Executive Branch.

In their first cause of action, plaintiffs seek injunctive and declaratory relief pursuant to the Take Care Clause of the United States Constitution (the "Clause"), which authorizes the President to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. But this provision does not create a private cause of action against the President or any other defendant.

In fact, "[n]o court in this circuit, or any other circuit, has definitively found that the 'Take Care Clause' provides a private cause of action which a plaintiff may bring against the President of the United States or his administration." *City of Columbus v. Trump*, 453 F. Supp. 3d 770, 800 (D. Md. April 10, 2020). Accordingly, the "viability of the 'Take Care Clause' as a stand-alone cause of action is, to put it lightly, uncertain." *Id.* And that uncertainty and lack of precedent forecloses finding a private cause of action under the Clause given the Supreme Court's repeated caution that courts should avoid creating new constitutional causes of action or even extend the application of previously implied causes of action. *See, e.g.*, *Hernandez v. Mesa*, 140 S. Ct. 735,

742 (2020) ("In both statutory and constitutional cases, our watchword is caution."); *Id*. ("We have stated that expansion of *Bivens* is a disfavored judicial activity, and have gone so far as to observe that if the Court's three *Bivens* cases had been decided today, it is doubtful that we would have reached the same result. And for almost 40 years, we have consistently rebuffed requests to add to the claims allowed under *Bivens*.") (cleaned up); *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1856 (2017) (Congress is best positioned to evaluate "whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government" based on constitutional torts.); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 695 (2004) (Supreme Court has "recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases."). Thus, were this Court to hold that the Clause creates a private right of action, it would be reaching a novel conclusion that neither the Supreme Court nor any other court has reached; and, in doing so, this Court would disregard forty years of Supreme Court precedent disfavoring the creation of new constitutional causes of action. This case does not present an occasion for such a drastic break from precedent.

Plaintiffs amorphously allege that defendants have permitted a variety of practices that, taken together, have led to "mismanagement of the immigration courts" (Comp. ¶ 197), which has, de facto, undermined the INA's requirement that immigration judges review matters on a case-by-case basis. Therefore, plaintiffs' putative syllogism continues: the President has, through his delegates, violated the "Clause" thereby entitling plaintiffs to declaratory and injunctive relief. Comp. ¶¶ 198-200. Plaintiffs are incorrect. No court has found that the Clause creates a stand-alone private cause of action, let alone for such an attenuated chain of allegations. Nor should this Court do so here. *Columbus* is instructive.

In *Columbus*, plaintiffs sued the President and his delegates alleging they violated the

Clause through a number of executive actions and a final rule, which, taken together, created a de facto repeal of the Affordable Care Act passed by Congress. The Court held that the Clause does not create a private right of action, and even if it did, it would not extend far enough to encompass plaintiffs' claim, which hinged upon a challenge to the discretionary actions of the Executive rather than his failure to implement a non-discretionary ministerial function. *City of Columbus*, 453 F. Supp. 3d at 800-803. The Court began its analysis by considering and distinguishing *Nat'l Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974)—"the closest any court has come to [recognizing a private right of action under the Clause]." *Id.* at 800.

In *Nixon*, plaintiffs sought mandamus pursuant to 28 U.S.C. § 1361 and declaratory relief pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, to compel the President to implement a pay adjustment for federal employees that Congress passed in the Federal Pay Comparability Act. *Nixon*, 492 F.2d at 591. The mandamus act, not the Take Care Clause, provided the private cause of action under which the court held that it had jurisdiction to hear the claim and issue declaratory relief.[1] The Court ultimately issued a declaratory decree that the President had a ministerial duty to grant the specific federal pay increase mandated by Congress. *Id.* at 605. While the court did discuss the President's "constitutional duty" to implement the federal pay increase under the Clause, it did not hold that the Clause created a federal cause of action. *Nixon*, 492 F.2d at 604-605, 616. Thus, "*Nixon* did not involve a freestanding cause of action brought under the

[1] Declaratory judgment is merely a remedy available for established causes of action, and not a separate cause of action. *See Nixon*, 492 F.2d at 615; *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 246 (1952) ("The Declaratory Judgment Act cannot be used to circumvent the enforcement mechanism which Congress established."); *Circle v. Western Conf. of Teamsters Pension Trust*, No. 3:17-cv-00313-YY, 2017 U.S. Dist. LEXIS 151149, *7 (D. Or. Aug. 31, 2017), *report and rec. adopted sub nom.* 2017 U.S. Dist. LEXIS 150068 (D. Or. Sept. 15, 2017) (rejecting "stand-alone claims for declaratory judgment and rescission" because "declaratory judgment and rescission are both remedies" "not separate claims or causes of action").

Take Care Clause," *Columbus*, 453 F. Supp. 3d at 800, as plaintiffs attempt to assert here. And, in contrast to *Nixon*, plaintiffs here do not assert a mandamus claim under 28 U.S.C. § 1361. Thus, while some courts have discussed the Clause, no court, including *Nixon*, has gone so far as finding a stand-alone cause of action premised upon an alleged violation of the Clause.[2]

Further, in *Nixon*, the court refused to issue a writ of mandamus, "in order to show the utmost respect to the office of the Presidency and to avoid, if at all possible, direct involvement by the Courts in the President's constitutional duty faithfully to execute the laws and any clash between the judicial and executive branches of the Government." *Nixon*, 492 F.2d at 616. The Court grounded its decision declining to grant injunctive relief in *Marbury v. Madison*, 5 U.S. 137, 154 (1803) and *Mississippi v. Johnson*, 71 U.S. 475 (1866). In each of those cases, the plaintiffs sought mandamus to compel the President to perform a single, specific act legislated by Congress that required no discretion to implement. These cases distinguished "executive and political" duties, also referred to as "discretionary" duties, from a "ministerial duty," which is "a simple,

[2] In its order on defendants' motion to dismiss, this Court noted three cases that had discussed the Clause: *Center for Biological Diversity v. Bernhardt*, 946 F.3d 553, 561 (9th Cir. 2019), *Texas v. United States*, 809 F.3d 134, 146 n.3 (5th Cir. 2015), and *NAACP v. Trump*, 298 F. Supp. 3d 209, 239–40 (D.D.C. Apr. 24, 2018). D.E. 79 at 24. ECF No. 79 at 24. As the government previously observed, none of those cases held the Clause creates a private right of action. ECF No. 84 at 29-31. In *Texas*, the Court declined to consider the issue. "We find it unnecessary…to address or decide the challenge based on the Take Care Clause." *Texas*, 809 F.3d at 146, n.3. In fact, the same judge recently stated in a related case, "the legal waterfront has not changed []; there is still a dearth of precedent on the Take Care Clause. *Texas v. United States*, Case No. 1:18-CV-00068, 2021 U.S. Dist. LEXIS 133114, at *116 (S.D. Tex. July 16, 2021). And while *Bernhardt and NAACP* considered the Clause, neither court found that the Clause creates a private right of action. Indeed, there was no occasion for doing so. In neither case had the plaintiffs asserted a cause of action under the Clause. *See* 17-cv-00091-JWS, D.E. #1 (Complaint in *Berhart*) and 17-cv-01907-CRC D.E. #10 (First Amended Complaint in *NAACP)*. This Court may grant this motion without disturbing its prior ruling, and even were that not the case, the Court has authority to reconsider or modify a prior decision at any time before the entry of final judgment to dismiss these claims. *See* Fed. R. Civ. P. 54(b); *Moses H. Cone Me. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 12 (1983); *Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461, 465 (9th Cir. 1989).

definite duty" that is "imposed by law" where "nothing is left to discretion." *Johnson*, 71 U.S. at 498. In contrast, "a duty is discretionary if it involves judgment, planning, or policy decisions." *Beatty v. Wash. Metro. Area Transit Auth.*, 860 F.2d 1117, 1127 (D.C. Cir. 1988) (citation omitted). Pursuant to *Johnson*, "[t]he former could be enforced, by mandamus, on executive branch officials—and perhaps, though not clearly so, even on the President[3]—while the latter were beyond the purview of the courts." *Columbus*, 453 F. Supp. 3d at 800. The *Nixon* court relied upon this distinction to note that, even where a plaintiff has a cause of action under "mandamus," a court can grant relief "only where the duty to be performed is ministerial and the obligation to act peremptory, and plainly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable....If the law direct[s] [the President] to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial." *Nixon*, 492 F.2d at 602 (cleaned up). Critically, in *Nixon*, the Court found that the Federal Pay Comparability Act created a plainly defined, clear and undisputable, ministerial obligation on the part of the President, and that issuing a declaratory judgment would "not require any court supervision over the performance of duty by the executive branch." *Id.* at 605. The same is not true here; nor was it so in *Columbus*.

Considering *Nixon*, its analysis of *Marbury* and *Johnson*, and after canvassing for other

[3] Subsequent case law sheds serious doubt as to whether the Court can enjoin the President (as opposed to merely his delegates) in the performance of his official duties. *See Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992) (plurality observed that a "grant of injunctive relief against the President himself is extraordinary, and should . . . raise[] judicial eyebrows."; *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017) (en banc) *vacated as moot*, 138 S. Ct. 353 (2017) ("in general, this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.") (cleaned up); *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir. 2017), *vacated and remanded on other grounds*, 138 S. Ct. 377 (2017) (same); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief.") (internal citation omitted).

relevant cases regarding whether the Clause creates a private right of action, the *Columbus* Court held that there is no precedential authority for finding the Clause creates a private right of action against the Executive Branch. *Columbus*, 453 F. Supp. 3d at 803. The *Columbus* court further held: "Assuming, *arguendo*, that a valid Take Care Clause cause of action exists in some form, and that a district court may, as it did in *Nixon*, issue a declaratory judgment against the President—neither of which appears firmly grounded in precedent or sound constitutional principles—Plaintiffs have nonetheless failed to state a claim." *Id*. The Court explained that none of the Executive's actions about which plaintiff complained were ministerial in the sense developed in *Johnson* and *Nixon*. "That is, there is no peremptory, and plainly defined, course of action the President could take to rectify the flaws that Plaintiffs perceive in his execution of the [statute]" and "[a]ny judgment to the contrary by this court would require court supervision over the performance of duty by the executive branch." *Id*. (cleaned up).

Courts have thus viewed attempts to supervise Executive discretion as infringing on the authority provided by the Clause to the Executive and thus protected from judicial interference. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (holding that it would be improper for the courts to take over the President's duty to "take Care that the Laws be faithfully executed")[4]; *Johnson*, 71 U.S. at 499 (The president's duty "to see that the laws are faithfully executed," falls

[4] "To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3. It would enable the courts, with the permission of Congress, to assume a position of authority over the governmental acts of another and co-equal department, and to become virtually continuing monitors of the wisdom and soundness of Executive action. We have always rejected that vision of our role." *Lujan*, at 577 (cleaned up).

under "the general principles which forbid judicial interference," and a claim to restrain executive action through this clause is not only "without a precedent," but there is "much weight against it.")[5]; *Citizens for Responsibility and Ethics in Washington v. Trump*, 302 F. Supp. 3d 127 (D.D.C. 2018) ("The Supreme Court has advised that how the President chooses to exercise the discretion Congress has granted him is not a matter for [the courts'] review") (quoting *Dalton v. Specter*, 511 U.S. 462, 476 (1994)); *In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d 1092, 1139 (S.D. Cal. 2018) ("[G]iven that the challenged steps taken by the Secretary are ones that are plausibly called for by an act of Congress, a Take Care challenge in this case would essentially open the doors to an undisciplined and unguided review process for all decisions made by the Executive Department."). Plaintiffs' claim here presents the same problem. The Court need look no further than to the relief they seek: "require[e] Defendants to take specific corrective actions to ameliorate and mitigate the dysfunctionality of the immigration court system that has resulted in the asylum-free zones[6], immigration court backlogs, and lack of impartial adjudication", and

[5] Plaintiffs may argue, as they did in response to the motion to dismiss, that "Defendants' argument that the Take Care Clause falls under general principles forbidding judicial interference is [] unavailing" because courts can enjoin unconstitutional actions by state and federal officers, ECF No. 57 at 39 (citing *Armstrong v. Exceptional Child Ctr*., 575 U.S. 320 (2015)). But *Armstrong*, which rejected an attempt to craft a "right of action" for "private enforcement" under the Supremacy Clause, does not stand for the proposition that the Court could craft some novel cause of action or equitable relief here. The Supreme Court noted, "[t]he power … to enjoin unlawful executive action is subject to express and implied statutory limitations" and, based on the limited right of action in the statute at issue in that case, rejected an attempt to pursue a claim or seek relief different from what Congress set out in the statute. *Id*. at 327-28. Similarly here, the INA provides for a particular, but limited, cause of action to enforce the statute, and the "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Id*. The Clause's lack of any manageable legal standard to apply also counsels against finding it provides a stand-alone cause of action. Where a provision is of a "judicially unadministrable nature" it "preclude[s] the availability of equitable relief." *Id.*. And, as plaintiffs earlier conceded, "the contours of the [] Clause have not yet been defined by the federal courts." ECF No. 57 at 37.

[6] The Court has already dismissed that portion of the first cause of action pertaining to asylum-free zones.

similarly "declare that…the immigration court backlog suspends the INA's case-by-case adjudication standards, and thereby violates the Take Care Clause, U.S. Const. Art. II, § 3." Compl. at 63.

Were this Court to hold that the Clause creates a private right of action, then any time a person or entity disagrees with President's chosen means of executing a statutory obligation, such person or entity could raise a direct constitutional challenge, thereby circumventing, and rendering meaningless, other established, Congressionally-created causes of action that can be brought against federal agencies, such as claims under the Administrative Procedure Act, and the limitations Congress placed on such causes. That result should be avoided. Because Congress has defined the ways in which private entities may bring suit against federal agencies, there is no need for courts to take the unusual step of implying a direct cause of action on a constitutional provision. *Moore v. Glickman,* 113 F.3d 988, 994 (9th Cir. 1997) ("[W]hen Congress has created a statutory remedy for potential harms, the courts must refrain from implying non-statutory causes of actions.") (internal citations omitted); *see also Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63, 66-67 (2004) (Without "a specific, unequivocal command" there is no basis to review agency action, 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."). And, again, the Supreme Court has cautioned against creating any such novel constitutional causes.

In short, plaintiffs do not identify in the INA a plainly defined, clear and undisputable ministerial obligation that the Court could order. Crafting relief would require Court supervision over the performance of how the executive branch carries out broad statutory provisions, further defining the statutory obligations in ways the statutes themselves do not. No Court has read the Clause to create such a cause of action or read it so broadly as to open the courtroom doors to

challenges to *how* the Executive executes Congress's laws. The Court should dismiss plaintiff's first cause of action under the Clause.

II. Section 1229a of the INA does not provide a private cause of action for plaintiffs to sue the Executive Branch.

"[P]rivate rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (the remedies available are those "that the Congress enacted into law")). "[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Touche Ross & Co.*, 442 U.S. at 568 (quoting *Cannon v. University of Chicago*, 411 U.S. 677, 688 (1979)) (internal quotations omitted). Rather, "[s]tatutory intent" to create a private right of action is "determinative," and without it, a private right of action "does not exist and a court may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 286-87. *See also Touche Ross & Co.*, 442 U.S. at 568 ("our task is limited solely to determining whether Congress intended to create the private right of action asserted").

If the statute does not "evidence Congress' intent to create the private right of action asserted," then "no such action will be created through judicial mandate." *Ziglar*, 137 S. Ct. at 1848 (2017). When it comes to statutory rather than constitutional claims, federal courts must be even more careful to recognize only explicit causes of action. When Congress enacts a statute, "there are specific procedures and times for considering its terms and the proper means for its enforcement." *Id.* at 1856. Therefore, it is "logical" to assume that Congress will be "explicit if it intends to create a private right of action." *Id*.

Here, determining whether a private right of action exists under § 1229a of the INA begins and ends with the "text and structure" of the provision. *Sandoval*, 532 U.S. at 288. On its face,

§ 1229a contains no reference to a private right of action. Where a statute contains no express provision creating a private right of action, courts historically considered whether the statute contains an implied private right of action by evaluating whether: (1) the plaintiff is of the class for whose "especial benefit" the statute was enacted; (2) there is any indication of legislative intent to create or exclude a private right of action; (3) it is consistent with the underlying purposes of the legislative scheme to imply a private right of action; and (4) whether the cause of action is traditionally relegated to state law. *Cort v. Ash*, 422 U.S. 66, 78 (1975). But, a few years after *Cort*, the Supreme Court clarified that "the focus of the inquiry is on whether Congress intended to create a remedy." *California v. Sierra Club*, 451 U.S. 287, 297 (1981). And, later still, in *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001), the Supreme Court instructed, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. *Statutory intent on this latter point is determinative*. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.") (emphasis added). Applying this "determinative" analysis, § 1229a did not create a private right of action.

First and foremost, per *Sierra Club* and *Sandoval*, the Court must principally focus its inquiry upon whether Congress "intended to create a remedy" for violations of § 1229a beyond the procedures for review afforded to noncitizens through a petition for review ("PFR") under § 1252. The answer is no. Section 1229a is silent as to the creation of a remedy. The Supreme Court has said that silence on the remedy question serves to confirm that, in enacting the law, Congress was not concerned with private rights. *Sierra Club*, 451 U.S. at 296. The lack of a specified remedy is determinative. Yet, even a broader analysis under *Cort* leads to the same result.

The Supreme Court explained that, in considering whether the plaintiff is of a class for

whose "especial benefit" the statute was enacted, "[t]he question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries." *Id.* at 294. Assuming, *arguendo*, that plaintiffs (legal aid organizations) benefit from the implied "impartial adjudicator" provision read into § 1229a, neither this specific provision nor § 1229a more broadly, was enacted for plaintiffs' "especial benefit." On the contrary, to the extent that § 1229a creates rights and procedures, it does so for individual *non-citizens*. *See* 8 U.S.C. §1229a(b)(4) (titled "Alien's rights in proceedings," and addressing the "privilege[s]" and "rights" "*the alien* shall have" in these proceedings (emphasis added)); *id.* § 1229a(c)(1)(A) (addressing determinations immigration judges must make related to "an alien"); *id.* § 1229a(c)(4)(A) (addressing "[a]n alien applying for relief" and burden of proof for "the alien").

The second factor—whether there is any indication of legislative intent to create or exclude a private right of action—also directs against finding a private right of action under §1229a. There is no indication Congress intended to imply any private right of action beyond those explicitly provided in § 1252(a)(5), which states: "[A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal." *Id.*; *see also id.* § 1252(b)(9) ("review of all questions of law and fact, including interpretation and application of constitutional and statutory provision, arising from any action taken or proceeding brought" under *inter alia* § 1229a, "shall be available only in judicial review of a final order under this section"); *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (holding PFR process under § 1252 is the sole cause of action for claims related to "*any* removal-related activity"). Under Congress's carefully constructed scheme for judicial review of all challenges related to removal proceedings, including challenges to the policies and practices applied to individual noncitizens in those proceedings, only an individual affected noncitizen may

seek judicial review, and he may do so only through a PFR filed with the court of appeals following completion of proceedings in immigration court and any appeal to the Board of Immigration Appeals.[7]

Third, implying a private right of action under § 1229a is inconsistent with the underlying purpose of the legislative scheme. The Supreme Court has held that statutory schemes that provide private rights of action in some situations but not others weigh against inferring additional private rights of action because "when Congress wishes to provide a private damages remedy, it [knows] how to do so and [does] so expressly." *Touche Ross & Co.*, 441 U.S. at 572; *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 773 (1981). With respect to the INA, Congress explicitly stated that the PFR process is the "sole and exclusive means for judicial review," 8 U.S.C. § 1252(a)(5). Implying additional causes of action would be inconsistent with this "exclusive" review scheme. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984) ("[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded"); *see also San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1096-97 (9th Cir. 2005) (permitting plaintiffs "to proceed directly under a federal statute" and "sidestep the

[7] The United States may also file proceedings in District Court under the INA pursuant to 8 U.S.C. § 1329. And Congress made clear that no party other than the United States could litigate such claims in the district courts; it did so by revoking jurisdiction for such causes of action that had previously existed. Until Congress amended the INA to include the claim-channeling provisions of §1252, an earlier version of 8 U.S.C. § 1329, provided an affirmative basis for jurisdiction for suits filed by any non-citizen or organization challenging implementation of the immigration laws. *See, e.g.*, *Bains v. Schiltgen*, No. C 97-2573 SI, 1998 U.S. Dist. LEXIS 5712, at *7 (N.D. Cal. Apr. 21, 1998) (describing prior version of the statute). But Congress amended §1329 in 1996, "making clear that district court jurisdiction founded on the immigration statute is confined to actions brought by the government." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999). This legislative history further indicates congressional intent to exclude a private cause of action under the INA for organizations.

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"). Finally, the fourth factor is not at issue, because immigration is a federal matter.

Because the *Cort* factors counsel against finding § 1229a contains a private right of action, under *Sandoval*, no private right of action may be created by the courts. Indeed, even before *Sandoval*, courts found that the animating principles of the INA did not create a cause of action for individuals affected by either the proper or the improper implementation of the INA's provisions. For example, in *United States v. Richard Dattner Architects*, 972 F.Supp. 738, 743 (S.D.N.Y. 1997), the court declined to find a private right of action to protect American citizens in the broad policy goals of the INA, which the court described as "a regulatory statute that establishes the circumstances under which people may be admitted to the United States."

Indeed, the only case defendants could find explicitly holding that §1229a, in particular, creates a private right of action—*Torres v. United States Dep't of Homeland Sec*., 411 F. Supp. 3d 1036 (C.D. Cal., Oct. 24, 2019)—improperly applied *Sandoval* and *Cort*. In *Torres*, the district court found that § 1229a implies a private right of action for non-citizens.[8] It did so despite the Supreme Court's repeated caution against imputing implied rights of action into statutory text. In reaching its conclusion, the Court focused its analysis upon whether "there is rights-creating language [in § 1229a] directed to a class of people that includes Plaintiffs." *Id*. at 1058. In focusing its analysis on "rights creating language," the *Torres* Court relied upon a footnote in *Cannon* stating that "the right-or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action." 441 U.S. at 690, n.13. But the

[8] Although the plaintiffs in *Torres* were both non-citizens and various legal organizations, the Court's private right of action analysis was confined to a discussion of the rights of "individuals in immigration proceedings." *Id*. at 1059.

Supreme Court has more recently said otherwise; the primary inquiry is not whether § 1229a creates rights, but rather whether it creates remedies. *Sandoval*, 532 U.S. at 286 ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."); *Sierra Club*, 451 U.S. at 297 ("[T]he focus of the inquiry is on whether Congress intended to create a remedy. The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide.") (internal citations omitted). In focusing solely on rights—even going so far as to note that one definition of the word "privilege," (as used in § 1229a's phrase "the noncitizen shall have the privilege of being represented"), is a "special legal right" according to Black's Law Dictionary— the *Torres* Court "revert[ed] … to the understanding of private causes of action that held sway 40 years ago." *Sandoval*, 532 U.S. at 287. "That understanding is… that it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose expressed by a statute." *Id*. (cleaned up). But the Supreme Court rejected that earlier approach in *Sandoval*. "Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink." *Id*.

Furthermore, even as it applied the *Cort* test, the *Torres* Court failed to address *Cort*'s third factor—whether implying a private right of action is consistent with the underlying legislative scheme of the INA, in general, or § 1229a in particular. It is not. The majority of courts have found (when discussing the INA generally, as opposed to § 1229a in particular), that the INA does not create a stand-alone cause of action. *See, e.g., Singh v. Cissna*, No. 18-cv-00782 (SKO), 2018 U.S. Dist. LEXIS 169488, *20 (E.D. Cal. Sept. 30, 2018) ("The INA does not provide an independent

cause of action…"); *Huiwu Lai v. United States*, No. C17-1704-JCC, 2018 U.S. Dist. LEXIS 56846, *9 (W.D. Wash., Apr. 3, 2018) ("INA does not provide a cause of action."); *Jaskiewicz v. United States Dep't of Homeland Sec.*, No. 06 Civ. 3770 (DLC), 2006 U.S. Dist. LEXIS 85973, *11 (S.D.N.Y. Nov. 29, 2006) ("[T]he INA does not itself create a cause of action or federally-protected right.") (internal citations omitted). And *Torres* similarly gave no consideration to the legislative scheme of § 1229a in particular. Had it done so, it would have at least mentioned the interplay between § 1229a and § 1252, which provides a specific, exclusive PFR process. But *Torres* is silent with respect to Congress's explicit language limiting causes of action related to removal proceedings to the procedures set forth in § 1252. It is telling that *Torres* seems to stand alone. No other court has found an implied private right of action under § 1229a. This Court should not do so either. Rather, the Court should dismiss plaintiffs' second cause of action brought pursuant to § 1229a.

CONCLUSION

The Court asked defendants to answer two question: (1) Whether the Take Care Clause provides a private cause of action which a plaintiff may bring against the President of the United States or his administration; and (2) Whether the "impartial adjudicator requirement" in § 1229a of the INA proves a "private cause of action." Minute Order (Aug. 11, 2021). As set forth above, the answer to both questions is no. The Court should dismiss plaintiffs' first and second causes of action with prejudice.

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Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

WILLIAM C. PEACHEY
Director

EREZ REUVENI
Assistant Director

BRIAN C. WARD
Senior Litigation Counsel

/s/ Elissa Fudim
ELISSA FUDIM
Trial Attorney
U.S. Department of Justice, Civil Division
Office of Immigration Litigation,
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 598-6073
Email: elissa.p.fudim@usdoj.gov

Counsel for Defendants